

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 83 of 2013

BETWEEN : **URI SOLOMON KUROP** of 34 Wasawasa Road, Newton, Nadi,
Businessman

FIRST PLAINTIFF

AQUA BLUE (FIJI) LIMITED a duly incorporated limited liability
company having its registered office at Crosbie and Associates, 3
Cruikshank road, Nadi, Fiji.

SECOND PLAINTIFF

AND : **ADRENALIN WATERSPORTS (FIJI) PTY LIMITED** a duly
incorporated limited liability company having its registered office at
Shop 8 Port Denarau, Nadi, Fiji.

FIRST DEFENDANT

PAUL COOK of Shop 8 Port Denarau, Nadi, Fiji Company Director

SECOND DEFENDANT

ZDENKA COOK of Shop 8 Port Denarau, Nadi, Fiji Company
Director

THIRD DEFENDANT

LOWATA VULASE of Shop 8 Port Denarau, Nadi, Fiji Company
Director

FOURTH DEFENDANT

Mr. Roneel Kumar for the Plaintiffs
(Ms) Pulekeria Maibatiki Low for the Defendants

Date of Hearing: 09th November 2016
Date of Ruling : 17th February 2017

RULING

- (1) The matter before me stems from the Defendants '**Amended Summons for Security for Costs**', dated 13th October 2016, made pursuant to Order 23, rule 1 of the High Court Rules, 1988 and the inherent jurisdiction of the Court.
- (2) Counsel for the Plaintiffs raised by way of a preliminary issue that the Defendants have failed to surmount the threshold criteria spelt out in **Order 23, rule 1** of the High Court Rules, 1988.

I focus on paragraphs 07, 08, 09, 10, 11, 15 and 18 of the Plaintiffs written submissions.

Para 7. Security for cost will only be ordered if: -

- (i) The Plaintiff is permanently a resident out of the jurisdiction of the Court.*
- (ii) The Plaintiff has no assets within the jurisdiction of the Court.*

8. The 1st Plaintiff is a Fiji Citizen, has been living in Fiji for around 30 years and has established profitable business in the 2nd Plaintiff.

9. This is clearly deposed in paragraph 21 of the affidavit of Uri Solomon Kurop filed on 16th of June 2016 that states as follows:

"That I am a Fiji citizen and I have been residing in Fiji for around 30 years and my wife and I have established a profitable business in the 2nd Plaintiff and other associated business which are not party to these proceedings."

10. The Defendants have not disputed this position or submitted any evidence to show that the 1st Plaintiff is residing permanently out of the jurisdiction. There is nothing to dispute because the residency of Uri Kurop in Fiji is a well settled fact. This is also the fact before the Honorable Court as there is no affidavit by the Defendants disputing it.

11. The Defendants have failed to meet the 1st criteria or security for cost. The Defendants application accordingly fails as they have incorrectly made an application for security for costs against the Plaintiffs who are ordinarily resident in Fiji.

15. We repeat that the above facts deposed in the affidavit filed by the 1st Plaintiff is unopposed by the Defendants. The Defendants have also failed to meet the 2nd criteria for security for cost. However, as stated earlier the 2nd criteria does not need to be considered by this Honorable Court as the Defendants have failed to go past the hurdle of the 1st criteria.

18. *The Plaintiffs humbly and respectfully submit that the Defendants have not met the 1st criteria as the Plaintiffs are ordinarily resident in Fiji. For sake of completeness the Defendants have also failed to meet the 2nd criteria as the Plaintiffs have significant assets in Fiji.*

(3) In response, the Defendants say; (I focus on paragraphs 05 and 06 of the Defendants written submissions.)

Para 5. On behalf of the Defendants, it is submitted that it should be permissible for it to seek security for costs against the Plaintiffs who has clear intentions to move its assets to a company (Solante Limited) who is not a party in the current proceedings but a company half owned by the First Plaintiff. In this application the Defendants relied on the fourth limb of Order 23, rule 1, in that instead of the Plaintiff changing its address during the course of the proceedings with a view to evade the consequences of litigation, it had shown that it has intention to move its assets within Aqua Blue Fiji Limited in 2014. Order 23 Rule 1 of the High Court Rules 1988 provides as follows:

“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 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 a reason to believe that he will be unable to pay the costs of the defendant if ordered to so; or*
- c. Subject to paragraph (2), that the Plaintiff's address is not stated in the writ or other originating process or its 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 think it just to do so, it may order the plaintiff to give such security for the defendant's costs of the actions or other proceedings as it thinks just.”

