

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 346 of 2015

BETWEEN : EMMETT KENT MORGAN formerly of the Waterfront Building, Savusavu but now of
Gordon Street, Suva, Businessman and Foreign Investor.

PLAINTIFF

BETWEEN : RAVINDRA LAL of Savusavu.

DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSELS : Ms. Vaurasi - for the Plaintiff
Mr. Sen - for the Defendant

Date of Hearing: 05th April, 2017

Date of Ruling : 31st May, 2017

JUDGMENT

*[Defendant's Application for Security for Costs pursuant to Order 23 of the
High Court Rules, 1988 and the Inherent Jurisdiction of the Court]*

A. Introduction

1. On 05th December, 2016, the **Defendants** filed a **Summons for Security for Costs** against the Plaintiff and sought for the following Order-
 - (a) *That the Plaintiff be ordered to pay security for Costs in the sum of \$50,000.*
2. This application is made pursuant to **Order 23 Rule 1 (a) and Order 25 Rule 2 of the High Court Amendment Rules, 1993 and the Inherent Jurisdiction of this Court.**
3. The Defendants relies on the Affidavit in Support and Reply deposed by the Defendant Ravindra Kumar Lal.
4. The Plaintiff relies on the Affidavit in Opposition deposed by the Plaintiff Emmett Kent Morgan.

B. The Law on Security for Costs

5. ***Security for costs of action, etc. (O.23, r.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)
- (c)
- (d)

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.

The Rule states that "having regard to all circumstances of the case, the Court think, it just to do so, it may order" confers upon the Court a discretion whether or not to order security for costs.

C. Analysis and Determination

6. The **issue** for this court to determine is '**Whether the Defendant is entitled to Security for Costs**' as sought for in their application?
7. The Plaintiff does not deny the fact that the Plaintiff is an **American Citizen**. The Plaintiff says that he holds the appropriate visa to reside and work in Fiji. Since setting up the

business in Fiji and owning various assets have always travelled overseas but returned to Fiji as his place of abode, given his investments and assets here in Fiji.

8. The Plaintiff further stated that he is a foreign investor here in Fiji to conduct the registered business in Fiji. That he is a **Director** and **shareholder** for Morgan's Enterprises and Balaga Bay Farms Limited.
9. The Plaintiff submitted that he has the following **assets** in Fiji-
 - A registered business, Morgan Enterprises (Fiji) Limited approved under Foreign Investment Registration Certificate Number 14-0002 as annexed in paragraph 4 above;
 - A registered business, Balaga Bay Farms (Fiji) Limited approved under Foreign Investment Registration Certificate Number 16-0125 as annexed in paragraph 4 above;
 - Vehicle registration Number FV 156 and FG 076, annexed hereto and marked "EM3" is a copy of the Land Transport Authority vehicle ownership registration.
 - Bank account for Morgan Enterprises (Fiji) Limited in which I am a sole signatory, annexed hereto marked "EM4" is a copy of the said Bank Statement.
 - A two deck transverse fiberglass built boat with a door tonnage of 10.85 registered as "Kalokalo Ni Viti" (registration number 003311), purchased for \$100,000.00 (one hundred thousand dollars), annexed hereto marked as "EM5" is the Maritime Safety Authority of Fiji Certificate of Registration and a copy of the Berthing fee receipt.

The Plaintiff added that the reason the Defendants asks for costs in the sum of \$50,000 is that this matter is very complicated and that the Defendant is fortified in his view that he will be awarded indemnity costs.

10. Whereas the **Defendant** submitted as follows-
 - That the Plaintiff must establish his residential status and at least produce his passport evidence for court's consideration to confirm his Residential Status. The Plaintiff is a foreign citizen and does not have any family, assets and or possession in Fiji Jurisdiction;
 - That he is an American Citizen;
 - That Morgan Enterprises is a separate entity altogether;
 - That the Defendant's share in Banaban Company was obtained by fraud and Labasa civil case remains pending determination on this issue;
 - That the Plaintiff's substantive issue is that of Defamation; and
 - That the Plaintiff's vehicle is very old, manufactured in 2006, and the Boat is derelict.
11. **Security for Costs** is not ordered because a Plaintiff is ordinarily resident outside of Fiji, the Court must consider other facts incidental to the proceedings.
12. Reference is made to the case of *Inspired Destinations (Inc) Ltd v Bayleys Real Estate (Fiji) Ltd [2015] FJHC 812; HBC180.2013 (20 October, 2015)* wherein the issue of **security for costs** was discussed and observed as follows:

