

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

CIVIL ACTION NO. HBM 44 OF 2022

IN THE MATTER of a Statutory Demand dated 27th October 2022 taken out by SHARMA MUSIC CENTRE PTE LIMITED (“the Respondent”) through its Solicitors against THE LAB PTE LTD (“the Applicant”) and served on the Applicant on 29th October 2022.

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

THE LAB PTE LTD a limited liability Company having its registered office Martintar, Nadi

APPLICANT

AND

SHARMA MUSIC CENTRE PTE LIMITED a limited liability Company having its registered office at Sharma Arcade, Main Street, Nadi Town, Nadi

RESPONDENT

BEFORE

A.M. Mohamed Mackie -J

APPEARANCES

Ms. Tumalevu, for the Applicant
Mr. J. Sharma for the Respondent

DATE OF HEARING

18th September, 2023

WRITTEN SUBMISSION:

By the Respondent on 23rd October, 2023
Applicant not filed.

DATE OF RULING

27th October 2023.

RULING

[setting aside a statutory demand]

A. Introduction:

1. Before me is an Originating Summons (Expedited Form) dated and filed on 14th November 2022 by the Applicant hereof seeking the following reliefs;
 - a. *The Honourable Court order and make a declaration that the Statutory Demand dated 27th October 2022 taken out and made on behalf of the Respondent be set aside.*
 - b. *The Honourable Court grant an interim injunction restraining the respondent from filing an application to wind up the Applicant and/ or from taking any steps, including but not limited*

to , publicly advertising anything relating to winding up of the Applicant pending the hearing and determination of this application and/or these proceedings.

- c. The Honourable Court grant permanent injunction restraining the respondent from filing an application to wind up the Applicant and/ or from taking any steps, including but not limited to, publicly advertising anything relating to winding up of the Applicant.*
- d. The Honourable Court make any other orders it deems just, expedient, fit and/ or necessary in the circumstances.*
- e. The Respondent be ordered to pay the costs of and incidental to this proceedings and/or application on an indemnity basis.*

On the Grounds that:

- 1. The Applicant is a solvent Company.*
 - 2. The claim by the Respondent is premature at law as no money is due and payable to the Respondent by the applicant.*
 - 3. Furthermore, there is a genuine dispute between the applicant and the respondent about the existence or amount of the debt to which the statutory Demand relates as the Respondent has , contrary to its oral and written representations , supplied second hand equipment, defective equipment and/or equipment not fit for purpose and that the matter requires viva voce evidence.*
 - 4. The applicant has an offsetting claim to the extent that requires viva voce evidence.*
2. The Application is supported by the Affidavit of SHADIYA SHAYAL KUMAR sworn and filed on 14th November 2022, along with annexures marked as “SSK-1: to “SSK-6”.
 3. The Application is made pursuant to sections 516(1), 517(1) (a) (b) 517 (5) (a) (b) of the Companies Act 2015 and the inherent jurisdiction of this Court.
 4. The Application is resisted by SHARMA MUSIC CENTRE PTE LIMITED (The Respondent). The Respondent has on 20th February 2023 filed the Affidavit in opposition sworn by SUSHIL SHARMA on 16th February 2023. This Affidavit accompanies annexures marked from “SMS-1” to “SMC-7”.
 5. An Affidavit in reply was sworn and filed by SHADHIYA SHAYAL KUMAR on 26th April 2023, along with annexure marked as “SSK-7” in proof of the service of the Application for setting aside on the City Agent of the Respondent’s Solicitors, namely, Krishna & Company and on the Respondent’s branch office at Lautoka. The reply Affidavit, allegedly, not served on the Respondent’s Solicitors.
 6. At the hearing, counsel for both parties made oral submissions. Respondent has filed its written submissions on 23rd October 2023. No written submissions filed by the Applicant within the time granted or at least before this ruling was finalized this morning.

