IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 386 of 2009

BETWEEN : **DOUGLAS BAMLETT** and **ROWEENA GRACE CROSS** (also known as Grace Bamlett) both of Ocean Pacific Road, Wainadoi, Navua in the Republic of Fiji Islands, both Company Directors.

PLAINTIFFS

AND : **INSPECTOR SHAILESH KUMAR** of the Anti-money Laundering Unit, CID, Suva.

FIRST DEFENDANT

: **ASSISTANT SUPERINTENDENT OF POLICE PURAN LAL** of the Anti-money Laundering Unit, CID, Suva.

SECOND DEFENDANT

: **SERGENT AIYAZ ALI** of the Anti-money Laundering Unit, CID, Suva.

THIRD DEFENDANT

: **THE COMMISSIONER OF POLICE** of Level 4, government Building, Suva.

FOURTH DEFENDANT

: **ATTORNEY GENERAL OF FIJI** of Level 6-7 Suvavou House, Victoria Parade, Suva.

FIFTH DEFENDANT

: **DIANA DIESBRECHT** of 25 Hutson Street, Suva in the Republic of Fiji Islands, Lecturer.

SIXTH DEFENDANT

BEFORE : Justice Deepthi Amaratunga

COUNSEL : Mr. Fa S for the Plaintiffs
Mr. Rayawa A. for the 6th Defendant

Date of Hearing : 24th February, 2012
Date of Decision : 10th June, 2013

DECISION

A. INTRODUCTION

1. The 6th Defendant sought to strike out the Plaintiff's action in terms of Order 25 rule 9 and if that application is denied and was considered as summons for directions a security for costs was sought on the basis that both Plaintiffs were residing outside Fiji and had not disclosed the address. The Plaintiff's are admittedly residing in abroad and no affidavit in opposition filed. Instead an unsigned document allegedly attested by a purported Notary Public in USA in the state of California, was filed in court which violated all the rules regarding the affidavits found in the High Court Rules of 1988 and the practice directions. It is a fundamental thing in any affidavit in any country, that the deponent should sign at the end of the averments, with a sworn or affirmed (depending on the religion of the deponent) statement as to the truth of the statements made in the averments, and this was not understood by the counsel for the Plaintiff Mr. S. Fa who argued that in USA, in the state of California that the deponent of the affidavit does not sign the affidavit before the attesting person! When I asked him either to swear an affidavit to that effect, or to obtain an affidavit to that effect of such strange method of obtaining an affidavit without the affirment's signature, he refrained from that and in the absence of any such

evidence the document filed by the Plaintiff's solicitors opposing this summons, cannot not be considered as evidence since it was not signed by the affirment and has also not complied with the Rules of High Court and has not even signed by the alleged affirment.

B. LAW AND ANALYSIS

2. Order 23 Rule 1 of the High Court Rules provides as follows:

SECURITY FOR COSTS

Security for costs of action

"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 circumstance 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) The Court shall not require a plaintiff to give security by reason only of pragraph1© if he or she satisfies the Court that the failure to state his or her address or the misstatement thereof was made incorrectly and without intention to deceive.

(3) The reference in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including on a counterclaim." (emphasis is added)

3. The discretion of the court has to be exercised in the determination of the security for costs considering all the circumstances of the case. The mere fact of the Plaintiffs being residing outside the jurisdiction would not itself sufficient to obtain an order for security for costs. The requirements to make an application is spelt in Order 23 of the High Court Rules of 1988, but a broad discretion is granted to the court to consider 'all the circumstance of the case', before an order for security is made.

4. The White Book (1999) Volume 1 at page 431 (23/3/5) which states as follow;

"The ordinary rule of practice is that no order for security for costs will be made if there is a co-plaintiff resident within the jurisdiction (Winthorp v. Royal Exchange Assurance Co. (1755) 1 Dick. 282; D' Hormusgeev Gray (18820 10 Q.B.D. 13). The ordinary rule, however, is subject to the general

discretion of the Court; it is not an unvarying rule. Its application is appropriate where the foreign and English co-Plaintiffs rely on the same cause of action, where each of the Plaintiff is bound to be held liable for all of such costs as may be ordered to be paid by any of the Plaintiffs to the Defendant at the conclusion of the trial, and where one or more of the Plaintiffs has funds within the jurisdiction to meet such liability."

