

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 80 of 2015

BETWEEN : DR DREW ALLBRITTEN of 265 Waimanu Road, Suva, Visiting Professor at FNU,
Executive MBA.

PLAINTIFF

BETWEEN : THE UNIVERSITY OF THE SOUTH PACIFIC a Statutory body established
under the University of the South Pacific Charter, Cap 266 and with its registered address at
Laulala Campus, University of South Pacific, Private Bag, Suva.

DEFENDANT

BEFORE : Master Vishwa Datt Sharma

**COUNSEL : Mr. Devenesh Sharma- for the Plaintiff
Mr. John Apted- for the Defendant**

Date of Hearing : 25th February, 2016

Date of Ruling : 20th April, 2016

RULING

A. INTRODUCTION

1. The Defendants filed a **Summons** together with an **Affidavit In Support** on 08th September, 2015 and sought for the following orders-

- (i) That the Plaintiff do within fourteen (14) days give security for the Defendants' costs to the satisfaction of the court on the grounds that the Plaintiff is ordinarily resident outside of the jurisdiction and as otherwise appears in the affidavit of Dr Dilawar Grewal and Madonna Lania Fong filed herewith;
- (ii) That in the meantime all further proceedings in the above action other than the proceedings relating to the giving of security be stayed; and

(iii) That the costs of this application be the Plaintiff's costs in any event.

2. The application was made pursuant to *Order 23 rule 1 (a) and (c) of the High Court Rules, 1988*.
3. The Plaintiff filed an Affidavit in Opposition to the Defendants' application in terms of *Order 41 Rule 9 [2]* Indorsement.

B. BACKGROUND TO THIS CASE

4. The proceedings concerned essentially a claim for Damages brought against USP by a former employee. It arises out of USP's refusal to re-employ the Plaintiff under internal university laws regarding retirement. There is also a claim for allegedly unpaid benefits at the time his contract came to an end i.e. reimbursement of medical expenses and an air-fare.
5. The substantive action was filed on 04th February, 2015. Apart from this application, a summons for further and better particulars filed by the Defendant is pending determination by this court.

C. THE LAW

6. *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)
- (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)

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.

D. ANALYSIS and DETERMINATION

7. This is an **application by the Defendant** seeking an order for **security for costs** to be made against the **Plaintiff** on the ground that the **Plaintiff is ordinarily resident out of the jurisdiction**.
8. In the present case, the **Plaintiff** does not dispute that he is a foreign national and now **Resident in France**. He also confirms that he does not **own any land or property** in Fiji in his answering affidavit at paragraphs 18 and 30.
9. The Plaintiff opposes the application for **security for costs** sought in terms of the estimated Bill of Costs of \$49,825 or consent orders for \$30,000, rather stated that if the Defendant had sought a reasonable security of say \$2500-\$3,000, then the Plaintiff may have even agreed and there would be no necessity to make this application.
10. The **fundamental principle** is the **right of a litigant to pursue and enforce rights** in the courts. The court must have a concern to achieve a balance between ensuring that adequate and fair protection is provided to the **Defendant**, and avoiding injustice to an impecunious **Plaintiff** by unnecessarily shutting it out or prejudicing it in the conduct of the proceedings. (*Case of Idoport Pty Ltd v National Australia Bank Ltd [2000] NSWLR 598* refers).
11. The **Rule** as mentioned hereinabove, states that "*having regard to all the circumstances of the case, the Court thinks, it is just to do so, it may order* " confers upon the Court a discretion whether or not to order security for costs.
12. There is no hard and fast rule that **security for cost** should be ordered when the **Plaintiff** is ordinarily **resident outside the jurisdiction**. Hence it is not desirable to award **security for cost** solely on the ground of the Plaintiff being a resident in another jurisdiction. Court must consider other facts incidental to the proceedings.
13. Therefore, it follows that the **discretion** lies with the Court to order the **Plaintiff** to give **security for the Defendants' costs** of this action only after the Court has given due regards to all the circumstances of the case.
14. Reference is made to the White Book (1997) at page 407 (23/1- 3/2) which states as follows;

"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 to be given. Rule 1(1) provides that the Court may 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 the 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 68 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).

15. Further, a passage from Sir Nicolas Brown Wilkinson VC as reported in the case of Porzelack K.G v. Porzeluck (UK) Ltd [1987] 1 W.L.R 420 at 422, 423 is of much importance to the present case. Therein it was stated as follows-

'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 this court against which it can enforce the 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 is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiff's resident within the jurisdiction. There is only one exception to that, so far as I know, namely, in the case of limited companies, where there are provisions under the Companies Act for security for costs.'

