

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

CIVIL ACTION NO. HBM 13 OF 2021

IN THE MATTER of a Statutory Demand dated 4th March 2021 taken out by **CARPENTERS FIJI PTE LIMITED** trading as **MORRIS HEDSTROM** against **PRO PACKAGING SUPPLIED PTE LIMITED** and served on the Applicant on 9th March 2021 at its place of business in Nadi.

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 : **PRO PACKAGING SUPPLIES PTE LIMITED** a limited liability company having its registered office at Lot 1 Mahesh Dutt Road, Namaka, Nadi Fiji.

APPLICANT

AND : **CARPENTERS FIJI PTE LIMITED** trading as **MORRIS HEDSTROM** a limited liability company having its registered office at 34 Rodwell Road, Suva, Fiji

RESPONDENT

BEFORE : Hon. Mr. Mohamed Mackie-J.

APPEARANCES : Mr. Lagonilakeba with Mr. Bandnord, for the Applicant
Mr. E. Narayan, for the Respondent

DATE OF HEARING : On 9th June 2023.

WRITTEN SUBMISSIONS: On 9th June 2023

DATE OF DECISION : On 4th September, 2023

RULING

[setting aside a statutory demand]

A. INTRODUCTION

1. This is an Application made by, PRO PACKAGING SUPPLIES PTE LIMITED, (“the Applicant”) under section 516 of the Companies Act (“the Act”) seeking to set aside a Statutory Demand.

2. By its Application, supported by the Affidavit of KISHOR KUMAR, (the Director of the Applicant Company) sworn on 23rd March 2021 and filed on 24th March 2021, the Applicant seeks to set aside the Statutory Demand Notice dated 4th March 2021 and served on it by the Solicitors for the Respondent, CARPENTERS FIJI PRIVATE LIMITED trading as MORRIS HEDSTROM ("the Respondent"), on 9th March 2021, demanding a sum of \$52,150.19 (VIP), together with \$2,000.00, being the cost of the Demand Notice. The Affidavit in support was accompanied by annexures marked from "KK1" to "KK15".
3. The Applicant, with the leave of the Court, on 22nd July 2021, also filed a supplementary Affidavit sworn by the said Director KISHOR KUMAR, along with number of annexures marked as "A" and "B".
4. The Application is resisted by the Respondent, which on 14th October 2021 filed its Affidavit in opposition sworn by KUNASEELAN SABARATNAM on 12th October 2021, as a Director of the Respondent Company. The Affidavit in opposition was filed along with annexures marked as "A" to "C-2". The Applicant, through its Director, Kishor Kumar, swore and filed its reply Affidavit on 26th October 2021.
5. At the hearing, learned Counsel for both parties orally argued that matter and filed their respective written submissions as well.

B. BACKGROUND:

6. The Applicant is a manufacturer and wholesaler of certain paper and plastic products, such as cups, plates and tissues etc in and around Fiji and in the Pacific region.
7. The Respondent Company owns and operates Super Markets in Fiji, which used to purchase those goods from the Applicant on credit basis pursuant to a Supplier Agreement entered into by and between them, which is marked and annexed as "KK-4" to the Affidavit in support.
8. The said Agreement embodied 20 negotiated terms and conditions, which included, *inter alia*, the terms of payment and the percentage of rebates the Respondent is entitled to on the purchases done by it. As per the clause 7 of the Agreement the agreed rebate was 20% of the purchase value and the clause 8 thereof states payments to be agreed on 45 days.
9. Dispute cropped up in relation to the payment of the purchase price and the rebate that the purchaser Respondent claimed to be entitled to as per the Agreement. After exchange of few e-mail correspondences and the Respondent's letter of demand dated 12th November 2020 and marked as "KK-6", the Respondent caused its Solicitors to issue the impugned Statutory Demand Notice dated 4th March 2021 marked as "KK-1" to the Applicant for a sum of \$52,150.19 as per the Respondent's Invoice No. 0660 "KK-5", being the Rebate claimed on account of the purchases done for the year 2019 from the Applicant company.

