

IN THE HIGH COURT OF FIJI AT LAUTOKA
COMPANIES JURISDICTION

Action No: HBM 11 of 2021

IN THE MATTER OF Statutory Demand (undated) taken out by **METROMIX CONCRETE (FIJI)** ("The Respondent") against **FOUR R ELECTRICAL & GENERAL CONTRACTORS PTE LIMITED** ("The Applicant") and served on it on or about 17th day of February, 2021.

AND

IN THE MATTER of an Application by the Applicant for an order setting aside the Statutory Demand pursuant to Section 516 of the **Companies Act 2015**.

BETWEEN:

FOUR R ELETRICAL & CONTRACTORS PTE LIMITED CONTRACTORS PTE LIMITED a limited liability company having its registered office at Lot 1, DP3105 Kings Road, Yalalevu, Ba, Fiji.

APPLICANT

AND:

METROMIX CONCRETE (FIJI) a limited liability company having its registered office at Lot 1 Wailada Industrial Estate Lami.

RESPONDENT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. N. Kumar for Plaintiff
Mr. M. Anthony on instructions and Ms. M. Krithi for Defendant.

WRITTEN SUBMISSIONS: Filed by both the parties at the hearing

DATE OF HEARING : 26th July, 2022

DATE OF DECISION : 5th October, 2022

RULING

[Setting aside a statutory demand]

A. Introduction

1. This is an Application preferred by the Applicant Company, FOUR R ELECTRICAL & GENERAL CONTRACTORS PTE LIMITED (Applicant) , by way of its Originating Summons filed on 9th March , 2021 pursuant to section 516 of the Companies Act 2015 (the Act) seeking for reliefs , *inter-alia*,
 - a. *That the Statutory Demand (undated) taken out by the Respondent against the Applicant and served on 17th February, 2021 be set-aside.*
 - b. *That the Respondent shall not file any Application for a Winding up Order under the said Statutory Demand pending the hearing and determination of this Originating Summons.*
2. This Application is supported by the Affidavit sworn on 09th March, 2021 by RISHIKENDRA KUMAR, the Director of the Applicant, and filed with annexures marked as “RK-1” to “RK-7”.
3. The amount demanded by the Respondent Company METROMIX CONCRETE (FIJI) (Respondent) from the Applicant , as per the Statutory Demand, is **\$380,296.70**.
4. The Application is resisted by the Respondent. The Affidavit in response sworn on 2nd August, 2021 by Mr. FAIZ HUSSAIN, the General Manager of the Respondent was filed on 19th August, 2021, with no documents annexed thereto, except for the authority granted to swear the Affidavit. The Affidavit in Reply by the Respondent sworn by said RISHIKENDRA KUMAR on 29th November,2021 was filed on 3rd December,2021 with an annexure marked as “RK-A”. The service of the Affidavit in reply is disputed and no Affidavit of service is found in record in proof thereof.
5. However, the Respondent , pursuant to the permission granted by the Court on 4th April , 2022, filed a Supplementary Affidavit in opposition on 19th April ,2022 sworn by said MOHAMED IMRAAZ , the Company Secretary of MY GROUP PTE LIMITED T/A METROMIX CONCRETE (FIJI) . This Supplementary Affidavit was accompanied by additional documents marked from “MI-1” to “MI-8”, contents of which were found to be crucial in determining the issue in hand.
6. Though, a copy of the said Supplementary Affidavit in opposition was, reportedly, served on the Applicant’s Solicitors, (Krishna & Co) on 20th April, 2022, for reasons best-known to the Applicant/ Applicant’s Solicitors, no Affidavit in reply thereto was filed despite the liberty for same had been reserved.

7. At the hearing, Counsel for both parties orally argued the matter, and they have filed their respective written submissions as well, along with the copies of the case law authorities relied on by them.

B. Background.

Applicant's Case (summary) as per Affidavit in Support & Reply.

