

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 233 of 2018

BETWEEN : **NAISOSO RESIDENTIAL MANAGEMENT LIMITED**, a limited liability company having its registered address at The Marina Naisoso Sales Office, Naisoso Island, Nadi.

PLAINTIFF

AND : **NAISOSO ISLAND BODY CORPORATE LIMITED**, a company limited by guarantee and having its registered address at R Patel Lawyers, 77 Ratu Cakobau Road, Domain, Suva and its business address at Naisoso Island, Nadi.

FIRST DEFENDANT

AND : **ROBERT EDWARD LOWRES**, Company Director, of Lot 141 Coral Bay Drive, Naisoso Island, Nadi.

SECOND DEFENDANT

Appearances : (Ms.) Mary Muir for the plaintiff
(Ms.) Pulekeriya Low for the first defendant
Mr Devanesh Sharma with (Ms.) Gul Fatima for the second defendant

Hearing : Tuesday, 18th August, 2020.

Decision : Friday, 25th September, 2020.

DECISION

[A] INTRODUCTION

- (01) The matter before me stems from the first and the second defendants' summons made pursuant to Order 23, rule 1 of the High Court Rules, 1988 and inherent jurisdiction of the Court seeking of security for costs against the plaintiff.
- (02) The application is opposed by the plaintiff.

- (03) The parties have filed three (03) affidavits for consideration. They are;
- (A) The affidavit of Mr Mohammed Harun, the director of the first defendant company, in support, sworn on 19th December, 2019.
 - (B) The affidavit of Mr Robert Edward Lowres, the second defendant, in support, sworn on 20th January, 2020.
 - (C) The affidavit of (Ms) Nyssa Berryman, the director of the plaintiff, in opposition, sworn on 27th March, 2020.

[B] Preliminary Objections by the Plaintiff to the First Defendant's Summons

- (04) The plaintiff filed Summons on the 31st January, 2020 to set aside the first defendant's Summons and affidavit, pursuant to Order 2, rule 2 and Order 41, rule 6 on the grounds that;
- (a) *The Summons (for security for costs) does not pray for security for costs to be paid to the Court as provided for by Order 23 rule 1 of the High Court Rules, but instead asks for costs to be paid to the First Defendant, as prayer 1 of the Summons asks that "the Plaintiffs jointly and/or severally do forthwith pay cost to the First Defendant for the sum of \$40,000.00," and the Summons is therefore irregular and/or defective on its face as being outside the purview of Order 23.*
 - (b) *The Summons seeks orders to be made jointly and severally against the Plaintiffs, plural, when there is only a single plaintiff in this action and such orders are not available against a single plaintiff, and the Summons is therefore irregular and/or defective on its face.*
 - (c) *The Affidavit in Support (of Summons for Security for Costs) contravenes Order 41 rule 5 in that the deponent relies on unattributed hearsay in paragraph 6 thereof, stating "I am aware that Regan Burke Berryman cancelled two building contracts and sold his vehicle. I have been told that he is now known to be living in Australia" without giving any sources and grounds for the deponent's statements on information and belief, which paragraph 6 should therefore be expunged from the said Affidavit.*
 - (d) *The Affidavit in Support (of Summons for Security for Costs) does not depose as to any facts within the knowledge of the deponent concerning the Plaintiff, which is a limited liability company, being ordinarily resident outside the jurisdiction but only makes allegations concerning two of the directors of the Plaintiff, and is therefore misdirected and not relevant to an application for security for costs from the Plaintiff and/or scandalous and should be expunged and struck out.*

(05) As to the first, the prayer (01) of the first defendant's summons praying for costs, not security for costs, is not a jurisdictional impediment to an application made pursuant to Order 23, rule (1) of the High Court Rules, 1988.

(06) As to the second, the first defendant admits the use of plural when referring to the plaintiff and says that it was an "oversight" on their part.

I do not consider that a substantial injustice arises from the "oversight" on the part of the first defendant.

It is a mere irregularity and it shall not nullify the proceedings.

(07) As to the third, Order 41, rule 5 argument, Counsel for the first defendant contends that "*paragraph 06 of the affidavit in support did not contravene the said order as it also contains the source of such a statement and information*".