B. Background:

7. The Applicant Company, being incorporated on 14th July 2022, had decided to start a business of a Tavern or Nightclub in Nadi, and chose as its location the venue of a former Nightclub called “Purple Haze” at Beddoes Circle, Nadi, to operate its new venture under the name and style of THE LAB PTE LIMITED (“The Lab”)

8. For the said purpose, the Applicant wanted to have its Sound System, CCTV solutions and Lights purchased/ supplied and installed at its said premises, for which they had chosen the Respondent Company. One Mr. Ronald Prasad, the General Manager of the Respondent Company, had represented the Respondent Company as its agent in negotiations to act on the instructions of the Director/s of the Respondent.
9. The Respondent, through Mr. Ronal Prasad, gave the Applicant a written quotation / proposal marked and annexed as "SSK -3" to the supporting Affidavit , which included the details of the goods and prices thereof for the supply and installation of the sound System and Security Solutions, including the necessary Lights.
10. The original total marked price as per the said quotation for the Sound system and CCTV Solutions was \$83,920.00. However, after discount it was reduced to \$65,000.00 as the total package price, out of which a sum of \$30,000.00 was paid as advance on or about 18th July 2022 against the invoice No-58798 dated 15th July 2022 marked as "SMC-4". A balance sum of \$35,000.00 was to be paid.
11. For the supply and installation of Lights, the original total marked price was \$28,560.00. But, after discount it was reduced to \$22,570.00 as total package price, out of which \$10,000.00 was paid on or about 18th July 2022 against the invoice No-58799 dated 15th July 2022 marked as "SMC-5". A balance sum of \$12,570.00 was to be paid. The Applicant marked and tendered a copy of the said quotation as "SSK-3", while the Respondent marked and tendered a coloured copy (original) of it as "SME—3".
12. Accordingly, out of the total sum of \$87,570.00 for the supply and installation of all goods, after deduction of \$40,000.00 (\$30,000.00+\$10,000.00) being the advance deposit as per the said two invoices, a sum of \$47,570.00 had become as the arrears to be paid by the Applicant to the Respondent. This has now become the bone of contention and led the parties to the Court as aforesaid pursuant to issuing of the impugned Statutory Demand dated 27th October 2022 by the Respondent's Solicitors. Messrs JANEND SHARMA LAWYERS.

Filing & Serving of the Application:

13. Admittedly, the Statutory Demand notice dated 27th October 2022 was served on the Applicant Company on 29th of October 2022 , and the Applicant has preferred the Application in hand on 14th November 2022, which is ,unarguably, within 21 days' time period stipulated by section 516 (2) of the Companies Act 2015.
14. As far as the service of the Application is concerned, though the compliance with the prescribed time period for the service of it under section 516 is not disputed , the propriety/ legality of the service is disputed by the Respondent.

C. Legal framework:

15. Sections 516 and 517 of the Companies Act 2015 ("Com Act") provide the necessary legal provisions

- “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.*

16. 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. The issues:

17. The issues that warrant consideration hereof are ;

1. *Whether the service of the setting aside application on the City Agent of the Respondent’s Solicitors was in compliance with the section 516 (3) (b) of the Companies Act 2015?*
2. *If the service of the setting aside application was in compliance with section 516 (3) (b) of the Companies Act 2015, is there a genuine dispute about the existence or amount of a debt or an offsetting claim requiring the setting aside of the statutory demand notice under section 517 of the Companies Act?*

E. Discussion:

18. The Respondent, through its Solicitors, Messrs Janend Sharma Lawyers, issued the impugned Statutory Demand Notice dated 27th October 2022 against the Applicant in the sum of \$47,570.00 .The Applicant disputes the said sum of \$47,570.00. It has also taken up a position that there is an offsetting claim. The Applicant by its timely Application has applied to this court to have the statutory demand notice set aside.

Was the Service improper?

