

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 299 OF 2005

BETWEEN : **ATIL CHANDRA GOSAI** of Martintar, Nadi, Accountant

PLAINTIFF

AND : **SURESH PRATAP** of Nadi, Contractors and Council
member of Nadi Town Council

DEFENDANT

Counsel :

Mr Mishra Prakash for plaintiff

Mr V Sharma for defendant

Date of Hearing: 29 July 2014

Date of Ruling : 16 February 2015

R U L I N G

Introduction

- [1] This ruling concerns with an application for security for costs.
- [2] By summons (application) the defendant seeks an order for costs in the sum of \$18,700.00 against the plaintiff. The application is supported by an affidavit of Suresh Pratap (defendant). The application is made pursuant to O. 23 of the High Court Rules 1988 ('HCR').

- [3] Opposing the application, the plaintiff filed an affidavit. The defendant filed an affidavit in reply to plaintiff's affidavit in opposition.
- [4] Both parties had also filed their respective written submissions.

Background

- [5] The brief background of the case is as follows. In October 2005, the plaintiff commenced proceedings against the defendant claiming damage for defamation. The defendant filed his Statement of Defence with counterclaim which seeks damage against the plaintiff for defamation. At the time of issuance of the writ the plaintiff used to reside in Fiji, since then the Plaintiff has moved abroad and is currently residing in Melbourne, Australia. The security for defendant's costs of the action is sought on the ground that the plaintiff is ordinarily resident out of the jurisdiction.

The Law

- [6] The relevant rule that deals with security for costs is O. 23 of HCR which, so far as material, provides:
1. – (1) *where on the application of a defendant to an action or other proceedings in the High Court it appears to the Court-*
 - (a) *that the plaintiff is ordinarily resident out of the jurisdiction or*
 - (b) *that ... , or*
 - (c) *... , 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 proceedings as it thinks just.*
 - (2)...

(3) ...

Guidelines on security for costs

[7] The following guidelines have been laid down as to the circumstances which the court ought to consider on granting or refusing security for costs:

- (1) whether the plaintiff's claim is made in good faith and is not a sham;
- (2) whether the plaintiff has a reasonably good prospect of success;
- (3) whether there is an admission by the defendant on the pleadings or otherwise that money is due;
- (4) whether there is a substantial payment into court or an open offer of a substantial amount;
- (5) whether the application for security was being used oppressively, for example so as to stifle a genuine claim;
- (6) whether the plaintiff's want of means, especially in the case of a limited company, has been brought about by any conduct by the defendant, such as delay in payment, or in doing his part of the work; and
- (7) whether the application for security is made at late stage of the proceedings, see Halsbury's Laws of England, Vol. 37 (4 Ed) and see also **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd** [1973] QB 609, [1973] 2 All ER 273, CA, per Lord Denning MR.

Plaintiff's contention

[8] Mr Mishra Prakash, counsel for the plaintiff contended that application for security for costs is delaying tactic without merit. The matter ought to be put down for trial at the earliest given that it was already part heard when the judge hearing it could not complete it as his contract as a judge expired. He also argued that the plaintiff owns property in Fiji and that property was in fact the reason for part of the defamatory comments of the defendant.

Defendant's contention

[9] The rival argument advanced by Mr V Sharma, counsel for the defendant was that the plaintiff in his opposition has failed to identify his current address in his affidavit in opposition and in his reply dated 13 March 2014. It is, he argued, quite apparent that the plaintiff does not want or intend to give his full residential address to the court. The property given by the plaintiff is bad property and ought not to be given any form of consideration by the court.

Determination

[10] The defendant applies for an order that the plaintiff to give security for the defendant's costs of the action. The application is made on the ground that the plaintiff is ordinarily resident out of the jurisdiction (ground 1(1) (a) of O.23) or that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation (ground 1 (1) (d) of O.23). Security for costs sought by the defendant is in the sum of \$18,700.00. On either of the grounds the court may order the plaintiff to give security for costs of the action.

[11] The plaintiff, though he has not provided his correct residential address, does not deny that he is residing in Melbourne, Australia. In para 3 of his affidavit in opposition the plaintiff deposes that, *the case*

was commenced when I was living in Fiji and a great part of the reason I left is the humiliation I faced when the defendant defamed me’.

[12] It is immaterial for the present purpose why the plaintiff moved abroad. Obviously, the plaintiff is now residing out of jurisdiction. This makes a ground on which the court may order the plaintiff to pay security for the defendant’s costs of the action.