Para 23/3/3 of the White Book says in regard to foreign plaintiffs-

"In exercising its discretion under r.1 (1) the Court will have regard to all the circumstances of the case. Security cannot now be ordered as of course from a foreign plaintiff, but only if the Court thinks it just to order such security in the circumstances of the case. For the circumstances which the Court might take into account whether to order security for costs, see per Lord Denning MR in ***Sir Lindsay Parkinson & Co Ltd v Triplan Ltd*** *[1973] QB 609 at 626-627; [1973] 2 A;; ER.*

5. In ***Sir Lindsay Parkinson & Co. Ltd v Triplan Ltd*** [1973] 2 All ER 273 at pop. 285-286, Lord Denning MR described the factors as follows-

"So I turn to consider the circumstances, Counsel for Triplan helpfully suggests some of the matters which the court might take into account, ***such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success.*** *Again, it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there*

was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also consider whether the application for security was being used oppressively – so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work."

6. So, the strength of the Plaintiff's case has to be determined from the evidence before the court at the time of the award of the Security for Costs, among other things. In Para 23/3/3 of the White Book states in regard to prospects of success –

> *"**A major matter for consideration is the likelihood of the plaintiff succeeding. This is not to say that every application for security for costs should be made the occasion for a detailed examination of the merits of the case.** Parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure (Porzelack KG v Porzelack (UK) Ltd [1987] 1All ER 1074). In the cases which follow, investigation of the merits was justified only because of the plaintiffs demonstrated a very high probability of success. If there is a strong prima facie presumption that the defendant will fail in his defence to the action, the Court may refuse him any security will fail in his defence to the action, the Court may refuse him any security for costs (see per Collins J in* Crozat v Brogden *[1894] 2 QB 30 at 33."*

It further states –

> *"In considering an application for security for costs the Court must take account of the plaintiff's prospects of success, admissions by the defendant, open offers and payments into Court, but a defendant should not be adversely affected in seeking security merely because he has attempted to reach a settlement. Evidence of negotiations conducted "without prejudice" should not be admitted without his consent (*Simaan Contracting Co. V Pilkington Glass Ltd *[1987] 1 WLR 516; [1987] 1 All ER 345."*

7. The 6th Defendant filed a civil action HBC 540 of 2007 against the Plaintiffs seeking damages for loss of her money 'invested' in a scheme of investment through the 2nd named Plaintiff who allegedly made representations as a investment advisor. The 6th Defendant and the second named Plaintiff signed an agreement and in terms of the said agreement 2nd named Plaintiff was an alleged trustee in terms of the said agreement. The clause which entrusted the trusteeship also state that such obligations were subject to the provisions of the same agreement and the provision regarding the recovery of the principal and the return in a case of default. The 6th Defendant also alleges fraud against the Plaintiffs, in the said 'investment' where she was unable to reap her benefits as well as the principal sum invested.

8. The 2nd named Plaintiff has to demonstrate that he made an effort on 'best effort basis', to recover the principal and the guaranteed return, which is not clear by plain reading of the agreement. The investment is not clear and some names are used as 'blue chip' and 'diamond'. The said investments were neither in blue chip (share in a reputed company) nor in Diamonds, but the said names were being used to lure the prospective 'investors'. It is not clear what was the investment, and it may be in digital currency where there are no specific regulations made and highly speculative, but it may be in a 'pyramid scheme'

where there are less or no regulations depending on the country where such schemes are implemented. In some countries such schemes are made offences and the 'investment' were allegedly made in a company in Vanuatu and above normal returns were guaranteed.

9. The agreement between the parties allows the money 'invested' by the 6th Defendant to be invested through the 2nd named Plaintiff's account with the GDT (Global Digital Transfers Inc. of Port Vila, Vanuatu). No further description of the said GDT is presumably given and the Plaintiff had allowed her money to be invested in unknown entity for unknown instruments. There are reputed investment institutions which are periodically rated either locally and or globally and the investments are being made in known instruments like shares, bonds etc but this instance the Plaintiff had knowingly allowed the 2nd named Defendant to 'invest' her money thorough the 2nd named Defendant's account with the GDT in blue chip portfolio which was not defined in the contract. The Plaintiff had admittedly left the country and letter marked 'DG 50' indicated that Fiji Police Force was investigating the Plaintiffs for Money Laundering and offences under the Capital Markets Development Authority Act and were also seeking extradition of the Plaintiffs since they live abroad.

