IN THE SUPREME COURT OF FIJI

[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No: CBV 0017 of 2019

[On Appeal from Court of Appeal No: ABU 0030 of 2017]

BETWEEN	:	**PITA TOKONIYAROI**
		Petitioner
AND	:	**1. COMMISSIONER OF POLICE**
		2. COMMISSIONER OF CORRECTIONS SERVICES
		3. DIRECTOR OF PUBLIC PROSECUTIONS
		4. ATTORNEY GENERAL OF FIJI
		5. SOLICITOR GENERAL
		Respondents
Coram	:	**Hon. Mr. Justice Priyasath Dep, Judge of the Supreme Court**
		Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court
		Hon. Mr. Justice Madan B. Lokur, Judge of the Supreme Court
Counsel	:	**Petitioner in Person**
		Mr. J. Mainavolau for the Respondents
Date of Hearing	:	**10 August 2022**
Date of Judgment	:	**26 August 2022**

JUDGMENT

Dep, J

1. I have read in draft the Judgment of Lokur J and I agree with his reasoning, conclusions and proposed orders.

Jayawardena, J

2. I agree with the draft judgment of His Lordship Lokur, J.

Lokur, J

3. Access to justice is a precious human right recognized by all democracies. Fiji is no exception and indeed, it is recognized as such in the Bill of Rights in the Constitution of Fiji thereby promoting a progressive philosophy in that direction. Additionally, Fiji has committed itself to achieving Goal 16 of the Sustainable Development Goals of providing equal access to justice for all by 2030.

4. The Bill of Rights is codified in Chapter 2 of the Constitution and Section 15 concerns itself with access to courts or tribunals, a vital component of any vibrant democracy. Clause 11 of section 15 is material for the purposes of the present discussion. It provides:

> *"11. If any fee is required to access a court or tribunal, it must be reasonable and must not impede access to justice."*

5. Succinctly stated, if any impediment is to be placed on access to justice, it must be reasonable. The Constitution recognizes that the imposition of a fee is, in a sense, an impediment in access to justice and must, therefore, be reasonable.

6. Similarly, this Court is of the view that any other 'imposition' must also be reasonable, whether described as a fee or otherwise. In the present case, this Court is concerned with the 'imposition' in the nature of a deposit of security for costs.

7. In this background, the present application requires this Court to decide whether in the case of the petitioner, who is in custody, the requirement of a deposit of security for costs for the redressal of a constitutional grievance is reasonable or not.

Background facts

8. The facts giving rise to this question of public importance have their origin in an application filed by the petitioner on 13 February 2016 in the High Court at Suva, but transferred to the High Court at Lautoka. The petitioner applied for constitutional redress for alleged improprieties at the hands of the police subsequent to his arrest on 19 November 2000.

9. The application (Application No. HBM 19 of 2016) was made by the petitioner in exercise of the right available to him under section 44(1) of the Constitution of Fiji. This section reads:

> *"**44. Enforcement***
>
> *1. If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.*
>
> *2. The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.*
>
> *3. The High Court has original jurisdiction –*
>
> *a. to hear and determine applications under subsection (1); and*
>
> *b. to determine questions that are referred to it under subsection (5), and may make such orders and give such directions as it considers appropriate.*
>
> *4. to 9. (Not relevant for the present purposes)*
>
> *10. The Chief Justice may make rules for the purposes of this section with respect to the practice and procedure of the High Court (including rules with respect to the time within which applications are to be made to the High Court)."*

10. The application was taken up for consideration by a learned Judge of the High Court at Lautoka and dismissed on 23 February 2017 as being "obviously out of time". In this regard, the learned Judge referred to rules framed by the Chief Justice under sub-section 10 of section 44 of the Constitution. The relevant rule being section 3(2) of the High Court (Constitutional Redress) Rules 2015 reads:

> *"An application ..... must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a Judge finds there are exceptional circumstances and that it is just to hear the application outside of that period."*

11. Feeling aggrieved by the decision of the High Court at Lautoka, the petitioner preferred an appeal before the Court of Appeal, being Civil Appeal No. ABU 30 of 2017. At this stage, it is necessary to point out that the Court of Appeal heard the appeal without any security for costs having been deposited by the petitioner – in fact, the deposit was dispensed with.