10. The Applicant's contentions, as per the Affidavit in support and the Supplementary Affidavit in support of the setting aside Application and the reply Affidavit, are **that** ;
- a. There is a genuine dispute in terms of the existence of the rebate as the Respondent had breached the suppliers Agreement entered into between the parties.
 - b. The Respondent was obliged to pay and/or clear the invoices within 45 days from the date of purchase in order to qualify for the rebate.
 - c. It is unfair and unconscionable for the Respondent to demand the rebates from the Applicant when it has failed to comply with the Agreement.
 - d. There is a claim for offsetting of \$38,388.40 being the sum owed by the Respondent to the Applicant on the account of the unpaid invoices.
11. The Respondent on 14th October 2021 filed its Affidavit in opposition sworn by Kunaseelan Sabaratnam on 12th October 2021 refuting the averments in Kishor Kumar's Affidavits in support and supplementary Affidavit. The Applicant Company's Director Kishor Kumar swore and filed his Affidavit in reply on 26th October 2021.

C. LEGAL FRAMEWORK:

12. 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.

13. 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. THE ISSUES:

14. The issues raised in this Application include:
- i. Whether the setting aside Application is in compliance with section 516 of the Companies Act 2015?
 - ii. If the Applicant's setting aside Application is in compliance with section 516 of the Companies Act 2015, is there a genuine dispute of debt or an offsetting claim requiring the setting aside of the statutory demand under section 517 of the Companies Act?

E. DISCUSSION:

15. Parties are not at variance on the question of compliance with the timeframe prescribed by the Act for the filing and serving of the Application for setting aside.
16. The Respondent raises a preliminary objection with regard to the manner and form in which the Applicant has made the Application. The Respondent alleges that the Application is substantially defective, erroneous and inconsistent with Order 5 Rules 3 and 5 of the High Court rules 1988, which reads as follows.

Proceedings which must be begun by originating summons (O.5, r.3)

3. Proceedings by which an application is to be made to the High Court or a judge thereof under any Act must be begun by originating summons except where by these Rules or by or under any Act the application in question is expressly required or authorised to be made by some other means.

This rule does not apply to an application made in pending proceedings.

Proceedings to be begun by motion or petition (O.5, r.5)

5. Proceedings maybe begun by originating motion or petition if, but only if, by these rules or by or under any Act the proceedings in question are required or authorised to be so begun.

17. Learned Counsel for the Respondent, in justifying his argument, relies on the decision in "***My Idea Pte Ltd (trading as five squares) v China Navigation Co Pte Ltd (trading as Swire Shipping) FHC 220; HBM 06 of 2021 (31st March 2021***" in which Hon. Amarathunga-J had observed, inter alia, as follows and proceeded to dismiss the Application, not purely on the propriety of the mode of the Application, but also on some other grounds as to the merits of the Application.

15. *An application for setting aside of statutory demand is no longer an inherent right of a debtor company that is subjected to discretion of court. It is a statutory right of a company, granted in terms of Section 516(1) of Companies Act 2015.*

16. *There is no specific procedure set out in Companies Act 2015 or Companies (Winding Up) for an application under section 516 of Companies Act 2015.*

17. *Rule 4(1) of Companies (Winding Up) Rules 2015, states;*

“4(1). Except as otherwise provided in the Act, the Regulations and these Rules, the general practice of the court, including the practices and procedure in Chambers, applies with any necessary modifications to the matters to which these Rules apply.”