8. That the Applicant and the Respondent had entered into two Agreements (**partially written, partially verbal and partially through conduct**) one for the supply of concrete mixture by the Respondent to various projects carried out by the Applicant and the other one for the Applicant that engaged by the Respondent, to cart ready-mix concrete utilizing its concrete dumber trucks .
9. That the Respondent engaged the Applicant to import 3 more concrete dumber Trucks, which will be hired on a long term basis by the Respondent. Marked and annexed as "RK1" are orders for the supply of concrete mixture by the Respondent to the Applicant and "RK 2" is an email by which the Respondent requested for 3 concrete dumber Trucks.
10. That the Applicant imported 3 concrete dumper Trucks in January 2020, as per the Agreement, and same were given on hire, together with other trucks, to the Respondent until sometime in or around 7th May,2020, when the Respondent Company stopped the services of the Trucks of the Applicant .
11. That the Applicant had invested in the Trucks solely relying on the Agreement with the Respondent that they will engage the services of 3 Trucks. Due to the failure of the Respondent in hiring the said Trucks the Applicant has suffered substantial losses and damages.
12. That the Applicant, on or about 17th February, 2021, was served with an (undated) Winding up Notice "RK5" threatening to wind up the Applicant unless **\$380,296.70** is paid and settled alleging as that being the amount due and owing in respect of an alleged breach of the Agreement to supply the concrete mixture. It is stated further that the said sum in the Statutory Demand is substantially disputed by the Applicant.
13. That the Statutory Demand (undated) is defective and it ought to be set aside as of a right due to it not being in accordance with the Companies Act.2015.
14. That from the said amount of **\$380,296.70** in the Statutory Demand, a sum of \$271,190.70 should be set-off and deducted being the sum owed by the Respondent unto the Applicant on account of hiring of its trucks by the Respondent.

15. That the Applicant has filed a writ action bearing No-HBC-11 of 2021 against the Respondent claiming damages and losses due to the Respondent's act of breaching the Agreement by terminating the hiring of the Trucks from the Applicant. That the debt is genuinely disputed and this has to be dealt with in the writ action and not through the winding up Application.

Respondent's case (in summary) as per Affidavit in Response & Supplementary Affidavit.

16. That there was no such an Agreement made as an alleged by the Applicant and no engagement was made by the Respondent with the Applicant for import of 3 concrete dumper Truck, for the same to be hired by the Respondent on long term basis as the Respondent already had several Trucks for its use.
17. That 3 dumper Trucks were imported by the Applicant on its own volition, thus it is the liability and responsibility of the Applicant and there was no engagement, arrangement or Agreement in respect of those Trucks binding the Respondent to use them on long term basis. Any substantial losses and damages sustained by the Applicant in respect of 3 Trucks is the sole responsibility of the Applicant.
18. That the Respondent deny and dispute the claim by the Applicant in a sum of \$271,190.70 being the hiring charges from 30th April, 2019 till 7th May, 2020 and reiterate that the Applicant owes the Respondent the sum of \$380,296.70. That the Applicant has previously agreed and admitted the debt owed by it to the Respondent.
19. The absence of date in the Statutory Demand is irrelevant. However, takes up a position that since the Applicant's claim from the Respondent is only \$271,190.70 and the Respondent's claim from the Applicant is \$380.296.70, the Applicant can immediately pay the difference which is \$109,106.00 unto the Respondent and dispute the balance, if they wish to.
20. The writ action No- HBC 11 of 21 filed by the Applicant does not have any impact on the debt owed by the Applicant, no evidence for such claim and the claim of the Applicant is vague.
21. That the Respondent on 11th May 2020 issued a Demand Notice "MI-3" to the Applicant and the Director of the Applicant had responded on 15th May, 2020 by "MI-2" admitting the debt as justly and truly payable and about its inability to pay.

22. That the Respondent disputes the counter claim made by the Applicant in a sum of \$271,190.70. However, the Respondent is willing to set-off the disputed sum claimed by the Applicant from the sum of \$380,296.72 owed to the Respondent by the Applicant leaving the balance of \$109,106.02 as admitted by the Director of the Applicant in the letter marked "MI-2" (vide paragraph 20 of the supplementary Affidavit)
23. That, the remaining amount of debt in a sum of \$109,106.02 is undisputed and the same has been accepted by the Director of the Applicant. (Para 23 of the S. Affidavit).

