

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HPP No. 23 of 2017
Caveat No. 32 of 2016

IN THE ESTATE OF NAVEEN CHANDRA PILLAY late
of Unit 9/51 Tidewater Way, Ascot, Western Australia.

BETWEEN : MERESINI ROKOSUKA aka MERESEINI TAMOKU of Taunovo, Pacific Harbour, Deuba.

CAVEATOR

BETWEEN : DEBORAH ANNE PILLAY As Trustee and Executor of the Estate of Naveen Chand Pillay, late of
9/15 Tidewater Way, Ascot, Western Australia.

CAVEATEE

BEFORE : Master Vishwa Datt Sharma

COUNSELS : Mr. J. Lanyon - for the Caveator
Ms. Ulamila Fa - for the Caveatee

Date of Ruling : 19th June, 2018 @ 9am

RULING

*[Caveator's Application for Security for Costs pursuant to Order 23 (1) and Order 22
Rule 5 of the High Court Rules, 1988 and the Inherent Jurisdiction of the Court]*

A. INTRODUCTION

1. On 24th May, 2017, the **Caveator** filed a **Summons for Security for Costs** against the **Caveatee** and sought for the following Order-
 - (a) *That the Caveatee do deposit with the Court within 21 days of making such order to give security for the costs of the Caveator in the Sum of \$8,000.00 or such sum as the Court may think just;*
 - (b) *In the event that such security is not provided within 21 days from the date of the Order herein, the action be struck out against the Caveatee.*
 - (c) *That cost of this Application is awarded in favor of the Caveator on an indemnity basis.*
 - (d) *Further and/or Other relief as this Honourable Court may deem just.*
2. This application is made pursuant to *Order 23 Rule 1 and Order 22 Rule 5 of the High Court Amendment Rules, 1988 and the Inherent Jurisdiction of this Court.*
3. The **Caveator** relied on the Affidavit in Support filed herein.
4. The **Caveatee** opposed the application and filed an Affidavit in Reply.

B. 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 Caveator is entitled to Security for Costs' as sought for in her summons?

7. The **Caveator** vigorously opposed the **Caveatee's** impending Probate proceedings and believes that she is a Citizen of Australia, holder of an Australian passport and resides in Australia with her immediate family members who are permanently residing in Australia.
8. According to the **Caveator**, the **Caveatee** does not own any assets in Fiji and therefore it will be difficult for the **Caveator** to recover any costs from the **Caveatee** in the event the **Caveatee's** claim fails.
9. Further, the **Caveatee** does not have any knowledge of the real worth of her assets in Fiji or abroad.
10. The **Caveator** sought for a sum of \$8,000 as legal costs to be paid into Court in terms of the security for costs since the hearing will last at least one day or so, She submitted that the **Caveatee** will not be unfairly prejudiced bearing in mind her status as mentioned in the affidavit.
11. Accordingly, she sought for the striking out of the **Caveatees** proceedings herein.
12. On the other hand, the **Caveatee** does not deny the fact that she is a **citizen of Australia** and also **holds an Australian passport**. Further, she doesn't deny owning any assets in Fiji.
13. The **Caveatee** argued in terms of the **Caveatee's** 'assets' in Fiji stating "that the **Caveatee** is the wife of deceased Naveen Pillay and is the Executrix and Trustee of his estate been granted Probate No. PRO/1192/2012 by the High Court of Western Australia on 21st March, 2012; that the estate is the legal registered owner of two pieces of freehold land at Taunovo being CT 24115 and CT 24116. Certificate of Title No. 24115 is an empty block of land. Erected on CT 24116 are two dwelling houses, one being the main house, and the other a cottage at the back; that the estate also owns one-third of another property also in Taunovo being CT 11836 which has a dwelling house; that in 2016 the **Caveatee** sought to finalise the issues pertaining to the properties in Fiji and applied to have the Probate of the Deceased Naveen Chandra Pillay resealed in the Fijian High Court; that the **Caveator** placed a caveat on the issuance of the reseal probate grant to the **Caveatee**; that there is no likelihood failure of the application of resealing of Probate Grant issued by the Western Australian Court for her late husband's estate as all claims made by the **Caveator** against the deceased estate are irrelevant and have no legal basis; and that it is the **Caveatee** who has incurred unnecessary legal costs to defend the **Caveator's** claim against the deceased estate.
14. **Security for Costs** is not ordered because a Plaintiff (**Caveatee**) is ordinarily resident outside of Fiji, the Court must consider other facts incidental to the proceedings.
15. 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.'

16. 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".

17. The Caveator will only be entitled to costs if the Caveatee's claim is ultimately dismissed with costs. The Caveator is not entitled to security for costs as of right. If the Court feels that the Caveatee has a good claim with good prospects for success, it may not be inclined to make any order for security for costs.
18. 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.

19. 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).

20. Lord Denning as reported in Sir Lidsy Parkinson & Co Ltd v Farringham 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 try and stifle a genuine claim."

21. An **exception applies** if it is established that a **foreign Plaintiff (Caveatee)** 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.
22. 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.'