(08) The paragraph (6) of the first defendant's affidavit in support of summons for security for costs is in these terms;

6. *THAT both directors and shareholders of the Plaintiff now reside outside of Fiji. Nyssa Berryman left Fiji on 21 January 2018. I am aware that Regan Burke Berryman cancelled two building contracts and sold his vehicle. I have been told that he is now known to be living in Australia. Annexed hereto marked "MH2" is a copy of Nyssa Berryman's post on Facebook confirming her move back to Australia.*

(09) Order 41, r.5 provides;

Contents of affidavit (O.41, r.5)

5. *-(1) Subject to Order 14, rules 2 (2) and 4 (2), to Order 86, rule 2 (1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an Affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

The wording of Order 41, r.5 (2) is perfectly clear to me; "***An Affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the source and ground thereof.***"

It is obvious from r.5 (2) itself that it operates as an exception from the primary rule of evidence stated expressly in Order 41, r.5 (1) that a person may only give evidence as the "facts" which he 'is able of his own knowledge to prove'. R.5 (2), by including statements of information or belief plainly allows the inclusion of hearsay. But such

statements will have no ‘probative value’ unless the sources and grounds of the information and belief are revealed. The purpose of r.5 (2) is to enable a deponent to put before the court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to provide but which, the deponent is informed and believes, can be provided by means which the deponent identifies by specifying the original sources and grounds of his information and belief.

By having to reveal original source (not the immediate source), the deponent affords a proper opportunity to another party to challenge and counter such evidence, as well as enabling the court to assess the weight to be attributed to such evidence.

The importance of these dual disclosures is obvious as was stated by **Lord Alverstone C.J** over a century ago in **J.L Young Manufacturing CO. Ltd. V J.L. Young Manufacturing Co. Ltd**¹ .

‘In my opinion some of the affidavits in this case are wholly worthless and not to be relied upon. I noticed that in several instances the deponents make statements on their Information and belief’ without saying what their source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion so-called evidence on ‘information and belief’ ought not to be looked at all, not only unless the Court can ascertain the source of the information and belief but also unless the deponent’s statement is corroborated by someone who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received in evidence in any shape whatever.’

As noted above, r.5 (2) provides for an exception on interlocutory proceedings, permitting the inclusion of hearsay and secondary evidence in affidavits filed in such proceedings. The relaxation is allowed only if the deponent discloses ‘the original source’ of his information and ‘the grounds’ of his belief.

- (10) Mr. Mohammed Harun, the director of the first defendant company, in paragraph six (06) of his affidavit in support states “*I am aware that Regan Burke Berryman cancelled two building contracts and sold his vehicle*”.

Is he speaking from his own knowledge? Is this confirmed? Is this statement corroborated by someone who speaks from his own knowledge?

The statement produced confusion in the mind of the court and not to be relied upon.

- (11) Finally, as to the fourth, it is not necessary, nor is it appropriate, for the court to consider in *limine* because it goes to the merits of the application for security for costs.

¹ (1900) 2 Ch. 753 at 754:

(C) **The grounds of the first and second defendants to make an order that the plaintiff company should give security for costs of the action.**

(12) Mr. Mohammed Harun, the director of the first defendant company, deposed in his affidavit in support;

6. *That both directors and shareholders of the plaintiff now reside outside of Fiji. Nyssa Berryman left Fiji on 21st January, 2018. I am aware that Regan Burke Berryman cancelled two building contracts and sold his vehicle. I have been told that he is now known to be living in Australia. Annexed hereto marked "MH2" is a copy of Nyssa Berryman's post on Facebook confirming her move back to Australia.*
7. *Since the plaintiff has ceased its operation in 2018 and is unable to pay any cost orders the Defendants seek an order for security for costs of \$40,000.00, approximately two thirds of the costs which they are likely to incur.*

(13) Mr. Robert Edward Lowres, the second defendant, deposed in his affidavit in support;

3. *I verily believe that the Plaintiff does not own any unencumbered assets or properties in Fiji and therefore is not in a position to pay costs if any costs are awarded against it if it does not succeed at the trial.*
4. *I have good reasons to believe that the shareholders of the Plaintiff Nyssa and Regan Berryman are both Citizens of Australia and are both residing in Australia at present and are therefore ordinarily resident out of the jurisdiction of this honourable Court.*
5. *Annexed hereto and marked as Annexure "A" is a copy of the Particulars of Shareholders and Directors filed with the Companies Office at Suva.*
6. *I believe that having inspected the Plaintiff's normal office premises that the Plaintiff is not operating at present and does not own any unencumbered assets within the jurisdiction of Fiji which could be used to pay costs in the event that a judgment is delivered against the Plaintiff.*
7. *I have filed a substantive defence to the Plaintiff's claim.*
8. *Even though one of the shareholders Regan Berryman was present in Fiji in 2018 and 2019 he has also now gone back to Australia.*
9. *I understand that Mr Berryman's other company is also being sued for a substantial debt incurred in Fiji.*
10. *A copy of a Winding Up Notice is annexed hereto and marked "B".*

(D) The plaintiff's opposition to both defendants' applications for security for costs.