*"That the Plaintiff is a non-resident and has no assets in Fiji is a circumstance of great weight favouring a security order. I am of course mindful to the fact that the making of an Order for **security for costs** is discretionary and the Courts no longer adapt a rigid rule. [see, M. J. Raine, "In locals we trust - Foreigners pay cash; rethinking security for costs against Foreign Residents (2012) 1 JCIVP 210 at 214P]."*

*'Returning to the instant case, although the grounds for **security for costs** have been proved by the Defendants, I am not bound to make an order.'*

13. In the High Court of Fiji in *Furuuchi Susian Company Limited v Hiroshi Tokuhisa and Others* Civil Action No.95 of 2009, Justice Byrne ordered Security for Costs against a Plaintiff company incorporated and operating in Japan as the Plaintiff was ordinarily resident out of the jurisdiction. In reaching this decision, Justice Byrne relied on what Sir Nicolas Brown Wilkinson V.C said in *Porzelack KG v Porzelack (UK) Limited* 1987 1 All ER 1074 at p.1076

*"That the purpose of ordering **security for costs** against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of the court against which it can enforce a judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a Plaintiff who lacks funds. The risk of defending a case brought by a penurious Plaintiff is as applicable to Plaintiffs resident within the jurisdiction".*

14. The Defendant will only be entitled to costs if the Plaintiff's claim is ultimately dismissed with costs. The Defendant is not entitled to security for costs as of right. If the Court feels that the Plaintiff has a good claim with good prospects for success, it may not be inclined to make any order for security for costs.
15. In *Ali v Chandra [2014] FJHC 710; HBA14.2013 (30 September 2014)*, Judge Kumar also saw fit to highlight a portion from *Porzelack K.G v. Porzelack* (supra) and further enunciated as follows::

3.26 The threshold for exercise of discretion is that Respondent (Plaintiff) "does not ordinarily reside in Fiji".

3.27 The term "resident" or "ordinarily resident" cannot be given a precise definition.

3.28 Whether a person is resident or ordinarily resident will depend on various factors such as person's address, type of employment, duration of stay at a particular address, ownership of real properties and so on.

3.29 Once the Court determines that the Respondent (Plaintiff) "does not reside" or "does not ordinarily reside" in the country then Court has to exercise its discretion as to whether to make an Order for security for costs or not.

3.30 Of course in exercising discretion whether to make an Order for security costs, Court needs to take various factors into account. Some of the factors which Court may take into account are available funds within jurisdiction properties owned by the Respondent within jurisdiction and their values; (*Sharma v. Registrar of Titles*) chances of Plaintiff's claim succeeding (*Para 25.13.1 White Book. Vol 1, 2011*).

3.31 It must be made clear that the factors listed in preceding paragraph are not exhaustive and Court is free in exercise of its discretion to take into consideration any relevant factors.

16. As reported in the White Book (1997) at page 407 (23/1-3/2) on Security for Costs it states that:

"Discretionarily power to order security for costs (rr1 - 3). The main and most important change effected by this Order concerns the nature of the discretion of the Court on whether to order security for costs 'if, having regard to all the circumstances of the case, the Court thinks it just to do so' These words have the effect of conferring upon the Court a real discretion, and indeed the Court is bound, by virtue thereof to consider the circumstances of each case, and in light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. It is no longer, for example, and inflexible or rigid rule that Plaintiff resident abroad should provide security for costs. In particular, the former Order 65 r 6B which had provided that the power to require a Plaintiff resident abroad, suing on a judgment or Order or on a bill of exchange or other negotiable instrument, to give security for cost was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1).