12. The appeal was then heard by three learned judges of the Court of Appeal on 15 and 20 November 2018 and dismissed by a judgment and order dated 30 November 2018.
The Court of Appeal observed as under:

> *"[5] From the material provided it appears that the complaint is related to a date in November 2000. The appellant states that he made the complaint to Fiji Human Rights Commission on 21st November 2001. He also gives reference number as HAC 0012/01. However, the appellant has not provided us with any information regarding the same. He only application before us is the notice filed dated 11th march 2016. This motion refers to an incident dated 19th November 2000 where the Appellant was allegedly assaulted by the police.*
>
> *[6] However there appears to be no continuation and these inquiries appear to have been abandoned. There is no record of any previous cases. Therefore I am of the view that the learned Judge had no alternative but to dismiss the application on the ground that it is out of time.*

[7] The hearing before the learned High Court Judge was not in relation to a revision application. It was a new application. Therefore the learned judge did not commit an error in dismissing the application. Therefore, I see no merit in this application and hence it is refused and the appeal is dismissed."

13. The petitioner challenged the judgment and order of the Court of Appeal on merits by filing a petition for special leave to appeal in this Court. Thereafter, in accordance with Rule 6 of the Supreme Court Rules, the matter was placed before the Chief Registrar, Supreme Court to fix the security for costs. Rule 6 of the Supreme Court Rules reads:

"Security for costs

6.(1) The Registrar must, within [1] month of the lodging of a Petition, notify the Petitioner of the sum to be deposited as security for costs, or for which recognizance is to be given by bond in Form 3 of Schedule 1 with one or more sureties as the Registrar directs.

(2) The sum mentioned in paragraph (1) is for the due presentation of the Petition and for the payment of any costs that may become payable to the Respondent in the event of the Petition being dismissed for non-presentation, or the Court ordering the Petitioner to pay the Respondent's wasted costs.

(3) The sum mentioned in paragraph (1) is to be fixed by the Registrar but must not exceed $30,000 per Respondent.

(4) The security for costs or the bond must be deposited with the Registrar or executed as the case may be, within 30 days of the sum being notified to the Petitioner.

(5) The Court may, if necessary, require security for costs for the performance of any order to be made on the Petitioner or on any interlocutory application, in addition to the sum determined, under the proceeding provisions of this Rule.

14. By an order dated 11 May 2020, the Chief Registrar fixed the security for costs at $5,000 payable in 30 days. This was duly and immediately communicated to the petitioner through the Officer in Charge, Medium Corrections Centre, Naboro.

15. Soon after receipt of intimation of the amount of security for costs, the petitioner moved a petition on 27 May 2020 seeking dispensing with deposit or in the alternative a stay of the requirement of deposit since he is incarcerated.

16. The petition dated 27 May 2020 was placed before the Chief Registrar, Supreme Court and the following was then communicated to the petitioner on 7 July 2020:

"Your application was forwarded to the Supreme Court Registrar for his directions. His Lordship has therefore directed us to inform you that, the Supreme Court Rules (6) does not allow the Registrar to dispense with security for costs.
Therefore, as it stands, the security for costs order of $ 5000 is still applicable."

17. Feeling aggrieved, the petitioner addressed a communication to Honourable the Chief Justice, Supreme Court of Fiji on 10 July 2020 (received on 27 July 2020) stating, *inter alia*,

> *"It is respectfully submitted my lord that the decision of the Supreme Court Registrar for the Security for costs order of $ 5,000.00 is still applicable and stands based on Supreme Court rules (6), should be reviewed.*
>
> 1. *The appellant is a state prisoner and being incarcerated for 17 years and cannot afford to paid $ 5,000.00.*
> 2. *The manner that the decision was made was unfair, as the Supreme Court Registrar failed to explain the Supreme Court Rules (6) in his letter received by the Appellant on the 11th of May, 2020 [copy attached with].*
> 3. *Whether the rule (6) of the Supreme Court is consistent with the 2013 Constitution."*

18. The petitioner then made the following prayer to Honourable the Chief Justice:

"Therefore, I respectfully submitted that if Justice is prevail and fairly served by the highest court of justice in Fiji, my application should be granted and security costs of $ 5,000.00 be dispense."

After receipt of the representation, Honourable the Chief Justice placed the matter for consideration before this Court.