(14) (Ms) Nyssa Berryman, the director of the plaintiff company deposed in her affidavit in opposition;

3. *I say that the Plaintiff is a company limited by shares duly incorporated and registered in Fiji, with its real estate office located at the Naisoso Island Marina Sales Office.*
4. *I crave leave to refer to the Affidavit of Robert Edward Lowres in Support of Second Defendant's Summons for Security for Costs (the "Lowres Affidavit"), Annexure "A".*
5. *The Second Defendant's own evidence is that the Plaintiff is a registered company under Fiji's Companies Act 2015, company number RCBS2010L2703.*
6. *The Plaintiff operates a real estate agency. It no longer operates as a residential resort caretaker since the wrongful termination of its contract by the First Defendant.*
7. *Annexed hereto and marked with the letters "NB 1" is a copy of the Plaintiff's current real estate license.*
8. *Annexed hereto and marked with the letters "NB2" is a photograph of the Plaintiff's real estate office, located at the Naisoso Island Marina Sales Office.*
9. *I say that the Plaintiff's real estate office still operates with Mr Rob Narruhn as its manager and sales agent, and Mr Narruhn visits that office regularly, although most of real estate agency business is handled through telephone calls, texts and emails.*
10. *I am informed by the salesperson Ms Diana Kuruvaki, who was sitting in reception at the material time, and I verily believe, that at about 2:21 pm on 25th October, 2019, Mr Lowres drove up to the Plaintiff's real estate office, but he did not get out of his vehicle or go inside and he did not speak with anyone there.*
11. *Annexed hereto and marked with the letters "NB3" is the photograph of Mr Lowres' vehicle leaving the Plaintiff's carpark taken by MS Kuruvaki.*
12. *I admit that my husband Regan Berryman and I currently reside and work in Australia, but we are not the Plaintiff nor are we parties to this action.*

13. *We are only two of the Plaintiff's four directors and shareholders as shown in Annexure "A" to the Lowres affidavit.*
14. *As to paragraphs 3 and 13 of the Lowres affidavit, I say that the Plaintiff operates a real estate agency in Fiji, and owns the assets of that business including the registered business name, website, goodwill and office furniture and equipment.*
15. *As to paragraphs 9 and 10, I say that my husband's other company is not the Plaintiff and is not a party to this action, and these allegations are totally irrelevant to this action and to the Second Defendant's application.*
16. *I say that the First and Second Defendants' applications are obviously hopeless, as the Second Defendant's own evidence establishes that the Plaintiff is resident in this jurisdiction.*

(E) Consideration and the determination

- (15) *The summons filed by the first defendant on 20.12.2019 states "This summons is made pursuant to the provisions of Order 23 rule 1 of the High Court Rules and the inherent jurisdiction of this honourable Court."*
- (16) *The summons filed by the second defendant on 30.01.2020 states; "This application is made pursuant to Order 23 Rule 1 and 2 of the High Court Rules 1988 and the inherent jurisdiction of this honourable Court".*
- (17) I should quote Order 23, rule 1 which provides;

Security for costs of action

- "(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 is 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."

The use of the words "having regard to all the circumstances of the case, the Court thinks it just to do so, it may order", confers upon the Court a real discretion on whether or not to order **security for costs**.

Order 23, rule 1 (a) is quite clear.

As I read Order 23, rule 1(a), and when reduced to its essentials, the plaintiff has to be ordinarily resident out of the jurisdiction. **This is the statutory foundation for an application seeking of security for costs to be made pursuant to Order 23, rule 1(a) of the High Court Rules, 1988.**

As I understand the evidence, it is not in dispute that;

- ❖ The Plaintiff is a Fiji registered Company
- ❖ It's registered office is in Fiji

- (18) The second defendants **own evidence** is that the plaintiff is a registered company under the Fiji's Companies Act, 2015, Company number RCBS 2010L2703. Annexure marked "A" referred to in the affidavit of Mr. Robert Edward Lowres, sworn on 20-01-2020.
- (19) The evidence does show that the plaintiff no longer operate as a residential resort caretaker. The plaintiff operates as a real estate agency. I take into account the annexure marked "NB-1" in the affidavit of Nyssa Berryman sworn on 27-03-2020, a copy of the plaintiff's current real estate license.
- (20) The plaintiff's real estate office is located at Naisoso Island Marina Sales Office. I take into account the annexure marked "NB-2" in the affidavit of Nyssa Berryman sworn on 27-03-2020.