[13] Turning to the ground that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation. It is not clear when the plaintiff went to reside overseas. The plaintiff in his affidavit in opposition has not shown his proper residential address in Melbourne, Australia. He has also not provided his occupation and whether he has moved to stay permanently or not. Since the plaintiff fails to give his proper residential address in Melbourne, Australia, I would, for the present purpose, decide that he has done so with a view to evading the consequences of the litigation, thus making another ground for the court to order the plaintiff to deposit security for the defendant’s costs of the action. Thus, by reasons of the plaintiff is ordinarily resident out of the jurisdiction (ground 1 (1) (a)) the court may order the plaintiff to pay security for the defendant’s costs of the action. The defendant is therefore entitled to apply for security for costs of the action.

[14] Mr Mishra submitted that this application for security for costs is a delaying tactic without merit. This submission, with respect to the counsel, carries no merit in it. The application for security for costs may be made at any stage of the proceedings.

[15] In **Huang Tzung-Hao & Yang Man-Hwa v A Team Corporation Limited & Yu-Shin-Ho** [2003] HBC 346/98 (22 July 2003), Pathik, J observed that:

“..., and where there is no dispute that the plaintiff is ordinarily resident out jurisdiction, order for security for costs is entirely discretionary. The fact that

the application was not made long before the close of proceedings or even subsequently when order for interrogations were made, is no bar to making the application. This is a proper case in which the application for security for costs ought to be granted.”

- [16] The plaintiff brought the action against the defendant for defamation in October 2005. The application for security for defendant’s costs coming in January 2014, over nine years after the commencement of the proceedings. The date when the plaintiff moved abroad is not available to court. It is not easy, at this stage, to provisionally assess the strength and prospect of success of the plaintiff’s case as it is one of defamation and the defence of fair comment is raised. There was no argument advanced at the hearing that the application for security for costs is being used oppressively, except for the amount sought as security is excessive. In these circumstances, the application for security for costs ought to be granted.

Amount of Security

- [17] The defendant seeks security for costs in the sum of \$18,700.00. The defendant has outlined the reasons for asking this amount. The plaintiff in his affidavit states:-

4. THAT the plaintiff commenced these proceedings on 13th October 2005 and it stands part – heard by His Honour Justice Inoke who is no longer a Judge of the High Court of Fiji. In the circumstances the trial may have to proceed de-novo.

6. THAT I will need to subpoena the Town Clerk of Nadi Town Council to come and give evidence on the formation of the Task Force Committee which was responsible for collecting outstanding Nadi Town Rates and also to explain the presence of reporters in the council meeting . I will need to pay taxi fares to Lautoka and meals for two days. Approximate costs will be \$500.00.

7. THAT I will need to call Mr Prabhat Chandra of Nadi, the transferee of 1/6th share in a property in Nadi that was transferred to the Plaintiff. I will need to pay taxi fares to Lautoka and meals for two days. Approximate costs will be \$500.00.

8. THAT I will need to call Ms Shakuntala Devi of Nadi, the transferee of 1/6th share in a property in Nadi that was transferred to the Plaintiff. I will need to pay taxi fares to Lautoka and meals for two days. Approximate costs will be \$500.00.

9. THAT I will need to call an officer from the Ministry of Local Government from Suva to give evidence on the then Ministers decision on discounts for outstanding town rates. I will need to taxi and air fare and accommodation in Lautoka for two days and meals. Approximate costs will be \$900.00.

10. THAT I have hired a new Senior Counsel with experience to conduct the carriage of this case. I have entered into a cost agreement and disclosure statements and I ask for the sum of \$15,000.00.

11. THAT I will need to call Mr Satendra Sharma of Nadi to give evidence in relation to my counter-claim. I will need to pay taxi fares to Lautoka and meals for two days, approximate costs in the sum of \$500.00.

12. THAT I will need to call two witnesses from Nadi who were with Mr Satendra Sharma in Para 11 to give evidence in support. I estimate approximate expenses at \$800.00.

[18] Conversely, Mr Mishra Prakash, submits that, should the court feel that security should be awarded the court has wide discretion regarding the amount of security it makes. He suggests that it be set at \$2,500.00 which would be the amount the defendant would be entitled to as costs in the unlikely event that he were to win.