17. Lord Denning as reported in Sir Lidsy Parkinson & Co Ltd v Farripian Ltd [1973] 2 A.E.R. 273 at 285-286.

.....'If there is a reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case.The court might also consider whether the application for security was being used oppressively-so as to trey and stifle a genuine claim."

18. An exception applies if it is established that a foreign Plaintiff has **substantial assets within the Jurisdiction which are available to satisfy a costs order**. In that exceptional case, security for costs will not be ordered.
19. In *Babu Bhai Patel v Moanohan Aluminium Glass (Fiji) Ltd, Civil Appeal 19/1997*, an appeal from the Magistrates Court, Chief Justice Fatiaki held to the effect that to come within the exception a non- resident Plaintiff has the onus to prove that he has suitable property within Fiji.

'Once it is established that the Plaintiff was not ordinarily resident in Fiji, **as in this case they are resident in Australia**, the 'onus' then shifted to the Plaintiffs to satisfy Court that they have property within the Jurisdiction which can be made the subject to the process of this court. However, even if the Plaintiffs have no assets in Fiji, they may still avoid having to pay security for costs if they are able to convince the court pursuant to Order 23 of the High Court Rules, 1988, that having regards to all the circumstances of the case, it would not be just and fair to order security for costs or that it would be oppressive to do so in the circumstances.'

20. In the current case before this Court, the Plaintiff has argued that in terms of the Plaintiff's **'assets'** in Fiji, the Plaintiff has two (2) registered business, Morgan Enterprises (Fiji) Limited and Balaga Bay Farms (Fiji) Limited. Apart from these businesses the Plaintiff has a two deck transverse fiberglass built boat purchased for \$100,000 and two (2) vehicles registration Nos. FV 156 and FG 076. Further, there is documentary evidence filed in terms of the Plaintiff's passport to establish the Plaintiffs status in Fiji.
21. Upon the perusal of the copies of the Plaintiff's passport furnished to Court, it reveals the following-
- That he is a Nationality of the United States of America, therefore he is not a Resident of Fiji;
 - Last issued with Fiji Immigration work permit from 15th July, 2015 to 15th July, 2017; and
 - Issued in his capacity as a **Director and shareholder** (having 1 ordinary share) for Morgan Enterprises (Fiji) Limited.
22. **Ownership and or shareholder** are literally the same thing. The term **owner** is used in the sense of proprietorship where **proprietor owns** the whole of the business. The term **shareholder** is used in corporate worlds where **share is owned by an individual**.
- Further, according to the **Companies Act 03 of 2015**, a **Director** of a Company means a person who is appointed to the position of a director; or an alternate director and is acting in that capacity, regardless of the name that is given to their position.
23. In this case, the Plaintiff has sued the Defendant in his personal capacity as Emmett Kent Morgan and not as a Director and shareholder of the Two (2) Companies; Morgan Enterprises Limited and or Balaga Bay Farms Limited.
24. It is noted from paragraph 1 of the Plaintiff's Statement of Claim that **'the Plaintiff is an American Businessman and is at all material times a foreign investor having had the approval of the Investment Fiji to conduct business and investment in Fiji.'**

25. It can clearly be ascertained from the Plaintiff's copy passport and now be concluded that the Plaintiff is in Fiji on a Work Permit for a period of (Two) 2 years' timeframe to look after the affairs of the two (2) Companies mentioned hereinabove. Further, he has one (1) ordinary share in Morgan Enterprises Limited as an individual. He does not have any Residency in Fiji nor a Citizenship but issued with a Work Permit for a period of Two (2) years which comes to an end on the 15th July, 2017.
26. The Plaintiffs filed a Writ of Summons and the Statement of Claim on 04th November, 2015. The Defendants filed his Statement of Defence on 09th December, 2015.
27. Reply to Defence was filed as per the requirements of the High Court Rules on 02nd June, 2016.
28. Thereafter, orders were made on the Summons for Directions (SFD) and parties have filed and served their respective Affidavit Verifying List of Documents.
29. The parties need to move on with the next cause which is the Pre-Trial Conference and not unnecessarily delay the proceedings because of any pending interlocutory application made in the circumstances.
30. Prima facie, bearing in mind the Defendants contention as based hereinabove together with his Defence, and the Statement of Claim of the Plaintiff as set out within the Statement of Claim, and upon a careful consideration, the **Plaintiff may** have an arguable case with good prospects of success on the substantive issue of Defamation. Likewise, the **Defendant may** also have a good prospect of defending otherwise.

