

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

MISCELLANEOUS ACTION NO. HBM 17 OF 2022

IN THE MATTER OF Statutory Demand dated 18th March, 2022 taken out by **MY GROUP PTE LIMITED T/A MEDTROMIX CONCRETE (FIJI)** (“the Respondents”) against **VITILEVU CONSTRUCTION (FIJI) PTE LIMITED** (“the Applicant”) and served on the Applicant on 24th March 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.

BETWEEN **VITILEVU CONSTRUCTION (FIJI) PTE LIMITED** a company incorporated in Fiji and having its registered office at Lot 1 Nawaka Road, Nadi.
APPLICANT

AND **MY GROUP PTE LIMITED T/A METROMIX CONCRETE (FIJI)** a limited liability company having its registered office at Lot 1 Latui Road, Wailada Industrial Estate Lami.
RESPONDENT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. A. J. Singh, with Ms. P. Prasad for the Applicant
Ms. M. Khirti for the Respondent

DATE OF HEARING : 4th November, 2022

WRITTEN SUBMISSION: By the Respondent on 4th November, 2022.
By the Applicant on 23rd November, 2022.

DATE OF RULING : 26th January, 2023

R U L I N G

[Setting aside a Statutory Demand]

A. Introduction

1. This is an Application for setting aside of the Statutory Demand dated 18th March, 2022, taken out by the Respondent Company against the Applicant Company and served on it on 24th March, 2022.

2. By its Application, supported by the Affidavit of ALIM IMAM BEGG, the Director of the Applicant Company, the Applicant seeks to set aside the Statutory Demand notice ("Statutory Demand") issued against it demanding payment of \$ 319, 124.50.
3. Opposing the Application, the Respondent Company has filed its Affidavit sworn by FAIZ HUSSAIN; the General Manager of the Respondent Company, together with the annexures marked as "R-1" to "R-13". The Applicant Company has filed its Affidavit in reply, sworn by the said Director, ALIM IMAM BEGG, together with annexures marked as "AIB-1" to "AIB-2".
4. At the hearing held before me on 04th November, 2022, matter was orally argued by the learned Counsel for both parties. Additionally, written submission on behalf of the Respondent was tendered in open Court at the hearing and the written submissions on behalf of the Applicant was filed on 23rd November, 2022 following the direction given. Though, the Respondent was left at liberty to file reply submissions, if needed, no such submissions filed.

B. Background:

The Respondent's Position:

5. The Applicant is a Construction Company and the Respondent Company supplied Concrete Mixture to various projects carried out by the Applicant Company, on Credit basis and payments were made periodically.
6. However, the Respondent Company was a secured Creditor of the Applicant Company as per the Credit Application executed on 24th September, 2019, by which the Applicant Company, among other things, had agreed for the Respondent Company to charge interest from the Applicant Company on overdue payments at the rate of 15% per Month.
7. During the time material to the Statutory Demand , ie from 19th June, 2020 to 23rd September,2020 , the Respondent Company had supplied and the Applicant had received several consignments of Pre-Mixed Concrete as per the Invoices and the Delivery dockets marked as "R-4" .
8. The Capital amount that had fallen arrears for the supply of the Concrete Mixture was \$ 74,215.00, to which a further sum of \$244,909.50 was added as 15% monthly interest in terms of the Credit Agreement, making the total sum payable by the Applicant Company, as per the Statutory Demand Notice, in a sum of \$ 319, 124.50.
9. However, upon reconciling the accounts, the total interest payable as per the Credit Agreement, on account of the deliveries made during the time material as evidenced by the invoices & Delivery Dockets marked as "R-4", came to be a sum of \$204.091.25 to which the

said capital outstanding amount in a sum of \$74,215.00 being added, the final sum came to be \$278,306.25 as substantiated by the statement of account marked as “R-13” and filed along with the Affidavit in opposition.

10. The Respondent’s stern position is that at no point in time had the Applicant, from the time of default in payment and prior to the date of service of Statutory Demand Notice on the Applicant, had disputed the sum of \$74,215.00 and have at all material times admitted the debt as per the annexures “R5”; “R6”; “R7”; “R8”; “R9”; “R10”; “R11” and “R12”, which are email correspondences. The Respondent’s claim for interest on the said capital sum is based on the relevant provision of the Credit Agreement.