I must say that the plaintiff has a registered address and place of business in Fiji.

- (21) The plaintiff is a limited company. The annexure "A" (the copy of a certificate of registration of company on change of name, Form A7, issued by the Registrar of Companies of the Republic of Fiji) shows that the plaintiff is a registered company under the Fiji's Companies Act, 2015. I must say that the plaintiff is resident within the jurisdiction.

Therefore, the defendants have no legal standing to bring these proceedings for security for costs of the action. The plaintiff has to be ordinarily resident out of the jurisdiction. **This is the statutory foundation for an application seeking of security for costs to be made pursuant to Order 23, rule 1(a) of the High Court Rules, 1988.**

- (22) A further point was put forward. The defendants contend that “*the shareholders of the plaintiff, Nyssa and Regan Berryman are both citizens of Australia and are both residing in Australia at present and are therefore ordinarily resident out of the jurisdiction of the Court*”.
- (23) It is important to remember that Mr & Mrs Berryman are not parties to this action. Therefore, the whereabouts of the shareholders of the plaintiff company are not relevant. Order 23, rule 1(a) clearly requires that the defendants to show the plaintiff is ordinarily resident overseas. It is trite law that a limited company is a separate legal entity from its directors and the shareholders. Solomon v Solomon & Co.²
- (24) On the hearing of the application, the defendants’ Solicitors made an attempt to seek an order for security for costs of the action on the ground that the corporate veil should be pierced, alleging that the plaintiff company was used to perpetrate fraud.

This is most unsatisfactory.

There is no notice at all in the defendants’ summons for security for costs and the supporting affidavit. I cannot accept that it would be in any way proper to entertain such a submission which sprung on the plaintiff and the Court at the last minute. I get the distinct impression that Counsel for the defendants’ argument on ‘piercing the corporate veil’ was formulated and perhaps conceived as the proceedings developed.

(Ms) Muir, Counsel for the plaintiff submits and I agree that the defendants’ applications filed before the Court **do not** plead that the corporate veil should be pierced and do not make any allegations of fraud or sham.

- (25) Finally, the defendants’ submit that “*the plaintiff is not operating at present and does not own any unencumbered assets within the jurisdiction of Fiji which could be used to pay costs in the event that a judgment is delivered against the plaintiff*”.
- (26) On the other hand, the plaintiff says that it operates a real estate agency in Fiji, and owns the assets of that business, including the registered business name, website, goodwill and office furniture and equipment.
- (27) I take into account annexure NB-1, in the plaintiff’s affidavit in opposition sworn on 27-03-2020, which is a copy of the plaintiff’s license to carry on business as a real estate agent, showing its place of business as Marina Office, Naisoso Island, Nadi which is admittedly in the jurisdiction.
- (28) I also take into account annexure NB-2, a photograph of the plaintiff’s real estate office, located at the Naisoso Island Marina Sales Office.

² (1897) A.C 22.

- (29) It was argued by counsel on behalf of the plaintiff that the plaintiff has ample assets to satisfy any costs of the defendants if they are successful in the action. (Also see, paragraph 14 of the plaintiff's affidavit in opposition.)
- (30) The mere fact that '*the plaintiff is not operating at present*' (of course the plaintiff denies) ***does not*** entitle the defendants to security for costs. I think that in exercising my discretion it is right to take into account the fact that the defendants did not submit and there is no evidence to show that the plaintiff's business had been sold to another.
- (31) If it appears by any credible evidence that there is reason to believe that if the defendants be successful in their defence, the assets of the plaintiff company will be insufficient to pay their costs, the court can make an order that the plaintiff company should give security for the costs of the action.
- (32) **Where a company is in liquidation**, this fact gives sufficient reason to believe that if the defendant be successful in his defence, the assets of the company will be insufficient to pay his costs, **unless evidence to the contrary is given**.
- (33) In the present case, the plaintiff, the limited company, is not in liquidation. The company is not insolvent. **Therefore, there is no inference that the assets will be insufficient to pay the defendants costs if they succeed. That being so, the plaintiff company has no evidential burden. The burden of proof lies with the defendants.**

It is for the defendants to show by credible evidence that the assets will be insufficient to pay the costs. In the present case, there is nothing to show that the assets will not be sufficient to pay the defendants costs if they are successful.

- (34) I must say that the making or refusal of the order for security for costs of the action is a matter of discretion of the court. I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case.

The second defendant further rests his case upon "*I verily **believe** that the Plaintiff does not own any unencumbered assets or properties in Fiji and therefore is not in a position to pay costs if any costs are awarded against it if it does not succeed at the trial.*" (See, paragraph (3) of the affidavit in support of Mr. Robert Lowres.)