Further, where the plaintiff resident outside the jurisdiction is a foreign limited company, different factors may apply: see DSQ Property Co. Ltd. v. Lotus Cars Ltd. [1987] 1W.L.R. 127. Under the R.S.C., Order 23, rule 1 (1) (a), it seems to me that I have entirely general discretion either to award or refuse security, having regard to all the circumstance of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstance of the case, is the just answer.'

16. The court also needs to take into consideration the following general principles and guidelines relevant to the exercise of the court's discretion as reported by Lord Denning in Sir Lidsy Parkinson & Co Ltd. v. Farriplan Ltd [1973] 2 A.E.R. 273 at 285-286 which is of great assistance in the present case before me.

'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 considering all the circumstances of the particular case. So I turn to consider the circumstances. Counsel for Triplan helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a

substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also consider whether the application for security was being used *oppressively-so as to tress and stifle a genuine claim*. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as *delay in payment or delay in doing their part of the work*.

17. The relevant factors reflected in the abovementioned case that needs to be taken into account in exercising the discretion cannot be stated exhaustively and will vary from case to case. Therefore, it will be grouped under the following headings-

(i) *The impecuniosity of the Plaintiff*

The court must first consider the threshold question of whether there is credible testimony to establish that the **Plaintiff** will be unable to pay the **Defendant's** costs if the **Defendant** is ultimately successful.

However, once the **Defendant** has led credible evidence of impecuniosity, an evidentiary onus falls on the **Plaintiff** to satisfy the court that, taking into account all relevant factors, the court's **discretion** should be exercised by either refusing to order security or by ordering security in a lesser amount than that sought by the **Defendant**. In other words, proof of the unsatisfactory financial position of the **Plaintiff** 'triggers' the court's discretion. (*Case of fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 refers).

On the outset, the Defendant has furnished court with itemized bill of cost for \$49,825 as to the probable costs they will incur or grant 2/3rds of the proforma costs at \$30,000.

Firstly, the Plaintiff has admitted and the Defendant has established that the Plaintiff is a foreign national resident in France.

Secondly, there is evidence from both parties that the Plaintiff does not have assets within Fiji Jurisdiction that may be utilized to recover costs if the Plaintiff loses the case.

Thirdly, the Plaintiff has made its stand very clear that if the court is mindful to impose a security for costs, then the costs must be reasonable and not make it too hard to prevent the Plaintiff from proceeding.

According to the Defendant, there is no evidence that the Plaintiff is impecunious and will be unable to pay any security.

In any event, the **fundamental principle** is the **right of a litigant to pursue and enforce rights** in the courts. He should not be shut out from prosecuting his case.

(ii) *The bona fides of the claim*

Whether the claim is bona fide or a sham is a relevant consideration, and the court will take into account the motivation of a **Plaintiff** in bringing the proceedings. For example, unsatisfactory pleading, or a vexatious claim, particularly where the Plaintiff is self-represented with 'abundant time' to pursue incessant and numerous applications. (*Case of Lall v 53-55 Hall Street Pty Ltd [1978] 1 NSWLR 310 refers*).

Upon the perusal of the Plaintiff's substantive claim within the Writ of Summons and the Statement of Claim, it can be ascertained that the same was filed when the Plaintiff was still a lecturer at the University.

The **Plaintiff** submitted to the court that the filing of a bare Statement of Defence by the Defendant as such is not in a position to say that the Plaintiff's claim has no prospects of success. The Plaintiff is of the contention that prima facie, based on the facts set out in the statement of claim, the Plaintiff has an arguable case with good prospects of success in that he was not treated fairly when it came to renewal of his employment contract with USP and USP breached its policies in terms of the contract for retiring academic staff.

The **Defendant** submitted that the Plaintiff has a negligible chance of success with regards to his claim.

The court is of the view that it should not delve itself prematurely into the **merits** of the case at this stage of the case, rather deal with the pending issue of the **security for costs**.

The Plaintiff's **cause of action** as it can be ascertained from the Statement of Claim is that for Damages brought against USP by a former employee. It arises out of USP's refusal to re-employ the Plaintiff under internal university laws regarding retirement. Further, there is a claim for allegedly unpaid benefits at the time his contract when it came to an end i.e. reimbursement of medical expenses and an air-fare, accordingly.