Discussion

19. We have heard the petitioner in person and learned counsel for the State and have also examined the record and written submissions. As far as the State is concerned, its principal submission is that Rule 6 of the Supreme Court Rules is mandatory. It is submitted, *"On a whole. Section 6 makes it mandatory for security for costs to be paid by an Appellant. It is lawful requirement that the Appellant must pay security for costs irrespective of his financial background."*

Nature of a security for costs order

20. At the outset, it should be appreciated that an order for deposit of security for costs is a procedural order and not a judicial order. The order of the Chief Registrar for deposit or not making a deposit for security of costs is a discretionary order.

21. The discretion provided to the Registrar under the Supreme Court Rules is wide but with an important rider. While it is for the Registrar to decide on the quantum of deposit, an upper limit of $30,000 per respondent has been placed under the Rules. A petitioner directed to make a deposit for security for costs is required to make the deposit within one month of the order.

Purpose of security for costs

22. What is the purpose of Rule 6? An order for deposit of security for costs is for the benefit of the opposite party or the respondent in civil proceedings. It is to ensure that the respondent is not financially burdened in a litigation in which he or she succeeds. Yet, at the same time the security should not be unaffordably high, such that it would result in non-compliance by a plaintiff or petitioner and thereby bring an early demise to a litigation for assertion of rights or interests. There is need for a balance to be struck through calibration by the Registrar in this regard. But such an order is based primarily on the financial status of the litigant and not only the merits of the litigation – the latter being left for decision by the Court.

Guidelines for determining quantum of security

23. The Supreme Court Rules do not provide any guidance *per se* to the Registrar to determine the quantum of deposit, but there can be no doubt that the discretion is required to be exercised judiciously by the Registrar and not arbitrarily or whimsically. The exercise of discretion should not result in the right to access justice being rendered illusory. For example, if an impecunious litigant is required to deposit the maximum amount of $30,000 his or her right to access justice is rendered illusory if not nugatory. In such a case, an unreasonable impediment is placed on the right to access justice, making the exercise of power by the Registrar fall foul of clause (11) of section 15 of the Constitution. This is certainly not the intention of Rule 6 of the Supreme Court Rules.

24. What should the Registrar consider? In ***The Director of the Department of Town & Country Planning v. Christine Badia Nkanka and another***[1] there is a useful discussion on the principles that guide a decision on security for costs. Reference has been made, for example, to Order 23 Rule 1 of the High Court Rules 1988 which provides:

> "***Security for Costs of action, etc.***

[1] HBJ 06 of 2020 decided on 15 March 2022 in the High Court at Lautoka

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 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 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.[1]

25. There is also considerable case law from New Zealand on the subject that is helpful. A few judgments in this regard are: ***Bell-Booth Group Limited v Attorney-General***[2] and ***Nikau Holdings Limited v Bank of New Zealand***[3]. In ***AS McLachlan v MEL Network Limited***[4] it was observed:

> *[15] The rule [regarding orders for security of costs] itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the courts for a genuine plaintiff is not lightly to be denied.*

[2] (1986) 1 PRNZ 457 at 460-462
[3] (1992) 5 PRNZ 430 at 436-440
[4] (2002) 16 PRNZ 747 CA

[16] Of course, the interests of the defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

26. In ***Official Bay Heritage Protection Society Inc. v. Auckland City Council and Perron Central Limited***[5] the learned Judge preferred to largely adopt the summary of principles culled out by learned counsel for Respondent No. 2 from case law. These principles provide useful guidance and are:

a) *The Court must be satisfied that the threshold has been reached of the plaintiff being unable to pay the costs of the defendant if the plaintiff is unsuccessful.*
b) *There is no burden or predisposition one way or the other. The discretion is to be exercised in all of the circumstances of the case.*
c) *The interests of both the plaintiff and defendant should be considered. The Court should not allow the rule to shut out a genuine claim. On the other hand, an impecunious plaintiff must not be allowed to use its inability to pay costs to put unfair pressure on a defendant.*
d) *The merits and bona fides of the plaintiff's case should be considered, even though it is acknowledged that it is often difficult to assess merits at the interlocutory stage.*
e) *In considering the circumstances, the public interest in the litigation is relevant, although it will not be determinative as to whether an order is made for security for costs.*
f) *Delay in issuing proceedings is relevant, as is delay in making an application for security.*
g) *The plaintiff's circumstances, including whether its impecuniosity has been caused by the acts of the defendant, is relevant.*
h) *Ultimately, the question of whether to grant security and the amount is a matter to be determined having regard to the interests of justice.*

[5] CIV 2006-404-005947 decided on 26 February 2007

It is necessary for the Registrar to keep these 'guidelines' in mind while exercising discretion in requiring deposit of security for costs.

