

IN THE COURT OF APPEAL, FIJI
Appeal from the High Court of Lautoka

CIVIL APPEAL NO.ABU 104 OF 2023
[High Court Action No. HBM 14 OF 2023]

BETWEEN : **TOLL CONSTRUCTION & JOINERY FIJI (PTE) LIMITED**

Appellant

AND : **BOAT SHED HOLDINGS LIMITED**

Respondent

Coram : Prematilaka, RJA
Clark, JA
Winter, JA

Counsel : Mr. Bale and Ms. P Kumar for the Appellant
Mr. K Chang for the Respondent

Date of Hearing : 13 November 2024

Date of Judgment : 28 November 2024

JUDGMENT

Prematilaka, RJA

[1] I agree with reasons and conclusions of Clark, JA with orders.

Clark, JA

Background

[2] On 17 February 2023, Toll Construction & Joinery (Fiji) Pte Ltd (Toll) served a statutory demand on Boat Shed Holdings Ltd (Boat Shed).

[3] On 9 March 2023, Boat Shed filed an application to set aside Toll’s statutory demand.

[4] On 31 March 2023, Toll filed an application to strike out Toll’s setting aside application.

[5] A hearing was fixed for 2 May 2023 and the parties presented submissions on that date.

Ruling

[6] On 15 September 2023, the High Court Judge issued his Ruling.¹ The Judge noted in his opening paragraph that there were two applications before him: Boat Shed’s setting aside application and Toll’s strike out application.

[7] I return to the judgment in due course. The short point at this stage is that the Judge took the view there was a genuine dispute about the asserted debt. Boat Shed had filed a counterclaim which the Judge characterised as a “strong potential offsetting claim”. The Judge also read the affidavits filed in support of the setting aside application and highlighted key points from that evidence. Given his conclusion there was a genuine dispute the Judge decided the statutory demand had to be set aside so the parties could either consider arbitration or

¹ *Boat Shed Holdings Ltd v Toll Construction & Joinery (Fiji) Pte Ltd* [2023] FJHC 671; Companies Action 14 of 2023 (15 September 2023).

mediation (in accordance with the clause in their contract) or pursue a claim and counterclaim.

- [8] Accordingly, the statutory demand was set aside and Toll was ordered to pay costs of \$1000.00.

The appeal

- [9] Toll filed a notice of appeal on 24 October 2023 with eight grounds of appeal. It is unnecessary to set out all eight grounds in this judgment. Ms Kumar, counsel for the appellant, submitted at the hearing of the appeal that the grounds could be grouped largely as follows:

- [a] The Judge erred in determining the setting aside application without notifying his intention to do so at the hearing on 2 May 2023 which hearing was only for the purpose of the strike out application.
- [b] The Judge erred “in law and procedural fairness” (as the appellant put it) by determining there was a genuine dispute when no time had been given to Toll to file an affidavit in opposition to Boat Shed’s setting aside application. This amounted to a breach of natural justice as did the Judge’s anticipation at [29] of his judgment that “any affidavit [filed by Toll] would simply refute the allegations”.
- [c] The Judge erred in law when he applied O 2, R 1 of the High Court Rules to cure the defect in the form of Boat Shed’s application to set aside the statutory demand.
- [d] The Judge erred in law in failing to consider leave was required to file the supplementary affidavit of Jason Gerrand and therefore that affidavit should not have been admitted or considered.

Was there a breach of natural justice?

[10] Point [a] above can be subsumed into the natural justice analysis.

[11] The starting point is the first call before the Judge on 24 March 2023. The Judge's Notes record the following:

**BEFORE THE HONOURABLE JUSTICE ANARE TUILEVUKA ON 24th DAY
OF MARCH 2023 AT 10.30 O'CLOCK IN THE FORENOON**

Appearances:

Ms. Tumalevu for Howards for the Applicant

Ms. Kumar for the Respondent

Counsels Submission:

Ms. Tumalevu:- *Application to set aside statutory demand. My friend served with copy.*

Ms. Kumar:- *We have been served. Whether application.*

Ms. Tumalevu:- *-*

Ms. Kumar:- *Companies Act granted by High Court Rules. This application made under.*

Ms. Tumalevu:- *They can raise that.*

Ms. Kumar:- *No affidavit. Jason Wayne not a party to proceedings to what operating is.*

Order:

- 1. 7 days to Respondent to file and serve application to strike out.*
- 2. 14 days to Applicant to file and serve Affidavit in opposition.*
- 3. Adjourned to 02/05/23 Hearing at 10.30am.*

(Sgd) A. Tuilevuka
Judge
24th March 2023

[12] In accordance with the Judge’s Note, Toll duly filed and served its application to strike out Boat Shed’s application to set aside the statutory demand.