23. In this case, the Caveatee has commenced the Probate proceedings in order to administer the **Estate of Naveen Chandra Pillay** who was her late husband.
24. The **Caveatee**, Deborah Anne Pillay was given the **"Probate Grant"** in her late husband's **Estate of Naveen Chandra Pillay** by the Supreme Court of Western Australia on 21st March, 2012 vide reference No. PRO/1192/2012.
25. That according to her , apart from the Estate in Western Australia, the Late husband was the legal owner of two (2) freehold properties in Taunovo, Deuba, being Certificate of Title No. 24115 [Lot 1] and Certificate of Title No. 24116 [Lot 2]. The deceased was also having a one-third legal ownership of freehold property located at Taunovo, Deuba being Certificate of Title No. 11836 [Lot 5].

26. In order to have the abovementioned properties in the deceased's Estate in Fiji administered and transferred to the beneficiaries, the Caveatee as the appointed Executrix and Trustee and later given the "Probate Grant" in the Western Australian Court, had to make an application to have that Probate Grant **Re-Sealed** in the Fijian jurisdiction in terms of the *Succession Probate and Administration Act* accordingly.
27. The Caveatee lodged her application with the Principal Probate Registry within the High Court in Suva but discovered that there was a caveat lodged by the Caveator preventing the issuance of the **Reseal of Probate Grant** to the Caveatee. The **Re-Seal of Probate Grant** to date remains impending for court's determination.
28. As far as the Caveator is concerned, her contention all along has been that she moved onto the property in 1993 till 2016, the Falveys have always represented her that they were the owners of Lots 1, 2 and 5 which she was engaged to maintain and look after as a caretaker. She believed that the property was owned by the Falveys and during the 26 years of her living on the property, she had always acted upon Falvey's instructions to maintain and collect rents in their 3 lots being Lot 1, 2 and 5.
29. The Caveator also submitted that although Naveen and Deborah Pillay knew of her existence as caretaker for the Falveys, they did not come up at any time to clarify their interests. She added that this non-action for the last 26 years since the Caveator moved onto the property that it confirms either that the Caveatee was unaware that the late Naveen Chandra Pillay was registered as owner of the 2 lots or knew that the property was not theirs in the first place, thus their hesitance in claiming ownership.
30. This court has perused the **Certificate of Title Nos. 24115** [Lot 1], **24116** [Lot 2] and **11836** [Lot 5] respectively. CT Nos. 24115 and 24116 confirms that the Title is registered in the name of Naveen Chandra Pillay. Whereas, CT 11836, is registered in the name of Naveen Chandra Pillay and 2 others.
31. **Prima facie**, bearing in mind the Caveatee's contention as based hereinabove together with her affidavit evidence and written submissions, and upon a careful consideration under whose name the Titles are registered, obviously the Caveatee has a case with good prospects of success on the substantive Motion filed herein seeking the Caveator "*to show cause what interest she claims in the Estate of Naveen Chandra Pillay*".
32. **However**, the Caveator may also have a good prospect of defending otherwise in terms of the period of occupation of the property under contention and bearing in mind that she had made an application for a vesting order of the property under contention
- 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 to test.
33. 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.'

34. 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.'

35. The **balance of convenience** lies in the Court accepting that the **Caveatee** has a regular **bona-fide claim** which has a chance of success without making any detailed determination as to the likelihood of success.

36. The **Caveator's** main thrust is that since the **Caveatee** is **resident out of this Jurisdiction, Citizen and Resident of Australia**, therefore, she should be required to pay **security for costs** in the sum of **\$8,000**. On the other hand, the **Caveator** will only be entitled to costs if the **Caveatee's** claim is dismissed.

37. The **Caveatee** has initiated the original **Probate proceeding** and she has the prosecution of the case to ensure she brings it to the conclusion on the balance of probabilities. And it is for the **Caveator** to counter the claim in terms of her **opposition and interest** in the deceased's **Estate** to the substantive Probate proceedings.

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 **Caveator** has sought for security for costs against the **Caveatee**.

38. However, there is evidence that the **Caveatee** has a **beneficial interest and entitlement** in the deceased's Estate of Naveen Chandra Pillay **since that can be ascertained from the file records that the Deceased was the Registered Owner of the two properties within the Certificate of Title Nos. 24115 [Lot 1], 24116 [Lot 2].** Further, he had a share in **Certificate of Title No. 11836 [Lot 5]**, which is registered in the name of Naveen Chandra Pillay and 2 others.

39. Bearing in mind the nature of the application and its conduct by the parties to this proceedings, it is only appropriate that I order **Costs** against the **Caveator** summarily assessed at **\$650** to be paid to the **Caveatee** within 21 days.

40. For the abovementioned rational, and taking into consideration the material evidence before court favoring the **Caveatee**, I **decline** to grant the **Caveator's** application for **security for cost** order against the **Caveatee** and proceed to make the following orders.

D. Orders

- (i) The Caveator's application for security for cost against the Caveatee fails.
- (ii) The substantive matter to be expedited and the parties must move and complete the cause to enable the court to hear and determine the case accordingly.
- (iii) Cost of this action is summarily assessed at \$650 against the Caveator and to be paid to the Caveatee within 21 days.
- (iv) The case will now be scheduled for further directions accordingly.

DATED AT SUVA THIS 19th DAY OF June 2018




.....
MASTER
VISHWA DATT SHARMA

cc: *M. A. Khan, Suva.*
Law Solutions, Suva.