Grievance redressal

27. The Supreme Court Rules do not specify a remedy to a litigant who is aggrieved by what is perceived to be an unreasonable amount of security for costs determined by the Registrar. But that is of no consequence since the order passed by the Registrar is a procedural order. Therefore, a representation can be made to the Registrar to reconsider the quantum determined or an appeal can be made to Honourable the Chief Justice, Supreme Court of Fiji as in the present case.

Security for costs

28. Three categories of cases are dealt with by the Courts – civil, criminal and constitutional. The Supreme Court Rules do not make any distinction between security for costs between civil and criminal cases or between persons in custody and persons not in custody. While expressing the view that the Courts and the Registrar must take this distinction into consideration, this Court leaves the matter at that since it is not the subject matter of the petition before us. This Court is concerned with a case of constitutional redressal which is a class apart from a civil or a criminal case.

Mandatory nature of Rule 6

29. The submission by the State is that Rule 6 is mandatory in nature. It is not. It is merely directory for no automatic consequence follows from its non-compliance. A further step is still required to be taken in that the Registrar may extend time (or refuse to extend time) for compliance, the order being a discretionary procedural order. Depending upon the order passed by the Registrar, the litigant is entitled to appeal to Honourable the Chief Justice (as in this case) and it is for Honourable the Chief Justice to have the petition for a

constitutional redressal heard without any deposit for security of costs or to let the Full Court take a decision, as in this case.. All these options suggest that Rule 6 is not mandatory but only directory. The submission of the State in this regard is rejected.

30. It is suggested by the State that a petitioner or appellant must make at least some deposit in a civil case. This is really for the Registrar to decide. On a consideration of the matter, the Registrar is entitled to dispense with the deposit. In criminal matters where the petitioner or appellant is in custody, no deposit is insisted upon by the Supreme Court. But, as noted above, proceedings for redressal of a constitutional grievance under section 44 of the Constitution of Fiji must stand on a separate footing and cannot be compared to civil or criminal proceedings. In such cases too, the Registrar has the inherent power, depending upon the facts of each case, to waive the deposit for security if costs, and indeed must be liberal in doing so, considering the allegation of an infringement of a constitutional right.

31. In so far as the present case is concerned, the petitioner moved the High Court under section 44 of the Constitution for redressal of a constitutional grievance. This is neither a civil nor a criminal remedy adopted by the petitioner. Being a constitutional grievance and proceedings having been initiated under a constitutional grievance redressal mechanism, the petitioner is entitled, in the opinion of this Court, to waiver of the security for costs. This Court has also taken into consideration the fact that the petitioner is presently in custody and has been so for several years.

32. Considering all these factors, this Court is of the opinion that the order of the Chief Registrar requiring the petitioner to deposit $5,000 for hearing his petition for special leave to appeal against the judgment and order of the Court of Appeal in Civil Appeal No. ABU 30 of 2017 is unreasonable and deserves to be and is set aside.

33. **Conclusion on the issue of security for costs**

1. An order for deposit of security for costs passed by the Registrar of the Supreme Court is a procedural and discretionary order.

2. The Registrar must exercise his discretion judiciously so that the litigant can have access to justice and no unreasonable impediment is placed on the exercise of such a right in derogation of the Constitution of Fiji.

3. The provisions of Rule 6 of the Supreme Court Rules are not mandatory, but only directory. The Registrar may dispense with a deposit of security for costs.

4. While keeping the interests of a respondent to a litigation in mind, the Registrar must not overlook the constitutional right of a petitioner or appellant of access to justice. A calibrated balance must be struck by the Registrar in deciding the quantum of deposit (if any) towards security for costs.

5. Constitutional proceedings under section 44 of the Constitution cannot be equated with civil or criminal proceedings and must be considered independently and distinctly.

Orders of the Court:

1. *Order dated 11 May 2020 of the Chief Registrar is set aside.*

2. *The petition for special leave to appeal filed by the petitioner directed against the judgment and order of the Court of Appeal in Civil Appeal No. ABU 30 of 2017 is directed to be listed for consideration without the petitioner having to deposit any amount towards security for costs.*

3. *No order as to costs.*

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Hon. Mr. Justice Priyasath Dep
President of the Supreme Court

SUPREME COURT FIJI

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Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

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Hon. Mr. Justice Madan B. Lokur
Judge of the Supreme Court