18. *If there is no procedure provided in terms of Companies Act 2015, or the Rules of winding provided in the Companies Act 2015 Rule 5 of Companies (Winding Up) Rules 2015 applies and the court can decide whether the procedure adopted was proper.*

19. *The Company can institute this proceedings by way of originating summons, in terms of Order 7 rule 1 of the High Court Rules 1988.*

20. *The Company had not applied any accepted method of institution of action in High Court in terms of High Court Rules 1988.*

21. *The Company that institute proceedings , by way of originating summons was also obliged to fulfil the requirements in terms of High Court Rules 1988 cannot be circumvented. For an example, the Plaintiff is required to comply with Order 7 rule 3(1) of High Court Rules 1988.*

22. *The Company had instituted this action as an “Application for setting Aside Statutory Demand”, for which there is no procedure contained in High Court Rules 1988 to institute proceedings in terms of statutory provision such as Companies Act 2015.*

23. *This was the first irregularity of this application, apart from that the Company had admitted that it could not serve this application to Respondent within time.*

18. The preliminary objection being raised in paragraph 7 (ii) of the Affidavit in opposition by the Respondent, the Applicant in paragraph 4 of its Affidavit in reply has averred that the when the same preliminary objection was taken up before Hon. Stuart –J (as he then was) for the first time, it was disregarded by him. I don’t find any ruling in that regard in the case record. Thus, I shall deal with it in the following paragraphs before I proceed to consider the merits of this Application.
19. The question that arises here is whether the observance in breach or non-compliance of the Order 5 Rules 3 & 5 of the High Court Rules 1988, when making Application for setting aside Statutory Demand under section 516 of the Companies Act, should necessarily inhibit the Court from adjudicating the matter and warrant the dismissal of the Application in limine.
20. There is no any specific mode set out in Companies Act 2015 or Companies (Winding Up) Rules for making an Application for setting aside a Statutory Demand Notice under section 516 of Companies Act 2015. The winding up Rules 5-(1) comes into play if circumstances

arise for which, (a) no specific procedure is provided by the Act or in these Rules; or (b) when there is doubt in relation to the correct procedure to be adopted.

21. There is no any hard and fast rules in place as far as the mode of the Application for setting aside a statutory demand is concerned. As long as the requirements of the section 516 of the Act are duly complied with in relation to the timeframe for filing, serving of the Application and filing of the Affidavits, the Court need not necessarily go further into the propriety of the mode adopted in making the Application.
22. Whatever the name given to the mode adopted in the process of moving the Court to have the statutory demand set aside, what factually occurs is making an "Application" to the Court. The Orders, Rules, Regulations and Procedures are in place with the main objective of conveying the litigants to their desired destinations conveniently and expeditiously in their journey of litigation. No technical objections should be allowed to stand on this way. It is only a mere irregularity, which does necessarily vitiate the proceedings. No any justifiable ground adduced for the Court to uphold the preliminary objection. Accordingly, I decide to overrule it and go into the merits of the Application.

F. MERITS OF THE APPLICATION:

23. The Applicant does not dispute the fact that there was a Supplier Agreement for the sale and purchase of the goods, and a provision found therein for 20% rebate on the total value of the purchases made by the Respondent within a given period of time, which in this instance is for the year 2019 as per the tax invoice marked as "KK-5". The Respondent claims \$ 52,150.19 (with 9% VIP) being the rebate on account of the purchases made by the Respondent in the year 2019. It appears that the Applicant disputes the existence of such an amount as a "debt" on account of the rebate claimed by the Respondent.
24. The basic issue in this Application is whether the Applicant Company has shown a strong enough case to persuade the Court to set aside statutory demand dated 4th March 2021, which required the payment of an alleged debt in a sum of \$52,150.19.
25. A company must be deemed to be unable to pay its debts, if a creditor to whom the company is indebted in a sum exceeding \$10,000.00 or such other prescribed an amount then due, has served on the company a statutory demand requiring the company to pay the sum so due and the company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks from the date of the service (see Com Act, s.515 (a)).
26. It follows that the Respondent was entitled to seek to enforce payment of this unsecured debt by service of a statutory demand which, if unsatisfied, would lead in due course of the presentation of a winding-up petition.
27. In the statutory demand, the Respondent claimed that the Applicant owed them the sum of \$52,150.19 being monies payable by the Applicant on account of the rebate that it is entitled under the MH Supplier Agreement on account of the purchases done in the years 2019.

