IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 157 of 2021

BETWEEN	:	**ARVINDRA KUMAR** of 1175 Chesepeake Drive, Pittsburg, California, USA, Driver.
		Plaintiff
AND	:	**MERCHANT FINANCE & COMPANY LIMITED** a limited liability company having its registered office at Level 1, 91 Gordon Street, Suva.
		First Defendant
AND	:	**HOME FINANCE COMPANY LIMITED** a body corporate duly registered as a Bank carrying on business as Bankers in Suva and elsewhere throughout Fiji and having principal place of business in Suva.
		Second Defendant
AND	:	**DOMINION TRANSPORT LIMITED** a limited liability company having its registered office at Malolo, Nadi.
		Third Defendant
AND	:	**THE REGISTRAR OF TITLES**
		Nominal Defendant
Before	:	Master U.L. Mohamed Azhar
Appearance	:	Ms. S. Veitokiyaki for the Plaintiff Ms. P. Singh for the First Defendant
Date of Ruling	:	18.07.2023

RULING

01. The first defendant took out this summons pursuant to the Order 23 rule 1 (1) of the High Court Rules and moved the court to order the plaintiff to provide such security for the cost determined by the court and to stay the action until the plaintiff provides such security.

02. The Order 23 of the High Court Rules gives discretion to the court to order for security for cost and deals with the other connected matters. Whilst the rule 1 deals with the discretion of the court, the other rules 2 and 3 deal with the manner in which the court may order security for cost and additional power of the court. The rule 1 reads as follows:

> **Security for costs of action, etc (O.23, r.1)**
>
> 1.-(1) Where, on the application of a defendant to an action or other proceedings in the High Court, it appears to the Court –
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> (a) that the plaintiff is ordinarily resident out of the jurisdiction, or
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> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a normal 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
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> (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,
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> 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 proceedings as it thinks just.
>
> (2) The court shall not require a plaintiff to give security by reason only of paragraph (1) (c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.
>
> (3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

03. The court has to exercise this discretion considering all the circumstances of the case. Sir Nicolas Browne Wilkinson V.C in **Porzelack K G v. Porzelack (UK) Ltd**, (1987) 1 All ER 1074 at page 1077 as follows:

> "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".

04. The plaintiff was willing to deposit a sum of $ 5,000.00 as security for costs when the current summons was filed. However, the defendant sought a sum of $ 18,000.00. The parties thereafter continued to negotiate the quantum. Even after hearing of the summons, the solicitors for the parties moved the court to adjourn the matter for the parties to come to an amicable amount to be deposited as the security for costs. The first defendant then agreed for sum of $ 13,000.00. However, the plaintiff did not agree to the same and insisted on the sum of $ 5,000.00. Finally the parties moved the court to make the ruling. Since the parties only disputed the quantum, it not necessary to discuss the issue whether the court should order for costs or not. It is the quantum that is in dispute and the court should decide the quantum only.

05. There is no hard and fast rule which guides the court in deciding the amount of the security that a party may be ordered to provide. The general practice is that, the court, in its discretion, will fix such sum as it thinks just, having regard to all the circumstances of a given case. In a very old case of **Dominion Brewery Ltd v Foster** 77 LT 507, Lindley MR said this at 508:

> *'It is obvious that, as to a question of quantum such as this, you cannot lay down any very accurate principle or rule. The only principle which, as it appears to me, can be said to apply to a case of the kind is this, that you must have regard, in deciding upon the amount of the security to be ordered, to the probable costs which the defendant will be put to so far as this can be ascertained. It would be absurd, of course, to take the estimate of the managing clerk to the defendant's solicitors and give him just what is asked for. You must look as fairly as you can at the whole case.'*

06. What is required from the court is to make a fair amount in a possible way at the whole case. It is neither on full indemnity basis, nor what is estimated by the law clerk of defendant's solicitors. **The Supreme Court Practice 1999** (White Book), in Volume 1 at page 440, and in paragraph 23/3/39, explains this practice and states that:

> *The amount of security awarded is in the discretion of the Court, which will fix such sum as it thinks just, having regard to all the circumstances of the*

*case. It is not always the practice to order security on a full indemnity basis. If security is sought, as it often is, at an early stage in the proceedings, the Court will be faced with an estimate made by a solicitor or his clerk of the costs likely in the future to be incurred; and probably the costs already incurred or paid will only a fraction of the security sought by the applicant. At that stage one of the features of the future of the action which is relevant is the possibility that it may be settled, perhaps quite soon. In such a situation it may well be sensible to make an arbitrary discount of the costs estimated as probable future costs but there is no hard and fast rule. On the contrary each case has to be decided on its own circumstances and it may not always be appropriate to make such a discount (**Procon (Great Brotain) Ltd v. Provincial Building Co. Ltd** [1984] 1 W.L.R. 557; [1984] 2 All E.R. 368, CA). It is a great convenience to the Court to be informed what are the estimated costs, and for this purpose a skeleton bill of costs usually affords a ready guide (cited with approval by Lane J. in **T.Sloyan & Sons (Builders) Ltd v. Brothers of Christian Instruction** [1974] 3 All E.R. 715 at 720).*

07. The courts have ordered the plaintiffs to deposit substantial amount as security for cost in the following cases: **Sunflower Aviation Ltd v Civil Aviation Authority of the Fiji Islands** [2015] FJHC 336; HBC250.2008 (8 May 2015); **Peters v Seashell @ Momi Ltd** [2015] FJHC 581; HBC32.2012 (11 August 2015); **Aerolink Air Services Pty Ltd v Sunflower Aviation Ltd** [2014] FJHC 817; HBC013.2011 (12 November 2014), **Neesham v Sonaisali Island Resort Ltd** [2011] FJHC 642; Civil Action 262.2007 (13 October 2011).

08. It is also informed that, the plaintiff's previous action against the first defendant (Civil Action No. 154 of 2018) was struck out and the plaintiff was ordered to pay costs in sum of $ 1,500 to the first defendant. However, the plaintiff failed to pay the said costs till to date. The first defendant could not recover the costs in that case too. Simon Brown LJ observed in **Olakunle Olatawura v Abiloye** [2002] 4 All ER (CA) at page 910 as follows:

> ..... *the more difficult it appears to be for the person concerned to raise the money, the more obvious becomes the need for an order for security to protect the other party against the risk of incurring irrecoverable costs. The court will have to resolve that conundrum as best it may.* (Emphasis added).

09. In this case too, the plaintiff was not even available to depose the affidavit in opposition for the summons for security for costs. The affidavit was sworn by plaintiff's attorney. The affidavit does not give any evidence of financial sources from which the costs could be recovered by the first defendant, if ordered so. The should be a reasonable amount of security for costs as it appears that, plaintiff can avoid the costs as he did in other case (154 of 2018) as well. Considering all the circumstances, I decide that a sum of 13,000.00 would be just in this case. Furthermore, given the plaintiff's past experience of not paying the

costs ordered by the court, I decide that, the proceedings in this case should be stayed until the amount ordered in this case is deposited in court.

10. In result, the final orders are;

a. The plaintiff should deposit a sum of FJ $ 10,000.00 at this registry as the security for costs within a month from today,

b. The matter to be mentioned on 26.08.2024 to check compliance by the plaintiff,

c. If the plaintiff fails to comply with this requirement, the plaintiff's action should be stayed, and

d. The cost for this application will be in the cause.

U.L. Mohamed Azhar
Master of the High Court

At Lautoka
18.07.2024

HIGH COURT OF FIJI
LAUTOKA