

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Winding Up Action No. 18 of 2014

IN THE MATTER of TELTEC COMMUNICATION
SERVICES LIMITED

AND

IN THE MATTER of the Companies Act, Section 324(1)

BEFORE : Master Vishwa Datt Sharma
COUNSEL : Mr. Pranish Kumar for the Applicant/Petitioner
Mr. Krishneel Naidu for the Respondent
Date of Ruling : 10th July, 2018

RULING

*[Respondent'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 18th May, 2015, the Respondent's filed a Summons for Security for Costs against the Petitioner and sought for the following Order-
 - (a) That the Applicant be ordered within seven (7) days of making such order to give security for the costs of the Respondent in the sum of FJD\$10,000.00 (Ten Thousand Fijian Dollars) or such other sum as the Court may think just and that pending the giving of such security, all further proceedings in the above action be stayed;
 - (b) The costs of this application be costs in the cause.

On the Grounds:

- (a) The Applicant is ordinary resident out of the jurisdiction; and
 - (b) Upon further grounds set out in the Affidavit of Manoj Kumar filed herewith.
2. This application is made pursuant to *Order 23 Rule 1 (1) (a) of the High Court Rules, 1988 and the Inherent Jurisdiction of this Court.*
 3. The Respondent relies on the Affidavit in Support and Reply deposited by Manoj Kumar.
 4. The Petitioner relies on the Affidavit in Opposition deposited by Savitri Ram. This affidavit is also deposited by Petitioner Savitri Ram on behalf of the other Petitioner Amrit Ram but it is noted that there is no authority annexed in terms of Order 41 Rule...of the High Court Rules, 1988.

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 Respondent is entitled to Security for Costs' as sought for in their application?
7. The **Petitioners** admitted that they were residents of 3 Bessemer Street, Blacktown, New South Wales, Australia previously but currently resided at 2 Sapphire Circuit, Quaker Hills, New South Wales and opposed the application for **security for costs**.
8. The **Plaintiff** further submitted in summary as follows-
 - The mere fact the Plaintiff is a resident outside the jurisdiction will not qualify the award of security for cost though an application can be made to court when the Plaintiff is not resident within the jurisdiction;
 - The Respondent's main contention is that they are incurring legal costs in this action and the Plaintiff ordinarily resides outside the jurisdiction to which they need protection save as to costs should the court award costs in this action;
 - That the Respondent has failed to provide receipts for payment of the legal fees and further that it is the Plaintiff who have suffered loss as a result of debt by the Company to the Plaintiff in the sum of \$17,469.32 which is being owed since 2007;
 - The rationale for security of costs is to provide some assets to recover costs when costs are ordered;
 - The Respondent submitted the estimated costs of the cause in the amount of \$10,000 and this is the amount they claim to be deposited first before this matter proceeds;
 - It is impetuous to burden the Plaintiff to deposit the sum sought when the costs ordered by the court shall in any event not be to recover the Solicitors Legal fees;
 - Delay is not a decisive factor but it may be treated as important where it has led the Plaintiff to act to his detriment;
 - The Magistrates court entered judgment against the Company and failed to pay the same instead moved the company assets to another Company to avoid items being seized and sold to recover the judgment debt sum;
 - The Respondent does not have a meritorious and/or valid defence;
 - The Plaintiff submitted that all the factors reflected in case of *Sir Lindsay Parkinson and Co Ltd v Triplan (Supra)* are in Plaintiff's favour;
 - The Plaintiff reside out of Jurisdiction and the court cannot order security for costs against foreign parties for the reason being that they are foreigners and do not ordinarily reside in Fiji; and
 - Delay by the Respondent in making this application amounts to unfairness.
9. Whereas the **Respondent** submitted as follows-
 - That there is no dispute that the Applicants/Plaintiff are ordinarily resident outside Fiji in Australia;
 - Therefore it is submitted that the presumption for foreign parties pursuing claims to give security for costs applies;
 - Applicant's proceedings are not genuine and there has not been evidence adduced to indicate that the Respondent had acted fraudulently or with intent to defraud creditors and there is little or no prospects for success of the Applicant's proceedings;
 - The Respondent does not personally owe the Applicants anything and that the Judgment in the Magistrate's Court action No. 517 of 2010 was obtained against the Company;
 - The Applicants were indebted to the Company, as evidenced by the report of the Official Receiver filed on 12th November, 2014;
 - The current application is not to oppress the Proceedings and that the Respondent has not contributed to the Applicant's perilous financial situation; and

- The Respondent is being subjected to heavy costs given the Proceedings and the Respondent needs security for costs, should costs be awarded in his favour to meet the legal costs.
10. **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.
11. 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.'