The Applicant’s Position:

11. The Applicant does not raise any issue with regard to the service or the propriety of the Statutory Demand dated 18th March, 2022, but disputes the debt and the amount therein, and states that there was no Agreement between them regarding the interest.
12. The Applicant states further that the Respondent was aware that the Public Rental Board and the National Fire Authority had engaged the services of the Applicant to provide Ready-mix concrete for their building projects and the payments for those supplies were dependent upon satisfactory completion of works, including the standard of material and or cement supplied by the Applicant for the constructions.
13. That the Public Rental Board has retained the sum of \$178,000.00 of payment due to the Applicant to check on the defect liability period of 12 months. The Applicant has been paying the Respondent in installments on receipt of funds from the said institutions, but such payments are not reflected in the Statutory Demand.
14. The Applicant states that it is a solvent Company, it is able pay its debts and prays that the Statutory Demand Notice be set aside as the debt will become due only when the building has been certified.

C. Legal framework:

15. Section 516 of the Com Act provides:

“Company may apply”

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 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. Discussion:

17. The Court, under section 517 of the Com Act, is empowered to set aside a statutory demand served on a company if it is satisfied either or both of whether there is a genuine dispute between the Applicant company and the Respondent about the existence or amount of a debt to which the demand relates.
18. I have carefully perused the contents of the averments in the Affidavit in Support, Affidavit in Opposition and reply thereto, together with the contents of the annexures filed and those of the oral and written submissions made on behalf of both the parties, in the light of the relevant legal provisions and the decided authorities on the subject.
19. The Applicant does not deny at all the delivery and receipt of Readymade Concrete mixture supplied by the Respondent Company as per the invoices and delivery dockets, which are marked as annexure “R4”. The Applicant also does not deny or dispute the capital amount of \$74,215.00 that is said to be due, as evidenced by the Statement of Account marked as “R13”.
20. The Applicant did not dispute or objected to even a single document, out of those marked as “R4”, being accepted as evidence in proof of supply and delivery of Ready- Mix Concrete. On the other hand, it is to be observed that except for merely disputing the Capital amount of \$74,215.00, it has failed to satisfy the Court as to on what basis the said Capital amount is disputed or to substantiate that the said amount or part of it was in fact paid and settled.

21. The dispute appears to be about the amount of the debt to which the demand relates, particularly the amount of interest. It is notable that there is no offsetting claim made by the Applicant against the Respondent.
22. The Application for setting aside is made on the grounds that the Applicant Company is a solvent Company, it is able to pay its just debts and there is substantial factual dispute between the parties.
23. On an Application to set aside a statutory demand, the Applicant must satisfy the court either or both of 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.
24. According to the Credit Agreement dated 24th September, 2019, the execution of which is not denied, the Applicant has, *inter-alia*, agreed to pay interest at the rate of 15% per month as and when the account fell overdue. Therefore, having entered into an Agreement in black and white, the Applicant cannot take a contrary stance that there was no such an Agreement. The Applicant is not entitled to challenge the interest rate on the ground of harsh or exorbitant.
25. Above all, on 18th September, 2020, pursuant to a payment follow up email by the Respondent, the Applicant had acknowledged the outstanding debt and had advised the Respondent that the Applicant is trying its best to clear all the dues, but was not in a position to clear all the dues on the same day. Vide "R-6" the copy of the email dated 12th November, 2020;
26. By the email dated 4th December, 2020, marked as "R7" which came as response to the email of the Respondent, the Applicant has admitted to the default in payment on the part of the Applicant and also has tendered an apology for the continuous delay in payment and requested time till 15th December, 2022 to make some payment.
27. By a returner mail of same date, ie; 4th December, 2020, marked as "R-8" the Respondent gave the Applicant further time to settle the said amount, together with the interest. This mail was responded by no less a person than , the Director of the Applicant Company and the deponent of the Affidavit in support , namely, Alim Imran Begg , committing to clear all the amounts payable by the Applicant Company unto the Respondent Company . This email dated 7th December, 2020 is marked as "R9".
28. After an email dated 22nd December,2020 , on the account follow up within the Respondent Company, being copied to the Applicant Company, the said deponent Alim Imam Begg , by his email dated 30th December,2020 requested the Respondent to allow time further to clear all the overdue before 15th January,2021. Vide emails marked as "R10".