However, this court at this stage of the proceedings cannot delve itself into the merits of the parties' case, since that would be determined upon a proper hearing accordingly. Evidence of both sides need to be put at a test.

31. In '*Kadavu Shipping Company Ltd v Dominion Insurance Ltd*' 2009 HBC 508 Master Udit said in relation to the 'Strength or bona fides of a claim'

'Under this criterion, the respondent is to show that it has a prima facie regular claim, which disclosed a reasonable cause of action. It is not the court's duty to divulge into a detailed analysis of the merits of the case unless it can be clearly demonstrated that there is a relatively high degree of success or failure. Once it is established, the Court is to proceed on the basis that the claim is bona fide.'

32. In '*Allan v Hill View Limited* [2003] HBC 366, Connors J said;

'.....another matter of importance for the Court is exercising its discretion is the Plaintiff's prospect of success in the action and of course as in any such situation that does not require the Court at this point in time to make any detailed

determination of the likelihood of success but merely to do so based on the pleadings as they appear before the court'.

33. The **balance of convenience** lies in the Court accepting that the Plaintiff has a regular bona-fide claim which has a chance of success without making any detailed determination as to the likelihood of success.
34. The Defendant's main thrust is that since the Plaintiff is resident out of this Jurisdiction, they should be required to pay security for costs. On the other hand, the Defendant will only be entitled to costs if the Plaintiff's claim is dismissed.
35. The Plaintiff has initiated this proceeding and he has the prosecution of the case to ensure he brings it to the conclusion on the balance of probabilities. And it is for the Defendant to counter the claim in terms of his Defence.

However, it is obvious in the circumstances that expenses in terms of costs will be incurred and therefore the parties to the proceedings must be ready to cater for the costs. In this case the Defendant has sought for security for costs against the Plaintiff.

Quantum of Costs

36. No formula for ascertaining the quantum of the security for costs was furnished to court by any of the Counsels. However, a very helpful guide is provided for in *Halsbury's Law of England (4th edition) Vol. 37 para 307, which states as follows-*

'The amount of security for costs ordered to be given is in the discretion of the court, which will fix such sum as it thinks just to do so, having regards to all the circumstances of the case. It is not the practice to order security for costs on a full party and party, still less on an 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 the stage of the proceedings for which security is ordered, but there is no hard and fast rule.'

37. Reference is made to the New Zealand Court of Appeal case of *Mclachlan & Others v. Mel Network Limited [2002] NZCA 215 (29 August 2002)* at paragraph 27 of the Judgment wherein His Lordship, Mr. Justice Gault said-

'[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...'


38. Further, parties must understand that any orders made in respect of the Security for Costs will be directed to be deposited into the Chief Registrar's interest bearing account and will only be released once the entire case is heard and determined by the Court.
39. Not only that, the Defendant may at liberty to make a second or consequent application and seek any additional Security for Costs if any costs ordered is insufficient to cover for the actual costs that will be incurred in the final determination of this case.
40. For the abovementioned rational, I grant the Defendant's application and proceed to make the following orders.

D. Orders

- (i) The Plaintiff is hereby ordered to pay a sum of \$10,500 as security for costs into the Chief Registrar's interest bearing account within 28 days.
- (ii) The Plaintiff's Writ of Summons and the Statement of Claim will be struck out upon the non-payment of the ordered security for costs within the set time frame.
- (iii) Parties to proceed with the next appropriate cause of action in terms of the substantive claim.
- (iv) Cost of this action is summarily assessed at \$500 against Plaintiff and to be paid to the Defendant within 28 days.
- (v) The case will now be scheduled for further directions accordingly.

DATED AT SUVA THIS 31ST DAY OF MAY 2017




.....
MR VISHWA DATT SHARMA
Master of the High Court

cc. Shekinah Law, Suva
Maqbool & Company, Labasa