12. 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".

13. The Respondent will only be entitled to costs if the Plaintiff's claim is ultimately dismissed with costs. The Respondent 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.
14. 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.

15. 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).

16. 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."

17. 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.

18. 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.'

19. In the current case before this Court, it is not in dispute that the Plaintiff resides overseas in Australia. Further, there is no evidence established to show that the Plaintiff has '**assets**' in Fiji.
20. The **Plaintiff's** obtained a Judgment in the sum of AUS\$17,469.32 against the Defendant Teltec Communications Services Limited in the Magistrate's Court Ruling in Civil Action No. 518 of 2010. The Plaintiff's position is that after the determination of the Plaintiff's claim against the Company, Manoj Kumar transferred all his business assets to his defacto partner, Ashwini Prasad, under a Business Name, failed to pay the Plaintiff the Judgment amount and allowed the Company to be simply wound up.
21. The **Respondent's** contention is that upon a mutual arrangement between the parties, the Plaintiff's paid on behalf of Manoj Kumar the sum of \$22,209.28 and likewise Manoj Kumar at the request of the Plaintiff's paid a total sum of \$23,067.92. They had agreed to offset each other's claims but the Plaintiff's had to repay Manoj Kumar the balance sum of \$858.64. Further, these dealings were of a private and personal nature, therefore it has nothing to do with the Winding Up of Teltec Communications Limited.
22. However, the application before this Court is that the Respondent is seeking an order for security for costs against the Plaintiff. The power is discretionary, and the rationale for **security for costs** is to provide some **assets** to **recover costs** once the matter is determined against the losing party.
23. The **Respondent** submitted that he did not personally owe the Applicants/Plaintiff anything and the Judgment obtained the Magistrates Court Civil Action No. 517 of 2010 was against the Company. The Plaintiff's proceedings are not genuine and no evidence has been adduced to indicate that the Respondent had acted fraudulently or to defraud creditors. Security for cost application is not to oppress the proceedings nor has the Respondent in any way contributed to the Plaintiff's perilous financial situation.
24. Prima facie, bearing in mind the **Defendants** and the **Plaintiff's** contention and argument based on the affidavits and the written submissions and upon a careful consideration, the **Plaintiff may** have an arguable case with good prospects of success on the impending substantive issue. Likewise, the **Respondent** may also have a valid defence and a good prospect of defending otherwise as argued herein.

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.

25. 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.

26. *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.'

27. The Respondent's application is that since the Plaintiff is resident out of this Jurisdiction, in Australia, should be required to pay **security for costs**. On the other hand, the Respondent's will only be entitled to costs at the finalisation of this case if the Plaintiff's claim is dismissed by the Court.
28. 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 Respondent 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 Respondent has sought for security for costs against the Plaintiff.

On the balance of probability and taking into consideration the **discretionary** power of this court, the **Respondent** is entitled to security for costs for the aforesaid ration in the sum of **\$9,500** to be paid by the **Plaintiff** within 14 days timeframe.

Quantum of Costs

29. 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.'

30. 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.'


31. Further, the Plaintiff pay the ordered into the Chief Registrar's interest bearing account and will only be released to the party once the entire case is eventually heard and determined by the Court.
32. Not only that, the Respondent may be 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.
33. For the abovementioned rational, I **grant** the Respondent's application and proceed to make the following orders.

D. ORDERS

- (i) The Plaintiff is hereby ordered to pay a sum of \$9,500 as security for costs into the Chief Registrar's interest bearing account within 14 days.
- (ii) The Plaintiff's substantive application 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 \$650 against Plaintiff and to be paid to the Respondent within 14 days.
- (v) The case will now be scheduled for further directions accordingly.

DATED AT SUVA THIS 10th DAY OF JULY 2018




.....
MASTER
VISHWA DATT SHARMA

cc. *Nands Law, Suva*
Patel Sharma Lawyers, Suva