19. Learned counsel for the Respondent has raised an issue to the effect that the service of the Application is improper as it was not served at the registered office of the Respondent Company, which is at SHARMA ARCADE, Lot 15, Naitovo Lane, Main Street, Nadi, on or before 19th November 2022. Accordingly, counsel moves that since the Applicant has not followed rules of the principal Act, the Originating summons ought to be struck out.
20. Careful perusal of the record shows that the Applicant, having filed the Application on 14th November 2022 (within the stipulated time period of 21 days from the date of the service of the Statutory demand on it), has served copies of the Application and the supporting Affidavit on Messrs; Krishna & Company, the City agent of the Respondent's solicitors on the same date (i.e. 14th November 2022) at 4:30 pm as substantiated by the annexure marked as "SSK -7" to the Affidavit in reply.
21. Moreover, it is also on record that the service also has been effected at the Respondent's branch establishment at Lautoka 5:11 pm on the same date. Vide "SSK-7". These two services are admitted by the Respondent's counsel.
22. The Statutory Demand was issued by Messrs **Janend Sharma Lawyers**, the Solicitors of the Respondent Company, for and on behalf of the Respondent Company. Thus, serving the Summons for setting aside of it on the Solicitors for the Respondent or serving at their City agent is not blameworthy and need not necessarily violate or defeat the purpose of section 516(3) (b) of the Companies Act 2015.
23. The Applicant has served the Application on Messrs Krishna & Company, the city agent of Janend Sharma Lawyers. The city agent has accepted the service on behalf of Janend Sharma Lawyers. I do not see anything wrong in the service of the Application on the city agent of the solicitor who served the demand. It should be taken as service on the solicitor who served the demand on behalf of the Respondent Company. No prejudice is caused to the Respondent. I find the service on the city agent of the solicitor, who served the demand is a valid service. A copy of it has also been served on the Lautoka branch office of the Respondent. The Applicant has thus, sufficiently, complied with the requirement of section 516 (3) (b).
24. Having carefully considered the preliminary objections raised and submissions made by the counsel for the Respondent in that regard, I conclude that the service of the Application for setting aside statutory demand on the City agents of the Respondent's Solicitors on 14th November 2022 was a due service. Accordingly, I would reject the preliminary objection raised by the Respondent's counsel. In this regard, I am guided by the decision of Mohamed Ajmeer-J, as he then was, in **Island Hoppers Pte Ltd v Pacific Energy (South West Pacific) Ltd [2020] FJHC 894; HBM47.2020 (28 October 2020)**

Is there a genuine dispute or an offsetting claim?

25. The annexures marked as "SMC-4" to the Affidavit in support, being the invoices bearing No-58798 and 58799 both dated 15th July 2022, clearly show that the parties had agreed on the goods being sold, the prices thereof, the advance deposits, and the balance to be paid in terms of both invoices as \$35,000.00 +\$12,570.00 = \$47,570.00.

26. It appears that the advance sum of \$40,000.00 was paid and settled either on or about 18th July 2022, as per the invoices signed by Shadhiya, or prior to or during the process of supply and installation of the goods. Parties are not in dispute as to the amount of the advance and the payment of it.
27. The averments of the Applicant in paragraph 20 of her Affidavit in support, to the effect that ***“the balance sum of \$47,570.00 would be due and payable 3 months after they commenced operation of the business (the Lab)”***, is unsubstantiated, which in present days’ business environment requires a formal written agreement or understanding. If, in fact, there was such an agreement or arrangement to delay the balance payment as averred by the Applicant, undoubtedly, it would have been reduced to writing at least in the said invoices.
28. Further, the aforesaid averment of Shadhiya, in paragraph 20 of her Affidavit in support cannot be accepted and considered in isolation. There should have been some firm undertaking or promise in writing or otherwise that the said sum will be paid and settled on or before a specific date or within a specific period of time. Moreover, the Applicant had not indicated a specific date for the commencement of the operation of the Applicant’s Nightclub, for the Respondent to have at least reasonably assumed as to when it would receive the balance sum. The last date for the balance payment could not have been beyond 20th September 2022, on which date the installation was completed.
29. It is difficult to believe that the Respondent Company, which enjoys such a clientele as evidenced by page 11 of the quotation “SMC-3” would have agreed for such a loose term in the absence of any firm undertaking.
30. The facts that the supply and the installation of the instruments were commenced by the Respondent on 1st September 2020, it was completed on 20th September 2022 and the operation of the Nightclub was started on 22nd September 2022 are not disputed. The position taken by the Respondent that the Applicant was required to pay the balance sum on or before the 20th of September 2022 (the date on which the installation was completed) appears to be acceptable.
31. The Applicant has, belatedly, taken up a position that it disputes the claim and they have a claim against the Respondent. If there were such defects in the items and/ or if the lights supplied were used /second-hand items, the Applicant could have formally informed the Respondent’s Directors in writing and/ or verbally with specific details thereof and could, probably, have sorted out those issues through discussions by availing of the after-sale services and/ or through the warranty given by the Respondent.
32. In the bundle of Messages (SMS) marked by the Respondent as “SMC-6”, the message dated 17th October 2022 from Shadhiya to Sushil Sharma clearly demonstrates Shadhiya’s tacit admission that the sum in question was by then due to the Respondent and she was working on arranging some funds to meet it . This message was sent around 4 weeks after the commencement of the operation of the Nightclub, but not a single word has been uttered therein about the defective equipment or used lights.
33. No evidence was adduced by the Applicant to show that he had to purchase replacements for the alleged faulty goods supplied by the Respondent. No evidence on assessment of loss, if any, has been adduced. The Applicant relies on lame excuses to evade the liability. If it had any true grievances over the goods supplied and installed, it could have promptly