(iii) *The stultification factor*

Where the effect of an order for security would be to stifle or end the Plaintiff's claim, this is an important consideration to be weighed, particularly in light of

the poverty rule. (*Case of fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 refers).

It is appropriate to examine whether the impecunious Plaintiff is, in reality, the Defender in the proceedings, and not the attacker. It is also appropriate to look behind the actual litigant to examine the means of others who stand to benefit from the litigation.

The Plaintiff submitted that the estimated Bill of Costs for \$49,825 and or \$30,000 shows that the Defendant was using the application for security for costs oppressively to stifle a genuine claim.

The general rule is that poverty is no bar to a litigant. The exercise of the power to order security for costs is a balancing process, requiring the doing of justice between the parties to the proceedings.

(iv) The prospects of success of the claim

A consideration of the Plaintiff's prospects of success is an important element of balancing justice between the parties. However, care needs to be exercised when assessing the proportionate strength of the cases of the parties at the early stages of proceedings. (*Case of fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 refers).

As a general rule, where a claim is prima facie regular on its face and discloses a cause of action, then in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide and has reasonable prospects of success. (*Case of KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189 refers).

As I have earlier on stated herein above that the Plaintiff's cause of action as it can be ascertained from the Statement of Claim is that for Damages arising out of USP's refusal to re-employ the Plaintiff under internal university laws regarding retirement and further, that there is a claim for allegedly unpaid benefits at the time his contract when it came to an end i.e. reimbursement of medical expenses and an air-fare, accordingly.

However, at this stage of the proceedings, the court should proceed on the basis that the claim is bona fide and has reasonable prospects of success.

(v) The causation factor

Where the Plaintiff's lack of funds has been caused or contributed to by the Defendant, the court will take this consideration into account. This has been the "causation" factor: (*Case of fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR

564 refers). It is a relevant consideration that an order would effectively shut a party out of relief in circumstances where that party's impecuniosity is itself a matter which the litigation may help to cure.

However, a Plaintiff cannot rely on the poverty rule where he or she so organized their affairs so as to shelter assets. It was said that in determining the causation factor it is not appropriate to have some regard to the apparent strength of the case.

(vi) Foreign Plaintiffs

Where a Plaintiff is ordinarily resident overseas and has no assets in the jurisdiction, **as in this case**, there must be weighty reasons why an order for security for costs should not be made. A Defendant is not expected to bear the uncertainty of enforcement in a foreign country. The difficulty in enforcing an order for costs overseas against a non-resident Plaintiff will usually be sufficient to ground an order, especially where there is no reciprocal right of enforcement in the relevant foreign jurisdiction. Special notation should be taken into consideration that the Defendant will only be entitled to costs if the Plaintiff's claim is dismissed, and not any time prior to a court's decision.

(vii) Delay

Application for security should be brought promptly and delay by a Defendant is a relevant factor in the exercise of the discretion. However, the passage of time is but a factor to be taken into account in the balancing exercise. The delay must be weighed in terms of prejudice and factors that have led to the delay.

In this case the Plaintiff commenced proceedings on 04th February, 2015, and the Defendant filed an application seeking security for costs on 08th September, 2015, some seven (7) months after.

18. The purpose of the rule and the prima facie presumption in favour of ordering security for costs has been recognized and applied in Fiji. In this Court in Furuuchi Suisan Company Ltd v Tokuhisa [2009] FJHC 194; Civil Action 95. 2009 (9 September 2009), Byrne J said -

"31.0. The first case I mention is *Porzelack (UK) Ltd*, (1987), 1 All ER 1074 where Sir Nicolas Browne Wilkinson V.C. said at p. 1076: 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 this court against which it can endorse the 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 coming from outside the jurisdiction as it is to plaintiff's residents within the jurisdiction.

"Under Order 23, r1 (1) (a) it seems to me that I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstances of the case, is the just answer."