[19] The amount of security for costs ordered to be given is in the discretion of the court, which will fix sum as it thinks just to do so, having regard to all the circumstances. It is not the practice to order security for cost on a full party and party, still less on indemnity basis. In the case of a plaintiff resident out of the jurisdiction the more conventional approach is to fix the sum at about two thirds of the estimated party and party costs up to the stage of the proceedings for which security is ordered, but there is no hard and fast rule, see para 307, Halsbury's Laws of England, 4th Ed (Vol.37).

[20] Security for costs may be ordered for past as well as future costs, see **Brocklebank & Co v King's Lynn SS Co** (1878) 3 CPD 365.

[21] His Lordship Mr Justice Gault in **Mclachlan & Others v Mel Network Limited** [2002] NZCA215 (29 August 2002) thought at para 27 of his judgment that:

"[27] the amount of security is not necessarily to be fixed by reference to likely costs awards: National Bank of New Zealand Ltd v Donald Export Trading LTD [1980] 1 NZLR 97 at 103. It is rather to be what the Court thinks fit in all the circumstances..."

[22] In the case at hand the defendant attempts to obtain security in the sum of \$18,700.00, which largely includes projected costs. The defendant states that he has engaged a senior counsel to conduct the hearing and has entered into a cost agreement and disclosure statement. For engaging a senior counsel to conduct the trial he asks for \$15,000.00.

[23] I note that at no time was a bill of costs provided by the defendant's solicitors for consideration by the court.

[24] The defendant seeks security for costs on the ground that the plaintiff is ordinarily resident out of the jurisdiction. In the case of a plaintiff resident out of the jurisdiction the more conventional approach is to fix the sum at about two-thirds of the estimated party-party costs up to the stage of the proceedings for which security is ordered. The defendant has put forward a figure, which covers costs from the commencement of the proceedings, all that was up to the end of the trial. But, in my view, it is appropriate to order the plaintiff to provide security for the period between commencements of these proceedings and 8 January 2014, the date that the formal application for security was made. I would decline to grant security for costs for projected costs, although security for costs may be ordered for past as well as future costs.

[25] I now attempt to set the amount of security for costs. The defendant asks security in the sum of \$18,700.00. This figure, as I stated earlier, includes largely future costs. Mr Mishra, counsel for the plaintiff submits that, the amount requested for security for costs is excessive

and unreasonable. He suggests that a sum of \$2,500.00 will be reasonable. The order for security for cost should not be oppressive. The defendant seeks an extensive amount, which is excessive and unreasonable. There is no hard-and-fast rule in assessing the amount for security. The amount for security is entirely in the discretion of the court. The defendant did not provide a draft bill of costs. So, I am left with my discretion in fixing the figure for security. Trial *de novo* is likely in this matter because the judge who heard the matter has left the bench. But that is not the fault of the plaintiff. I therefore, having regard to all the circumstances of the case and on the material that I have, fix the amount for security at \$4,500.00. The right figure for security is \$4,500.00. That is therefore the amount I will order the plaintiff to deposit with the High Court Registry at Lautoka.

[26] The plaintiff cannot rely on a property which is subject of litigation.

[27] If a plaintiff who has been ordered to give security for costs does not do so, the action may be stayed until security is given or dismissed for want of prosecution, see **La Grange v Mc Andrew** (1879) 4 QBD 210.

Conclusion

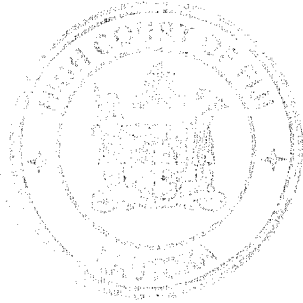
[28] For the reasons set out above, I order that the plaintiff should provide security for costs to the defendant in the sum of \$4,500.00. The plaintiff must within 28 days of this ruling deposit \$4,500.00 into court as security for the defendant's costs of the action. If the plaintiff does not do so, his action will be struck out for want of prosecution. I would order cost of these proceedings shall be costs in the cause.

Final outcome

The final outcome is that:

- (i) The plaintiff is to deposit the sum of \$4,500.00 with the High Court Registry at Lautoka within 6 weeks of the date of this ruling as security for defendant's costs of the action.

- (ii) If the plaintiff does not do so, his action will be struck out for want of prosecution.
- (iii) The costs of these proceedings shall be costs in the cause.
- (iv) Orders accordingly.



M H Mohamed Ajmeer

.....
M H Mohamed Ajmeer
Puisne Judge
[Sitting as Master]

At Lautoka

16 February 2015

Solicitors:

For plaintiff: Messrs Mishra Prakash & Associates

For defendant: Messrs Vijay Naidu & Associates