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IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 11 OF 1992
(Suva High Court Civil Action No. 116 of 1990)

BETWEEN:

NATIONAL BANK OF FIJI — Appellant

and

1. 21C GARDEN ISLAND WOO IL PACIFIC CO. LTD (IN LIQ.)
2. 21C GARDEN ISLAND DEVELOPMENT CO. LTD
3. SEEKERS HOLDINGS (FIJI) LIMITED
4. GARDEN ISLAND GROUP RESORTS (FIJI) LTD
5. EREMASI ROVA

Respondents

Mr H. Nagin for the Appellant
Mr V. Maharaj for the Respondents

Date and Place of Hearing: 24 November, 1994 at Suva
Delivery of Judgment: 25 November, 1994

JUDGMENT OF THE COURT

This is an appeal against a decision of Byrne J. given on 5 February, 1992 dismissing a motion for security for costs by way

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of payment into Court. The Appellant is one of the 5 defendants in the Court below. The 5 Respondents in this appeal are the Original Plaintiffs. They commenced their Action on 3 April, 1990 claiming damages and other relief arising out of the activities of the Defendants in relation to the Castaway Taveuni Hotel (also known as Garden Island Resort).

Paragraph 6 of the Statement of Claim reads as follows:

> *"6. The Fifth Plaintiff is and was at all material times a citizen of the Republic of Fiji and a director and shareholder of the First, Second, Third and Fourth Plaintiffs and brings this action in respect of the causes of action referred to herein in his personal capacity and in his capacity as a director and shareholder of the First Plaintiff."*

The application for security was made by all 5 Defendants but only the Appellant (the 1st Defendant) has appealed against the decision.

The grounds of appeal are as follows:

> *"1. THE Learned Judge erred in Law and in fact in not ordering the Respondents to pay security for costs when the Respondents had not denies that they were insolvent.*
>
> *2. THE Learned Judge erred in law and in fact in holding that there was delay on the part of the Appellant in applying for security for costs when the Appellant immediately made the application as soon as it became aware that all the Respondents were insolvent.*

3. THE Learned Judge erred in law and in fact in not properly applying Section 402 of the Companies Act.

4. THE Learned Judge erred in law and in fact in not properly exercising his discretion in the circumstances of the case."

The Appellant relied on the affidavit of Mr Hemendra Kumar Nagin, Solicitor for the National Bank of Fiji. The 5th Respondent Eremasi Rova filed an affidavit in opposition on behalf of himself and the other 4 Respondent Companies.

The application relating to the 1st to 4th Respondents was made pursuant to Section 402 of the Companies Act 1984, Cap 247. This Section reads as follows:

"Where a limited company is plaintiff in any suit or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

After summarising the Statement of Claim and the Statement of Defence and before dealing with Section 402 of the Companies Act the learned judge made the following observations and comments with regard to the affidavits filed for and against the motion -

" Mr Nagin confirms that the case was set down for hearing for five days from 2nd September to 6th September 1991 and he says that he is informed and verily believes that the First, Second, Third and Fourth Plaintiffs are in liquidation or assetless paper companies. He does not

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give the source of his information and belief nor any grounds for the claim he makes against any of the Plaintiffs. He deposes that on the 26th of April 1991 a Receiving Order was made against the Fifth Plaintiff. This is not denied by the Fifth Plaintiff. Mr. Nagin then says that he believes the Plaintiffs are financially unsound and not in a position to pay costs if costs are awarded against them if they do not succeed at the trial. He says this is a complicated case and will take several days of hearing to complete. He therefore prays that the Plaintiffs be ordered to pay into the Court a sum of not less than $10,000.00 as security for costs and that all proceedings in this matter be stayed until the security for costs is paid.

The Fifth Plaintiff has sworn an affidavit on behalf of himself and all the other Plaintiffs. He states that it is due to the fraudulent and deceitful actions of the Defendants that the Plaintiff companies have either ceased operations or become assetless and that these actions of the Defendants have brought disastrous financial consequences on him and his family which culminated in a Receiving Order being made against him. He refers to the Statement of Claim which gives full particulars of the fraud and deceit alleged by the Plaintiffs against the Defendants and he annexes to his affidavit a letter from the Official Receiver dated the 26th of June 1991 giving the consent of the Official Receiver for the Fifth Plaintiff to continue with the prosecution or any other case which may be brought against him. I observe that no such letter has been supplied on behalf of the First Plaintiff.