This statement is wholly worthless and not to be relied upon. The second defendant, Mr. Lowres, speaks what he believes, without giving the slightest intimation with regard to what his belief is founded on.

At the costs of some repetition, **I state that the plaintiff, the limited company, is not in liquidation. The company is not insolvent. Therefore, there is no inference that the assets will be insufficient to pay the defendants costs if they succeed. That being so, the plaintiff company has no evidential burden. The onus lies with the defendants.** It is for the defendants to show by credible evidence that the assets will be insufficient to

pay the costs. In the present case, there is nothing to show that the assets will not be sufficient to pay the defendants costs if they are successful.

The second defendant deposed in paragraph (6) of his affidavit;

- (6) *I believe that having inspected the Plaintiff's normal office premises that the Plaintiff is not operating at present and does not own any unencumbered assets within the jurisdiction of Fiji which could be used to pay costs in the event that a judgment is delivered against the Plaintiff.*

In reply, the plaintiff deposed in paragraph (10) of its affidavit;

- (10) *I am informed by the salesperson Ms. Diana Kuruvaki, who was sitting in reception at the material time, and I verily believe, that at or about 2.21pm on 25th October, 2019, Mr Lowres drove up to the Plaintiff's real estate office, but he did not get out of his vehicle or go inside and he did not speak with anyone there.*

There was no response from the second defendant. It is a matter of prudence that the second defendant should reply if indeed he had a reply. In the absence of a reply, I hold the inference inescapable that what the plaintiff has said to be true.

I am very far from satisfied that there might be insufficient assets to meet the costs of the defendants if they are successful in the action.

- (35) Weighing all these factors and all the circumstances of the case, I do not think that it is right to grant security for costs. I will dismiss the application for security for costs.
- (36) The plaintiff seeks indemnity costs. Counsel argues that the defendants' solicitors knew that the plaintiff is resident in Fiji and should have advised their clients the requirement under Order 23, rule 1 to show that the plaintiff should be ordinarily resident out of the jurisdiction. Counsel placed heavy reliance on **Kento (Fiji) Ltd v Naobeka Investment Limited And Others**³,
- (37) In the present case, there was no sufficient ground to commence and continue proceedings seeking security for costs because;
- The Plaintiff is a Fiji registered Company
 - It's registered office is in Fiji
 - The plaintiff is not in liquidation.
- (38) In these circumstances, the proceedings against the plaintiff seeking security for costs were hopeless from the outset. The proceedings for security for costs against the plaintiff are vexatious, in the shorter Oxford Dictionary sense of legal proceedings instituted "without sufficient grounds for the purpose of causing trouble or annoyance to the

³ High Court Lautoka, Civil Action No. HBC 100 of 2012

plaintiff". The other possibility is that the proceedings seeking security for costs against the plaintiff was pursued for no good purpose at all due to carelessness.

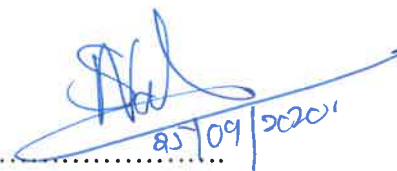
- (39) I cannot help thinking that the defendants commenced and continued proceedings seeking security for costs for the purpose of causing trouble or annoyance to the plaintiff. There has been reprehensible conduct by the defendants.

I wish to emphasize that the defendants resort to proceedings seeking security for costs against the plaintiff in a case where the plaintiff is a Fiji resident Company, its registered office is in Fiji and the company is not in liquidation, is a high risk strategy, the penalty for which, in my view should be an order for costs on an indemnity basis. I am satisfied there is reprehensible, oppressive and vexatious conduct by the defendants, the penalty for which in my view, should be an order for costs on indemnity basis.

[F] ORDERS

- (1) The defendants' application for security for costs is dismissed.
- (2) The plaintiff is entitled to indemnity costs on this application.
- (3) I order that each of the defendant pay indemnity costs to the plaintiff, that is to say, they will pay all reasonable legal fees and all reasonable disbursements incurred by the plaintiff in defending these proceedings from filing of affidavit in opposition until now. If these reasonable bills of costs are not agreed between counsel and then they will be assessed and settled.




Jude Nanayakkara
[Judge]

**High Court – Lautoka,
Friday, 25th September, 2020**

Solicitor for the plaintiff – Siwatibau and Sloan, Suva
Solicitor for the first defendant – Howards Lawyers, Suva
Solicitor for the second defendant – R. Patel Lawyers, Suva