28. The Applicant, on the other hand, argued that the amount of rebate becomes payable only when the Respondent completes the purchase of the items by paying the relevant purchase price within 45 days as provided by the supplier Agreement. This position taken up by the Applicant appears to be in harmony with the conditions in clauses 7 and 8 embodied in the said Agreement.
29. The burden lies on the Applicant to establish the existence of a substantial dispute, and the test which the Court applies is similar to that on an application for summary judgment (see **Collier v P & MJ Wright Ltd [2008] (WLR 643)**).
30. In an Application to set aside a statutory demand, the Court does not engage in any form of balancing exercise between the strength of competing contentions.
31. The decision in **CGI Information Systems and Management Consultants Pty Ltd v APRA Pty Limited, [2003] NSWSC 728**, was recently cited by Mutunayagam, J in **Gurbachan Singh's Steel Mills Ltd v Export Freight Services (Fiji) Ltd**, where 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."

32. The Respondent does not dispute the clause 8 of the supply Agreement, which requires the payments for purchases to be made within 45 days.
33. As per the facts before me, what I understand is that when the payments for the purchases are to be finally settled in terms of clause 8 of the Agreement, generally, the Respondent is expected to deduct the amount of the rebate that is provided in clause 7 of the Agreement and pay only the net amount unto the Applicant as the purchase price. There may not be any physical payment of money back to the Respondent purchaser by the Applicant seller, unless the Respondent had in fact paid the full sum of the purchase price, without deducting the rebate that it is entitled as per the Agreement.
34. On Further, careful scrutiny of the contents of the e-mails marked as "KK-2", "KK-3" and "KK-8" sent by the Applicant Company addressed to the Respondent Company, majority of which were not responded, clearly demonstrates that the claim for the rebate is vigorously disputed by the Applicant, on the ground that the Respondent has violated the Agreement by failing to pay the purchase prices from the year 2017. The offsetting claim advanced by the Applicant Company appears to be with some substance, part of which is tacitly admitted

by the Respondent. The Applicant Company seems to be in possession of good grounds to dispute the claim in the statutory demand.

35. Another question that arises is whether the rebate agreed upon between the parties, could be treated as a “debt” within the meaning of the Companies Act, which needs further legal arguments for a final decision. The Applicant disputes the claim for the rebate by the Respondent while the Respondent disputes the amount of the offsetting claim raised by the Applicant as the arrears of purchase price. These claim and counter claim cannot be decided on Affidavit evidence alone in the absence of a full-scale trial.
36. Having considered all the materials and contentions presented before me by both parties, I find the existence of an arguable case for the Applicant Company in relation to the claim for rebate. I am satisfied that statutory demand is genuinely disputed on the grounds, which appear to be substantial and there is a genuine triable issue as to the existence and/or amount of the alleged debt.

G. CONCLUSION:

37. For the reasons given, I proceed to set aside the statutory demand dated 4th March 2021 served on the Applicant Company on 9th March 2021, with summarily assessed costs of \$1,500.00 payable to the Applicant Company by the Respondent.

H. FINAL ORDERS:

1. The preliminary objection raised by the Respondent is overruled.
2. The statutory demand notice dated 4th March 2021, served on the Applicant Company on 9th March 2021, is hereby set aside.
3. The Respondent shall pay the Applicant summarily assessed costs of \$1,500.00.




A.M. Mohamed Mackie
Judge

At High Court Lautoka on this 4th day of September, 2023.

SOLICITORS:

For the Applicant:

Messrs.: Millbrook Hills Law Partners – Barristers & Solicitors.

For the Respondent:

Messrs.: Patel Sharma Lawyers- Barristers & Solicitors (Suva)*