

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Action No. HBE 04 of 2020

IN THE MATTER of a Statutory Demand dated 7th January 2020 taken out by
HANSONS (FIJI) PTE LIMITED ('the Respondent') against
NAIRS TRANSPORT COMPANY PTE LIMITED ('the Applicant')
and served on the applicant on 08th January 2020

AND

IN THE MATTER of an application for an order to set aside the
Statutory Demand pursuant to section 516 of the
Companies Act 2015.

BETWEEN

NAIRS COMPANY PTE LIMITED a limited liability company incorporated in
Fiji and having its registered office at Lot 81, 9 Miles, Nasinu.

APPLICANT

AND

HANSONS (FIJI) PTE LIMITED a limited liability company incorporated in
Fiji and having its registered office at Suva.

RESPONDENT

Date of Hearing : Mr. N. Sharma for the Applicant
Mr. S. Singh for the Respondent

Date of Hearing : 05th May 2020

Date of Judgment : 28th May 2020

JUDGMENT

[1] The applicant filed this summons seeking the following order:

1. The statutory demand dated 07th January 2020 served on the applicant on or about 08th January 2020 be set aside;
2. An order restraining the respondent company from issuing and/or advertising a petition for winding up of the applicant company based on the statutory demand dated 07th January 2020;
3. Costs of this action on an indemnity basis; and
4. Any further orders and/or other relief which the Honourable Court may deem fit.

[2] The respondent served on the applicant the statutory demand pursuant to sections 513, 514 and 515 of the Companies Act 2015 demanding the repayment of a loan \$200,000.00 within three weeks from the date of service.

[3] The applicant sought to set aside the said statutory demand on various grounds averred in its affidavit in support.

[4] The applicant's submission is that there are two agreements between the parties. One of which is a land swap agreement and the other one is the loan agreement. According to the applicant the amount paid in advance was only \$120,000.00 and the balance \$80,000.00 was to be paid after the execution of the land swap agreement.

[5] Section 517 of the Companies Act 2015 provides:

- (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.

[6] In the loan agreement entered into by the parties the loan amount is stated as \$200,000.00. However, in the same agreement the applicant has acknowledged that it received \$120,000.00.

[7] When there is a dispute as to existence or amount of a debt the court is required by section 517(1) and (2) to calculate the substantiated amount of the demand and if such amount is below the statutory minimum the court must set aside the statutory demand.

[8] In this matter the applicant admits that he received \$120,000.00 from the respondent and there is no evidence that the balance \$80,000.00 was paid to the applicant. The respondent in this regard relied on the letter signed by Kunjan Nair on behalf of the applicant company stating as follows:

That the Company take a loan of \$200,000.00 from Hansons (Fiji) Limited which sum is to be paid in 5 years time from the date of the advance.

[9] This letter does not show that the applicant in fact received \$200,000.00 from the respondent. From the agreement dated 23rd April 2014 and other documents it is clear that the applicant has received only \$120,000.00.

[10] Since the amount received by the applicant as a loan from the respondent exceeds statutory minimum this cannot be a ground to set aside the statutory demand.

[11] The next question the court has to determine is whether the difference between the amount claimed by the respondent and the actual amount advance would cause prejudice to the applicant. It was the position of the applicant that it was given only \$120,000.00. Therefore this defect in the statutory demand would cause no prejudice to the applicant.

[12] The applicant submits that the two agreements must be considered together since both these agreements were part of one transaction. In the second agreement the parties have enclosed the following clause:

This Agreement is separate from the Deed of Agreement for land swap entered into between the parties.

[13] The applicant does not allege that his signature was obtained to the agreement fraudulently or by misrepresentation. If the applicant did not agree to the terms and condition contained therein he could have refused to sign this agreement.

[14] The respondent tendered the document dated 23rd April 2014 signed by Kunjan Nair under the common seal of the applicant company the last paragraph of which states as follows:

We further confirm that we have made our own decision to enter into this agreement and we confirm that we have not been influenced, procured or induced by Hansons (Fiji) Limited, its Directors. Officers or agents to enter into this agreement.

[15] From the above it is absolutely clear that the applicant company has executed the agreement date 23rd April 2020 on its own freewill and without any influence from the respondent.

[16] It is averred in the affidavit in reply of the applicant that the document referred to as "D" in the affidavit in opposition is void as under section 53(1) of the Companies Act,

it has to be executed by two officers of the company. The document referred to as “D” in the affidavit in opposition of the respondent is not an agreement but is a document certifying certain resolutions Board of Directors of the applicant company. It is also pertinent to note that in the affidavit in reply that applicant does not say section 53(1) of which Companies Act. The Companies Act 2015 does not have retrospective effect and since this document has been executed in 23rd April 2014 before the Companies Act 2015 was enacted the provisions Applicable are found in Companies Act Cap 247 and not section 53(1) of the Companies Act 2015.

[17] Section 36 of the Companies Act Cap 247 provides:

- (1) Contracts on behalf of a company may be made as follows:
 - (a) a contract which, if made between private persons, would be, by law, required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied;
 - (b) a contract which, if made between private persons, would, by law, be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.
- (2) A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto.
- (3) A contract made according to this section may be varied or discharged in the same manner in which it is authorized by this section to be made.

[18] One of the other grounds raised by the applicant is that the claim of the respondent is time barred under section 4 of the Limitation Act 1971.

[19] Section 4 of the Limitation Act 1971 provides that actions founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. The agreement which is the subject matter of this action was entered into on 23rd April 2014 and the statutory demand dated 07th January 2020 was served on the company on 08th January 2020 within six years from the date of the agreement.

It is important to note that under section 4(1) of the Limitation Act 1971 the period prescribed by the Act begins to run from the date of the accrual of the cause of action. In this matter under the agreement the applicant was given five years to repay the loan. The period of six years prescribed by section 4(1) of the Limitation Act 1971 begins to run after the expiration of the period of the said five years that is, from 23rd April 2020.

[20] For the reasons aforesaid the court makes the following orders.

ORDERS

1. The application to set aside the statutory demand is refused.
2. The applicant is ordered to pay \$2000.00 to the respondent as costs of this application.




Lyone Seneviratne

JUDGE

28th May 2020.