19. The rationale was also described in *Sharma v Registrar of Titles* [2007] FJHC 118, HBC 351. 2001 (13 July 2007), where Master Udit elaborated further –

"[3] The aforementioned rule, vests the court with an unfettered discretion to order security for costs. All this rule entails to protect is the risks to which an applicant may be exposed to for recovering of costs in a foreign jurisdiction. The quantum of costs comparatively in Fiji is not relatively high although fairly substantive within the jurisdiction which is worth recovering. Execution of costs abroad where the litigation costs are much higher will render the exercise as wholly uneconomical. Be that as it may, ultimately the issue is not that the respondent will not have the assets or money to pay the costs or that the law of the foreign party's country not recognizing an order of our court, and/or enforcement of costs order even be it under any legislation similar to our *Reciprocal Enforcement of Judgments Act*, (Cap 39), but it is also the extra steps which will be needed to enforce any such judgment outside the jurisdiction. Indeed, in will not be an irrefutable presumption to infer that an extra burden in terms of costs and delay, compared with the equivalent steps that could be taken in Fiji, will be an inevitable corollary. The obvious expenditure which comes to my mind is the engagement of an attorney and the conundrum of registering an order in the foreign jurisdiction before it can be enforced."

20. The Plaintiff in this case commenced proceedings against the Defendant by way of a Writ of Summons and Statement of Claim filed on 04th February, 2015, wherein he claims Damages arising out of USP's refusal to re-employ the Plaintiff under internal university laws regarding retirement, as set out in the statement of claim, the contents of which the Defendant has been made aware of.
21. So far, the pleadings have reached the stage where the Plaintiff has filed a **Summons for Directions** on 04th May, 2015. Hereafter, a **Summons for Further and Better particulars** was filed by the Defendant on 25th May, 2015. It was mutually agreed between the parties to the proceedings that the Summons for Directions be deferred and allow the determination of the Summons for Further and Better particulars first. On 08th September, 2015 Summons for security for costs was filed which is now for courts determination. The substantive matter then came at a standstill.

22. I reiterate that Security for costs is not ordered just because a Plaintiff is ordinarily resident outside of Fiji, the Court must consider other facts incidental to the proceedings as discussed hereinabove.
23. There is no evidence before me that the delay in this pending application for security for cost has caused hardship for the future conduct of this action by either party since they thought fit and proper to deal with the present application for security ahead of other pending interlocutory application together with taking the next cause of action to complete the pleadings with regard to the pending substantive Writ action.
24. The Defendant has submitted a pro-forma Estimated Bill of Costs of \$49,825 or \$30,000 and this has been vigorously refuted by the Plaintiff. The Plaintiff did state that he sought for a reasonable sum of \$2500-\$3,000 to be imposed, if the court was so minded to order as security for costs in the circumstances.
25. The security for cost is rather ordered to secure the Defendant in an event of Plaintiff's claim being not successful at the conclusion. The security for cost sought by the Defendant in anticipation up to the conclusion of the case to meet the cost, if the Plaintiff's claim is dismissed, is exorbitant in nature.
26. The court can order **security for cost** up to a particular stage of the proceedings. A further application will be required after passing that stage of the trial. The **Defendant** will be at liberty to make a decision whether a further application for **security of costs** will be necessitated having regards to all the circumstances of this case. Bearing in mind the present status quo of this case, it cannot be said how the case will be handled by the parties hereafter in particular bearing in mind that there is already a pending application for further and better particulars.
27. Considering the circumstance of the case, I will order a cost of **\$6,000 at this stage of the proceedings**. This amount to be deposited into the Chief Registrar's interest bearing account in the High Court. Further, the **Plaintiff** is directed to remit the said sum within 28 days from today. If the money is not deposited within 28 days as directed herein, then the Plaintiff's case will be struck out accordingly.
28. Taking into consideration the above rational, I will accede to the **Defendant's** application to order **security for costs of \$6,000**.
29. The **Plaintiff** is directed to remit the abovementioned sum within 28 days from today. If the money is not deposited within 28 days into the Chief Registrar's interest bearing account, the **Plaintiff's** action will be **struck out** accordingly.

30. The Plaintiff is also directed to pursue with the pending summons for directions within 14 days' time frame, from today.

E. FINAL ORDERS

31. The **Plaintiff** is directed to deposit a sum of \$6,000 into the Chief Registrar's interest bearing account at the High Court in Suva, **as security for cost** within 28 days.
32. The **Plaintiff's** action will be struck out if the abovementioned direction is not complied by the **Plaintiff** within the stipulated time frame of 28 days.
33. The Plaintiff is further directed to pursue with the pending **summons for directions** within 14 days from today.
34. The cost of this application is assessed summarily at \$500 and the cost should be paid to the Defendant within 21 days.
35. The case will now be scheduled for further directions accordingly.

DATED at Suva on 20th April, 2016



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

Cc. Mr. Devenesh Sharma of R. Patel Lawyers, Suva- for the Plaintiff
Mr. John Apted of Munro Leys Lawyers, Suva-- for the Defendant.