C. Legal framework

24. 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.*

25. Section 517 of the Com 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. Analysis & Determination:

26. At the outset, I shall deal with the objection taken on behalf of the Applicant as to the validity of the Statutory Demand on the ground that it was undated.

An Application for setting said of Statutory Demand needs to be filed within 21 days from the date of service of the same. The Applicant hereof admits the service of Statutory Demand on **17th February, 2021**. The Applicant has filed the Application seeking to set aside same on **9th March 2021** and same has been, admittedly, served on the Respondent on **10th March 2021**. I find that the filing and serving have taken place within 21 days as required by the Act. (Month of February consists of 28 days)

The impugned Statutory Demand was issued in the month of **February 2021**, with no date inserted therein. The absence of the date therein need not have caused any prejudice or miss direction to the Applicant Company. Besides the Applicant Company has not pointed out any injustice caused to it due to the absence of the date in the Statutory Demand. The solvency of the Applicant is not ascertained at this stage. What is mainly gone into at this stage, is only (a) whether there is a genuine dispute between the Applicant and the Respondent about the existence or amount of a debt to which the demand relates; (b) whether the company has an offsetting claim?

27. Careful perusal of the contents of the averments in the Affidavits of both the parties and those in the documents annexed thereto, particularly as per their admissions therein and their conduct, it is evident that there had been some understanding between the Applicant and the Respondent and accordingly they have engaged in dealings as stated therein at least from March 2029 till 7th May, 2020.
28. The Applicant which is an Electrical and General Contractor, for its various projects, has obtained the supply of pre-mixed Concrete from the Respondent's plant. The supply of concrete mixture was carried out by the Respondent by utilizing fleet of dumper Trucks comprised of its own Trucks and the Trucks initially provided by the Applicant unto the Respondent on hiring basis, to which fleet the Applicant added 3 more newly imported trucks from the Month of January 2020. The Applicant's Trucks were made available to the Respondent, as and when needed, by keeping them parked at the Respondent's yard.
29. The unit price for the concrete mixture payable by the Applicant unto the Respondent and the charges payable to the Applicant for hiring of its Trucks by the Respondent were agreed upon and the respective payments were settled periodically leaving certain amount as pending arrears on the part of both the parties at any given time during the time material.
30. The Respondent by its letter dated 7th May, 2020 (marked as "MI-5") informed the Applicant that from 11th May , 2020 it will no longer render its services (supply of Pre-mixed Concrete) to the Applicant owing to the reasons stated therein.

31. Thereafter, by letter dated 11th May , 2020(MI-3) the Respondent demanded a sum of \$380,296.70 from the Applicant ,being the outstanding amount due on account of supplying concrete mixture unto the Applicant and the Applicant by its response letter dated 15th May, 2020 (marked as “MI-2”), while admitting the liability for the said sum of \$380,296.72 , made a cross claim in a sum of \$271,190.70 being the arrears of hiring charges in respect of its Dumper Trucks unto the Respondent.
32. Accordingly, the balance sum of \$ 109,106.02 still payable by the Applicant unto the Respondent was not at all disputed by the Applicant.
33. Though, the above fact was averred in paragraph 20 and in some other paragraphs of the Supplementary Affidavit in opposition filed by the Respondent, supported by the relevant annexures marked as “MI-2” and “MI-3”, the Applicant chose not to challenge it by filing an Affidavit in Reply, despite 14 days’ time period had been given for that purpose.
34. Thus, it is clear that the balance sum of \$109,106.02 is undisputed and the same has been, not only accepted and admitted by the Director of the Applicant , but also had offered to pay the said undisputed amount in 3 installments as evidenced by the said letter marked “MI-2”.