brought it to the attention of the Director/s of the Respondent. On careful perusal of the contents of the messages communicated, between the parties, I find that the conduct on the part of the Applicant's Director is evasive.

34. If Shadhiya had organized a sum of \$10,000.00 to be paid on 4th October 2022, as averred in paragraph 30 of her Affidavit in support, there was no reason for Amit Sharma to have refused to accept it, because it was a substantial amount out of the total balance sum. The Respondent's Director denies this in paragraph 29 of his Affidavit in opposition.
35. If there is a genuine dispute about the existence or amount of the debt, or an offsetting claim, the Applicant is duty bound to place it before the court with convincing evidence. In **Searoad Shipping Pvt Ltd v on call Cranes (Fiji) Ltd [2020] FJHC 1075 HBM 36 /2020 11th December 2020**) Jude Nanayakkara –J, as he then was, cited the following authority and decided that the genuine dispute ought to be presented with sufficient evidence.

"Fitness First Australia Pty Ltd v Dubow [6], the Court dealt with an application under section 459G of the Corporations Act 2001 (Cth) which is identical in terms to section 516 of our Companies Act 2015. Ward J stated;

.....the court does not determine the merits of any dispute that may be found to exist, but simply whether these [sic is such a dispute and the threshold for that is not high. In Edge Technology Pty Ltd v Lite-on Technology Corporation [2000] NSWSC 471; (2000) 34 ACSR 301, Barrett J said at [45]):

The threshold presented by the test to set aside a statutory demand does not however require of the plaintiff a rigorous and in-depth examination of the evidence relating to the plaintiff's claim, dispute or off-setting claim.....Hayne J in Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1994] Vic Rp 61; [1994] 2 VR 290".

36. The conduct of the Applicant's Directors clearly demonstrates that they were not so serious of settling the balance sum due. Otherwise, they would have directly met the Director/s of the Respondent Company as per the arrangements made.
37. The Applicant has not substantiated its purported offsetting claim, with facts and figures. I am not satisfied that statutory demand is genuinely disputed, as I do not find any triable issue as to the existence and/or amount of the alleged debt. Accordingly, for the reasons given above, this Court has no alternative, but to dismiss the Applicant's Application.
38. As the Court refuses the substantial relief of setting aside, the necessity for issuing injunctive relief as prayed for does not arise. Considering the circumstances, the Court decides to impose a sum of \$ 1,500.00 being the summarily assessed costs payable by the Applicant unto the Respondent.

F. Final Orders:

- a. The Application for setting aside the Statutory Demand fails.
- b. The injunctive reliefs prayed for are refused.
- c. The Originating Summons filed on 14th November 2022 is hereby dismissed.

d. The Applicant shall pay the Respondent a sum of \$1,500.00 (One Thousand Five Hundred Fijian dollars) being the summarily assessed costs.


A.M. Mohamed Mac Ie
Judge



At the High Court of Lautoka on this 27th day of October, 2023.

SOLICITORS:

For the Applicant:

Messrs: Gordon & Company - Barristers & Solicitors

For the Respondent:

Messrs: Janend Sharma Lawyers - Barristers & Solicitors