The Fifth Plaintiff alleges that the Defendants have delayed unduly in bringing the present application and that their sole purpose is to delay the trial of this action.

Finally Mr. Rova states that when this matter came before the Chief Registrar on 29th of May 1991 for fixing of a hearing date, the Defendants through their counsel advised the Chief Registrar that they would be making certain amendments to their defence within four weeks but to the date of his affidavit, the 25th of July 1991, no such amendments have been made. I comment that this is certainly true of the First and Second Defendants but that as I mentioned earlier the Third, Fourth and Fifth Defendants are seeking leave to file a counter-claim amounting to $50,000.00 together with interest against the Plaintiffs."

The Appellant does not deny that the learned judge did have a discretion although it says it is not a wide one. The Respondents do not dispute that they were insolvent at all

material times. The first question for determination by this Court relates to the companies -

> "Did the learned judge in refusing to order the Respondents to pay security for costs exercise his discretion judicially under Section 402 of the Companies Act?"

We feel we should say right at the outset that we agree that the trial judge has a discretion under Section 402 of the Companies Act. The use of the words "may --- require sufficient security to be given ---" clearly indicates this. But the discretion is not an unfettered one as the general purpose of the enactment has to be borne in mind and given effect to in appropriate cases.

Counsel for the Appellant has also contended that "insolvent Plaintiffs must give security for costs". He has cited Order 23 of the High Court rules in support of his contention. Order 23(1) reads as follows:-

> *"Security for costs of action, etc. (0.23,r.1)*
> *1.-(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court-*
>
> *(a) that the plaintiff is ordinarily resident out of the jurisdiction, or*
> *(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is*

suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

(2) ——

(3) —— "

In our view Order 23 has no application to the facts and circumstances of the present case. In any case we note that it is not a mandatory requirement since the Court clearly has a discretion in that "if having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for costs ---- as it thinks fit."

The basis on which the learned trial judge dismissed the motion for costs was two-fold. As to the 1st to 4th Plaintiffs, (the incorporated companies) he held that there was unreasonable and unexplained delay in making the application, although the Appellants were aware that at least the First Plaintiff would be unable to pay costs if unsuccessful. He held that the application was made some 14 months after the writ was issued whereas the proper time for doing so was at the beginning. He held that this delay must tell against the Appellants who must

have been aware that the Plaintiffs must have incurred potentially substantial costs by the time the application was made. He cited the decision in *Gabel Pty Ltd v Katherine Enterprises Pty Ltd* (1977) 2 A.C.L.R. 400 in support of his views regarding the effect of delay. He obviously considered the matter carefully in a very full decision. He said after referring to a number of cases -

> *"Here discovery has been obtained and the case set down for trial. Some twelve days after this the First Defendant issued a motion seeking security. In my view there is much force in the contention that the application has been made too late. From the very beginning all parties were aware at least of the fact that the First Plaintiff must be presumed unless the contrary be shown to be unable to pay costs if unsuccessful. Nevertheless no application was made until after fourteen months after the Writ was issued. No attempt has been made to explain this delay.*
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> *... In my judgment the proper time for making this application was at the beginning when the status of the First Plaintiff was known to the Defendants."*

Apart from the question of delay it is to be observed that the Respondents' action is not on the face of it frivolous. The allegations are serious and far-reaching and it would not have been fair to prevent the Respondents from pursuing them on the basis only of their insolvency.

We are of the view that the learned judge exercised his discretion on a proper basis and would not be prepared to interfere with his decision.

Insofar as the Fifth Respondent is concerned the learned judge noted that his situation was different. Section 402 did not apply to him. It is well established however that mere poverty is not a sufficient ground for making a Plaintiff who is not incorporated give security for costs. The requirement to give security should not be used to prevent a Plaintiff pursuing his claim. See per Philip J. in *Stock & Another v Woods & Another* (1957) St. R. Qd 62 at 65. We agree with this view and therefore do not find it necessary to examine the matter any further even if we agree that the "Defendants applied for security for costs as soon as they became aware that a Receiving Order was made against the Fifth Plaintiff" as contended by Counsel for the Appellant.

We do not find any merit in this appeal and it is dismissed with costs.

Decision

Appeal dismissed.

Costs to Respondents.

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Sir Moti Tikaram
President Fiji Court of Appeal

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Sir Peter Quilliam
Judge of Appeal

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Mr Justice Ward
Judge of Appeal

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