Off-setting claim & Filing Writ Action:

35. The Applicant, instead of paying the undisputed sum of \$109,106.02 as admitted, agreed and undertook by the said letter “MI-2”, has proceeded to file a writ action bearing No-HBC-11 of 2022 against the Respondent, which appears to be a move made by the Applicant to delay the admitted payment in order to frustrate the Respondent.
36. Filing of a writ action against a company that had already served statutory demand should be looked at closely. The fact that a civil action has been filed by a Company on which a statutory demand has been served, where there is no genuine dispute, should not be a ground to set aside statutory demand. This will not itself be a reason to consider that there is a genuine dispute.
37. This may be one of the factors to consider existence of genuine dispute, but not the conclusive fact as to existence of genuine dispute. Any person having an undisputed debt can also institute a civil action though it may be struck off or dismissed at the end. Hence the prospective writ action of the Applicant against Respondent must be considered with other facts and circumstances surround it.
38. There is no rule as to such an action *ipso facto* stay a winding up action or set aside statutory demand. If so this will be the preferred method to prevent winding up action

even for undisputed debt, as striking out of a civil action will invariably take more time than winding up action.

39. Thus, filing a writ action by an Applicant Company (who was served with a Statutory Demand) against the Respondent Company (who served the same), should not be considered as a complete bar to a winding up action or as a reason for setting aside Statutory Demand. If not institution of civil action may be resorted to abuse the process to evade the honoring of an undisputed genuine claim.
40. As per the correspondences between the parties and the averments in their respective Affidavits, it is clear that the amount claimed by the Respondent for the supply of concrete mixture to the Applicant till the termination of the hiring of trucks by their letter dated 7th May, 2020 marked as “MI-5” was **\$380,296.70**, which sum was subsequently demanded by the Respondent through its letter dated 11th May, 2020 marked as “MI-3” and the same was admitted by the Applicant in no uncertain terms through its letter dated 15th May, 2020 marked as “MI-2”.
41. Conversely, what the Applicant claimed from the Respondent, being the amount due on account of hiring of dumper Trucks by the Applicant unto the Respondent till the termination of hiring as aforesaid, was only \$271,190.70. Though, this amount was initially disputed, subsequently, the Respondent in paragraph 20 of its Supplementary Affidavit admitted the same leaving a balance sum of \$109,106.02 as undisputed sum still due from the Applicant.
42. I find that the aforesaid sum of \$109,106.02 is undisputed, on reconciliation being done with regard to their respective claims on account services rendered to each other. However, the Applicant has resorted to file the writ action HBC-11 of 2021 against the Respondent, claiming the said sum of \$271,190.70, together with further loss and damages said to have suffered by it.
43. If the Applicant intends to claim damages and/ or losses from the Respondent on account of discontinuance of hiring services provided by the Applicant, it can be done so by way of a separate action, however on a well-founded cause of action, without mixing the undisputed sum hereof in a sum of \$109,106.02, which should be the subject matter of the Statutory demand sought to be set aside by this Application.
44. Even if the amount claimed by the Applicant in a sum of \$271.190.70 is deducted from the amount claimed by the Respondent, which is, admittedly, in a sum of \$380,296.72, the remaining undisputed amount will still be more than the statutory minimum amount of \$10,000.00 required for the service of a Statutory Demand.

E. Conclusions:

45. Accordingly, the Court acting pursuant to section 517 (2) and (4) of the Companies Act 2015, arrives at the conclusion that the substantiated debt hereof shall be \$109,106.02 and the amount stated in the Statutory Demand should be varied accordingly. The Statutory Demand hereof will have had the effect, as so varied, as from the date the demand was served on the Applicant.

F. Final Orders:

- a. The Application for setting aside the Statutory Demand is hereby dismissed.
- b. The undisputed debt hereof is substantiated as \$109,106.02.
- c. The amount of debt stated in the Statutory Demand is hereby varied as \$109,106.02.
- d. The variation shall be effective from the date of the service of the same on the Applicant, which was 10th March 2021.
- e. Considering the circumstances, no costs ordered and the parties shall bear their own costs.



**A.M. Mohamed Mackie
Judge**

At High Court Lautoka this 5th day of October, 2022.

SOLICITORS:

For the Plaintiff: Krishna & Co.

For the Defendant: Nilesh Sharma Lawyers