10. This evidence indicate that the Plaintiffs were absconding and had left the country and there is little prospect of them returning to face the charges and or to assist the investigations of the Police regarding the charges relating to them in regard to Money Laundering and or Capital Market Development Authority Act. The conduct of the Plaintiff is that, though they had file this action in 2009 the Plaintiffs had not prosecuted the action with due diligence. Though I am not inclined to strike out the Plaintiffs action for want of prosecution, it is a fit and proper case to award security for costs, despite the fact that Plaintiffs having a property in Fiji.

11. The affidavit in support indicated that Plaintiffs had some property in Fiji and substantial improvements to those properties have been done, but that itself would not be sufficient to refuse this application seeking security for costs. The action is filed by the Plaintiffs seeking general damages from the Defendants for

alleged harassment, assault, false imprisonment. The claim against the 6th Defendant is based on her complaint to the Police, and from the facts before me the claim against the 6th Defendant is not strong. The behaviour of the Plaintiffs as well as the counsel in this proceedings have been very devious to say the least. First, the counsel of the Plaintiffs had filed a document allegedly in opposition to the present summons and the purported affidavit in opposition was not signed by the affirment (the Plaintiffs). There was no signature on the place allocated for the signature in the said document. When this was pointed out by the counsel for the 6th Defendant, Mr. S. Fa said that this was how an affidavit was sworn in the state of California! I have not heard of any where in the world where only the attesting person is attesting without the signature/sign of the affirment. When I requested the learned counsel Mr. S. Fa to file an affidavit to that effect he refrained from that, I do not need to say more on that issue as I have disregarded the purported unsigned document, but this again demonstrate the behaviour of the Plaintiff who had also absconded according to the 'DG 50' and the Police were taking steps to obtain an extradition of the Plaintiffs.

12. Considering all the circumstances of the case, it is just an proper to order a security of costs, despite the fact that there is evidence of some property of the Plaintiffs in Fiji. The facts and circumstances warrant such an order and then the issue is what is the amount that should be ordered as security. The 6th Defendant had sought $499,830.00. I do not know how such a figure was arrived at. There is no indication as to how such an amount was sought, either in the affidavit in support, and clearly such an award is not justified at this stage of the action. What the court has to consider is a reasonable security for costs if the Plaintiffs' claim is dismissed since the Plaintiffs are residing abroad. The Plaintiffs are not only residing abroad but also evading the investigations of the Fiji Police for charges relating Money Laundering. Considering the facts of the case I will consider a security for costs in the sum of FJD 10,000. For the said determination I have also considered the novelty and complexity of the action as well as the voluminous documentary evidence that will be produced at the hearing. Considering the behaviour of the Plaintiff I would also make a time period for the said deposit of the security for costs.

10. White Book (1988) p 406 state as follows

> '23/1-3/30 **Default in giving security**- If the plaintiff makes default in giving security he may be ordered to give security within a limited time , and in default the action may be dismissed (Gidding v Gidding (1847) 10 Beav, 29; and see La Garnge v Mc Andrew (1879) 4 Q. B.D. 210 where action was dismissed after order for security and stay of proceedings meantime) In Burton v Holdsworth [1951] 2 All ER 381, CA an order for transfer to the county court was made (against an assisted person) in default of payment for security of costs into Court.
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> The power to dismiss an action for default by a plaintiff in complying with an order for security derives form the inherent jurisdiction of the court, and applies as much to an order for security made under s 726(1) of the Companies Act 1985 as to one made under O. 23, r 1:pursued with due diligence, (ii) there is no reasonable prospect that the security will be paid, and (iii) the time limit prescribed by the court for the giving of security has been disregarded (Speed Up Holding Ltd v Gough & Co (Handly)Ltd [1986] F.S.R 330)."

13. The Plaintiffs are jointly and or severally directed to deposit in High Court, a security for costs of $10,000 within in one month from today.

14. I will also make directions regarding this action as follows

    a. The filing of the affidavit verifying list of Plaintiff's documents within 6 weeks from today. If not the action of the Plaintiffs' deemed struck off.

b. Thereafter Defendants are granted a further 6 weeks to file their affidavits verifying documents.

C. FINAL ORDERS

a. The Plaintiffs are ordered to deposit FJD 10,000 in the High Court within one month from today, as security for costs in this action.
b. The Plaintiffs are ordered to file affidavit verifying lists of documents within 6 weeks from today and if not the action is deemed struck off.
c. The Defendants are directed to file their affidavit verifying lists 6 weeks thereafter.
d. Cost of this application is costs in the cause.

Dated at **Suva** this **10th day** of **June, 2013**.

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Justice Deepthi Amaratunga

High Court, Suva