[13] On 2 May 2023, the date fixed for hearing, Ms Lodhia appeared for Boat Shed and Ms Kumar appeared for Toll as she did at the hearing of this appeal. The transcript records the opening exchanges with the Judge after counsel had made their appearances:

Judge: Thank you. Ms Lodhia are you ready to proceed?

Ms Lodhia: Yes My Lord.

Judge: Ms Kumar?

Ms Kumar: Ready to proceed My Lord.

Judge: Thank you. Ms Lodhia?

Ms Lodhia: My Lord I believe this is the Respondent’s application for strike out.

Judge: Oh I see! Ms Kumar?

Ms Kumar: Yes My Lord. On the last occasion, we had raised some issues in relation to the application to set aside which is not the correct application. It’s a summons and not an originating application ... Therefore the entire application itself is defective. Thereafter I raised another two issues which was the issue of the affidavit ... and there were two affidavits filed.

[14] It is apparent that his Honour called on Ms Lodhia first because he was anticipating Boat Shed’s application to set aside the statutory demand was to be argued. That apparent expectation did not accord with counsels’ understanding. They had prepared for, and argued only, the strike out application.

[15] Thereafter, the arguments and hearing were directed to the procedure governing an application to set aside a statutory demand. Toll took the view that Boat Shed’s “entire application” was defective having been filed by way of summons instead of an originating summons while Ms Lodhia relied on authorities supporting the proposition that such defects in form may be curable in light of the discretion conferred on the Court by O 2, R1 of the High Court Rules.

- [16] At a point in the hearing the Judge stood the matter down to enable him to have a look at the Companies Act and Winding Up Rules. When the hearing resumed shortly afterwards, his Honour drew counsels' attention to Companies Act Rules which provided that no proceedings under the Act would be invalid by reason of formal defect or irregularity unless they caused a substantial and irreparable injustice. The Judge asked Ms Kumar whether she changed her position in light of the Rules or whether parties were "stuck with the mandatory guillotine effect of non-compliance". The Judge gave Ms Kumar the opportunity to file written submissions.
- [17] At the conclusion of the hearing, the Judge told counsel both their arguments were clear but they could file further submissions "if need be" in 28 days. I note the Record on appeal includes a copy of the submissions Ms Lodhia had already filed on 1 May 2023.
- [18] At the hearing of the appeal Ms Kumar was asked what prevented Toll from filing an affidavit dealing with the merits of Boat Shed's setting aside application when it filed its application to strike out. In this way Toll could have placed before the Court evidence dealing with the merits of the dispute. Ms Kumar replied that it was necessary to first deal with the technical issue concerning the form of Boat Shed's application to set aside.
- [19] Ms Kumar was asked whether Toll would have agreed with or contested Boat Shed's affidavit evidence. Ms Kumar submitted Toll would have responded to the affidavits. When asked what that meant Ms Kumar submitted Toll would have had to show there was not a disputed debt.
- [20] The Bench pressed Ms Kumar about why, when the parties were given 28 days to file submissions, the substantive point about a disputed debt could not have been addressed. Ms Kumar maintained the essential plank in Toll's position which was that it should have been given an opportunity to file its evidence in response to Boat Shed's evidence before the Judge determined the application to set aside the statutory demand.
- [21] It is beyond doubt that the hearing on 2 May 2023 centered on the strike out application, and only the strike out application. In determining the application to set aside the statutory

demand, notwithstanding that it was not argued, the Judge may have been concerned to avoid unjustifiable delay. That is a proper concern. In the recent Court of Appeal decision in *Biju v Transfield Building Solutions (Fiji) Ltd*, his honour Heath JA discussed the statutory demand process:²

The issue of a statutory demand (failure with which to comply creates a rebuttable presumption of insolvency on the part of the debtor) is the first step in initiating a collective insolvency proceeding. It is more than a contest between parties to secure payment of a debt payable by one to the other. That means that a decision on the application has a public interest dimension.