6. *In reading the entirety of the provisions of Order 23 rule 1 of the High Court Rules outlined in paragraph 5 supra, it is submitted that the Court has the general discretion to award or refuse security after having considered all the circumstances of the case.*

In Porzelack KD-P-Porzelack (UK) Limited [1987] 1 WKL 420, Browne Wilkinson J alluded to the reason for such an order as follows:-

“the purpose for ordering security for the cost against a plaintiff ordinarily residence outside the jurisdiction is to ensure that a successful defender will have funds available within jurisdiction of this court against which it can enforce the judgment of costs. The Court has an entirely general discretion either to award or refuse security have been regard to all the circumstances of the case, is the just answer.”

In this case, though the Defendants are not relying on the 1st limb of the test but the 4th limb, we submit that it is clear from the case authorities that the Courts have the entire general discretion in this type of applications (security for costs).

(4) Let me now move to consider the preliminary issue raised by the Plaintiffs.

So I come to the terms of **Order 23, rule 1 of the High Court Rules**, which I quote;

SECURITY FOR COSTS

Security for costs of action, etc (O.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) The court shall not require a plaintiff to give security by reason only of paragraph (1) (c) if he satisfies the Court that the

failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

(3) The references 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 a proceeding on a counterclaim.

(5) On a strict reading of Order 23, rule 1, it is perfectly clear that the legislature has prescribed the following circumstances in which security should be ordered to be given. They are;

- (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.*

(6) Returning to the instant case, the Defendants primary ground for the reasons for seeking security is that the Plaintiffs have intentions to move their assets to a company "Solante Limited" (not a party in the proceedings) with a view to evade the consequences of the litigation. The other ground advanced by the Defendants is that the Second Plaintiff had ceased operations in Fiji.

(7) I must stress here that Order 23, rule 1 is not, in any sense designed to provide a Defendant the security for costs against a Plaintiff who has **intentions** to move his assets to another party with a view to evade the consequences of the litigation or who has ceased operations.

The Court is bound by the circumstances prescribed in Order 23, rule 1. The legislative intent is very clear and precise to me. The Court should not act arbitrarily, capriciously or so as to frustrate the legislative intent.

I do not forget what was said in argument by Counsel for the Defendants;

"In this application, the Defendants relied on the fourth limb of Order 23, rule 1, in that instead of the Plaintiff changing its address during the course of the proceedings with a view to evade the

consequences of litigation, it had shown that it has intentions to move its assets within Aqua Blue Fiji Limited in 2014.”

With all due respect to the argument, I am not at all persuaded by the submissions of Counsel for the Defendants.

There is a world of difference between a Plaintiff who has changed his address during the course of the proceedings with a view to evade the consequences of litigation from a Plaintiff who has **intentions** to move his assets to another to evade the consequences of litigation

With all due respect to the forceful and tenacious argument of Counsel for the Defendants, I stress here that her construction of Order 23, rule 1, will defeat the obvious intention of the legislature and produce a wholly unreasonable result. At this point, I cannot resist in saying that her construction is contrary to the apparent intention of the legislature and would indeed reduce Order 23, rule 1, to an absurdity.

It is true that the power to order security for costs is discretionary. But the discretion is to be exercised judicially, and not arbitrarily, capriciously or so as to frustrate the legislative intent. The Court is bound to consider the circumstances categorised in Order 23, rule 1 and in light thereof the Court should determine whether and to what extent or for what amount a Plaintiff may be ordered to provide security for costs.

The judicial descriptions of a statutory discretion to award costs as ‘absolute and unfettered’ cannot be taken at the face value. Because the discretion is typically conferred upon a Court or tribunal obliged to act judicially, fetters, confinement and controls of a sort are provided by the law. The application of the costs discretion must be examined in its precise statutory context.

For the reason which I have endeavoured to explain, I have no doubt and I am clearly of the opinion that the Defendants have failed to satisfy the threshold criteria spelt out in Order 23, rule 1 of the High Court Rules, 1988. I see no reason to depart from the circumstances prescribed in Order 23, rule 1 in which security should be ordered to be given. The precise statutory context of the proceedings at issue does not itself, provide any support for a departure from the prescribed formula and the scope and purpose of the legislation. Thus, the discretion must be exercised in its precise statutory context.

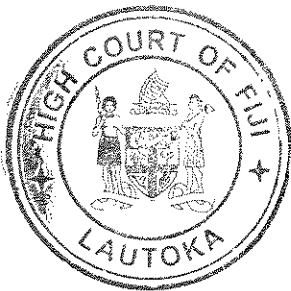
Given the above, I uphold the objection raised by the Plaintiffs.

Accordingly, there is no alternate but to dismiss the Defendants Summons for security for costs.


I cannot see any other just way to finish the matter than to follow the law.

ORDERS

- (1) The Defendants Amended Summons for Security for Costs is dismissed
- (2) The Defendants are to pay costs of \$750.00 (Summarily assessed) to the Plaintiffs within 14 days hereof.



At Lautoka
17th February 2017


17/2/2017
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Jude Nanayakkara
Master.