29. Once again on 5th January,2021, the said Deponent, Alim Imam Begg, sent an email giving further assurance for the payment of overdue amount before 15th January,2021 , and failing of which for the Respondent to begin proceedings after 15th January,2021. However, as no payments came in as assured, the Respondent Company sent the email dated 15th January, 2020 marked as “R11”.
30. On 1st February,2021, the Applicant Company through its email by the Director, Alim Imam Begg, gave further assurance and undertaking that the amount due would be settled once the payments are received from their clients Public Rental Board, as they wanted to have this cleared as soon as possible.
31. It is pertinent to note that the Applicant Company , nowhere in the said email correspondences , have uttered a single word disputing the debt or the amount thereof , or about the Credit Agreement , according to which the Applicant Company committed itself for the payment of interest on the overdue amount. It follows that there is no genuine dispute between the Applicant Company and the Respondent as to the existence of the debt.
32. The only , purported, reason adduced by the Applicant in its Affidavits , in disputing the debt claimed by the Respondent, is that there are dues to be settled to the Applicant Company by its clients , namely, Public Rental Board (P.R.B)and the National Fire Authority (N.F.A), for the works they have carried out , and those payments depend on the satisfactory completion of works , including the standard of materials and or Cement supplied for the construction.
33. The alleged reason that the PRB has retained a sum of \$178,000.00, out of the payments due to the Applicant, in order to check on the defect liability period of 12 Months, cannot be a valid ground to dispute the debt due to the Respondent. There is no evidence of such an Agreement or an understanding between the Applicant and the Respondent that the payments to the Respondent are subject to any defect liability period.
34. There is no evidence to demonstrate that the payments to the Respondents for the Ready Mix Concrete supplied by it to the Respondent, were subject to any condition.

E. Conclusion:

35. The Applicant did not dispute receiving the supply of Ready Mix Concrete as evidenced by annexures marked “R4” from the Respondent Company, on a Credit Agreement marked as “R2”, subject to 15% of interest on overdue payments thereof. Having admitted the liability thereof as shown in annexure marked “R13” arose through the annexures marked as “R5” to “R12” (emails), the Applicant cannot now be heard to say that it disputes the debt in relation to with the impugned Statutory Demand Notice.

36. However, it is to be noted that the amount of the debt shown in the Statutory Demand Notice hereof should be amended to be tallied with the reconciled amount shown in the Statement of Account marked as "R13", according to which the undisputed amount should be in a sum of \$278,306.25. Therefore, the Respondent Company was entitled to issue a statutory demand under section 515 of the Com Act.
37. For the reasons given, I conclude that the debt with 15% monthly interest totaling to a sum of \$ 278,306.25 was and is not in dispute. This follows that the Applicant did not satisfy the court that there is either a dispute about the existence of the debt or amount thereof. Therefore, subject to the amendment to the amount in the statutory demand, I would, dismiss the Application, with summarily assessed costs of \$1,500.00 payable by the Applicant to the Respondent.
38. Since the substantiated amount (\$278,306.25) is more than the statutory minimum amount for issuing a statutory demand (\$10,000.00), the Court makes an order under s.517(4)(a) and (b) varying the amount as specified here and declaring the demand to have had effect, as so varied as from when the demand was served on the company.

F. **Result:**

- a. Application to set aside the statutory demand is dismissed.
- b. The substantiated amount of undisputed debt shall be \$278,306.25.
- c. Accordingly, the amount of debt in the statutory demand is varied as \$278,306.25
- d. Applicant shall pay summarily assessed costs of \$1,500.00 to the Respondent.



A.M. Mohamed Mackie
Judge

At High Court Lautoka this 26th day of January, 2023.

SOLICITORS:

For the Applicant: Anil J Singh Lawyers

For the Respondent: Nilesh Sharma Lawyers