- [22] His Honour Walton JA observed that, in Fiji, statutory demands are increasingly being used as a debt collection device when it is a clear abuse of process to issue a statutory demand to obtain payment if the creditor knows the debtor company is not insolvent. As to creditors using the statutory demand process to obtain payment when they know the debtor company is not insolvent:³

... any creditor that proceeds in that way (and possibly, in a clear case, its legal advisers) may be at risk of a substantial award of costs to mark the abuse of process.

- [23] Returning to the Judge’s Ruling, despite Mr Chand’s valiant efforts to persuade this Court otherwise, it is clear his Honour’s determination of the application to set aside the statutory demand was reached in breach of the principles of natural justice. While it is desirable to resolve expeditiously the issues which emerge from the issue of a statutory demand, parties must be given a proper opportunity to put their case. As Heath JA observed in *Biju v Transfield Building Solutions (Fiji) Ltd*:⁴ [emphasis added]

It is inappropriate for the Court to embark upon a mini trial (without cross-examination) to determine whether “an offsetting claim” is available, and if so in what sum. All that the Court is required to do is to consider evidence adduced in support of the application by the debtor and in opposition from the creditor and assess, on a summary basis, whether a genuine claim on substantial grounds exists.

² *Biju v Transfield Building Solutions (Fiji) Ltd* [2024] FJCA; ABU014.2021 and ABU041.2021 at [35].

³ *Biju v Transfield Building Solutions (Fiji) Ltd*, above fn 1, at [41] per Heath JA.

⁴ At [58].

- [24] In this case, the Judge considered only the evidence adduced on behalf of one party, namely the affidavit evidence Boat Shed filed in support of its strike out application whereas natural justice required that the Judge should also have considered evidence for Toll which it had not yet filed:⁵ [emphasis added]

*The first principle is the principle of natural justice which applies wherever legal proceedings involve more than one person, and one party is asking the tribunal for an order which will affect and bind another. Natural justice requires that each party should have an equivalent right to be heard. **This means that if one party wishes to place evidence or persuasive material before the tribunal, the other party or parties must have an opportunity to see that material and if he wishes submit counter-material and, in any event, to address the tribunal about the material.***

- [25] Because Toll had no proper opportunity to file its affidavit evidence in opposition to the application to set aside its statutory demand, Toll was essentially not heard on the issue. Neither was Boat Shed “heard” on the setting aside issue on 2 May as neither counsel argued it. But the lack of equivalence in the right to be heard arises from the Judge’s reliance on the affidavit evidence of one party only, namely Boat Shed.

Conclusion

- [26] It seems reasonably clear from the transcript, and the exchange between the Judge and counsel at the beginning of the hearing, that the Judge’s expectation was that both applications were to be heard on 2 May 2023. It is unquestionable, however, that counsel prepared for and argued, only Toll’s application to strike out the summons to set aside the statutory demand. Toll had always insisted that the summons to set aside was in the wrong form and should be struck out.
- [27] The lack of clarity about the purpose of the hearing was unfortunate. The Judge may have proceeded expeditiously to determine both applications but the summons to set aside the statutory demand was decided without argument and, more particularly, on the basis of only one party’s evidence. Toll has established that its right to natural justice was breached.

⁵ *Home Office v Tariq* [2011] UKSC 35 at [104]; 1 AC 452 [2012]; 1 ALL ER 58 Lord Kerr SCJ citing the expression of principle from *Pamplin v Express Newspapers Ltd* [1985] 2 All ER 185 at 186.

[28] As Toll has succeeded on this ground the appeal must be allowed. It is unnecessary therefore to consider Toll's remaining grounds of appeal.

[29] Ms Kumar urged the Court to issue judgment on the procedural point as to whether failure to apply to set aside a statutory demand by way of originating summons is an irregularity susceptible to the exercise of the Court's discretion under O 2, R1. Toll's appeal has been determined on the basis of a breach of natural justice. Observations going beyond that decisive issue would be no more than obiter dicta. In the circumstances the Court does not regard this as the appropriate occasion for analysis and determination of the procedural point.

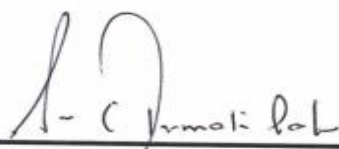
Winter, JA

[30] I agree.

ORDERS

- (1) The appeal is allowed.
- (2) Costs are to lie where they fall.





Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



Hon. Justice Karen Clark
JUSTICE OF APPEAL



Hon. Justice Gerard Winter
JUSTICE OF APPEAL