

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCA NO. 1 OF 2012

BETWEEN: ANDREAS SUPPER  
PLAINTIFF

AND: MAUI PALMS (FIJI) LIMITED  
DEFENDANT

Appearances: Mr. D. Sharma for the Plaintiff.

Mr. I. Fa for the Defendant.

Date /Place of Judgment: Friday 14 March 2014 at Suva.

Coram: The Hon. Justice Anjala Wati.

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**JUDGMENT**

Catchwords:

*Employment Law- powers to order security for costs- practice and procedure under the High Court Rules 1988.*

Legislation:

*The Employment Relations Promulgation 2007 ("ERP").*

*The High Court Rules 1988 ("HCR").*

*The Cause*

1. This is the defendant's application that the plaintiff provide security for costs in the amount of \$30,000 and until such amount is deposited, the proceedings be stayed.
2. The application is made pursuant to order 23 Rule (1) (1) (a) and (b) of the HCR 1988.

*The Substantive Cause*

3. The plaintiff has filed an employment action against the defendant. The cause of action is failure to supply records, non payment of wages and dues, unlawful cancellation of plaintiff's shares in a company, unlawful dismissal from employment, and unlawful removal as a director of the company.
4. All the claims are being defended.
5. Initially, by way of interim reliefs, the plaintiff had sought the following orders
  - a. *That the defendant and its agents and servants be restrained from terminating or seeking to terminate the applicant's employment with the defendant until further notice of this Honourable Court;*
  - b. *That in the event that the defendant or its agents and servants have purportedly terminated the applicant's employment with the defendant then such decision be stayed forthwith until the determination of this action;*
  - c. *That the defendant and its agents and servants be restrained from removing or seeking to remove the applicant as a Director of the defendant until further notice of the Court;*
  - d. *That in the event that the defendant or its agents and servants have purportedly removed the applicant as a Director with the defendant then such decision be stayed forthwith until the determination of this action;*
  - e. *That the defendant be ordered to immediately produce the wages record for the applicant;*

- f. That the defendant be ordered to pay to the applicant all wages and FNPF dues to him for two periods (as assessed by the Honourable Court) from 2006 until 2009 and from 2010 until 2012;*
  - g. That the Immigration Department be restrained from acting on only purported termination of the applicant's employment with Maui Palms (Fiji) Limited until further order of the Court and that any such decision made by the Immigration Department acting on the premise that the applicant's employment contract with Maui Palms (Fiji) Limited being terminated be stayed forthwith until the determination of this action;*
  - h. That the Court impose such other compliance orders as may be deemed necessary;*
  - I. General damages for wages to be paid until 2014; and*
  - J. That the defendant be ordered to pay costs of this application.*
6. The plaintiff's application was dismissed entirely with an order that the costs of the application be in cause.

***The Grounds/Submissions of the Defendant***

- 7. Ms. Christine Badia Nkanka deposed an affidavit through which she asserts that the plaintiff is an Australian Citizen. He is neither a Fiji Citizen nor a permanent resident in Fiji.
- 8. He had a work permit pursuant to being a Director of the defendant company. On 7 March 2012 he was removed as the Director. The immigration department had subsequently cancelled his work permit. If the Court was to grant an order for costs in favour of the defendant, it would be unenforceable as the plaintiff is now deported from the jurisdiction.
- 9. The defendant denies that there ever was a contract of employment between the parties. The defendant says that there was or is other means of resolving this dispute which is mediation under s.109 of the ERP.
- 10. It has till date cost the defendant approximately \$35,000 in legal fees. This figure will increase if the matter proceeds to trial. The plaintiff has an outstanding liability in

Australia in the sum of \$121,613.15. In that regard the plaintiff will be unable to pay the costs of this proceeding if ordered to do so.

*The Grounds/Submissions of the Plaintiff*

11. Mr. Sharma argued that this is an employment case under the ERP and amongst the many causes of actions; the claim is for unpaid wages. Not paying wages to an employee is a serious offence in a country. Although the HCR allows for security for costs, the ERP is silent on it and there is a good reason for not incorporating that provision in the ERP. If that provision was incorporated in ERP, it would be a major deterrent to some employees in bringing a case against the employers.
12. Mr. Sharma said that one can argue that under s.238 (2) (b) of the ERP, the HCR will apply where the provision is silent on practice and procedure but normally the Court should not grant an order against an employee to pay security for costs.
13. Mr. Sharma said that the Court can award minimum costs but asking for 30,000 is like asking for indemnity cost.

*The Law and Analysis*

14. The ERP is silent on the aspect of security for costs. S.238 (2) (b) of the ERP states that where no provision is made for a particular circumstance, the HCR apply to the proceeding before the ERC.
15. S.236 of the ERP states that the Court in proceedings may order a party to pay to any other party costs and expenses (including expenses of witnesses) as it thinks reasonable, and may apportion the costs between the parties or any of them as it thinks fit, and may at any time vary or alter the order in the manner it thinks reasonable.
16. Under s.236 of the ERP, the Court has powers to make interim and substantive orders for costs. If the ERP is silent on security for costs I will turn to Order 23 (1) (1) (a) of the HCR to derive the powers to consider the question of security for costs.

17. Indisputably, the plaintiff is out of the jurisdiction. He has been deported from Fiji. He does not dispute that he cannot pay security for costs or that he owes money in Australia to an extent of more than AUD\$100,000. He does not say that ordering costs will hamper his ability to continue the action or stultify the proceedings. Apart from arguing the issue of jurisdiction and that the amount sought is too high, there is no other factual or legal defence to the application.
18. I find that under Order 23 Rule 1 (1) (a) of the HCR and s.238 (2) (a) of the ERP I have jurisdiction to consider the question of security for costs.
19. The only matter I have to now ascertain is the next issue raised by the defendant being the quantum.
20. The defendant states that she now had spent about \$35,000 in legal costs. That is alarming. In an employment action where the proceedings have reached only a stage where the pleadings have closed with one interlocutory injunction application argued in Court, it is inconceivable how a party can incur \$35,000 in legal costs. The filing fee by any calculation would not have exceeded \$800. The photocopy fee would not have exceeded \$1,000. The lawyers fee cannot at this stage be so exorbitant to make the entire fee \$35,000.
21. Normally a practitioner who asks for security for costs must file an updated bill of cost indicating the work done and costs incurred at every stage and future estimate of the work required to be done and the potential costs that would be expected. No such bill of cost was filed.
22. The amount of \$35,000 is more than a person will get if he or she is successful in an application for indemnity costs. So far I do not find any actions of the plaintiff which may lead to a situation where indemnity costs could be granted against him.
23. To secure payment of any order for costs that may be given against the plaintiff, I am minded to make an order for security for costs but only to an extent of \$5,000 which to my mind would be the final order for cost, if the defendant is successful.

*Final Orders*

24. I make an order for security for costs in the sum of \$5000 to be paid by the plaintiff within 2 months.
25. The costs of this application shall be costs in cause.

**Anjala Wati**

**Judge**

**14.03.2014**

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**To:**

1. *Mr. D. Sharma for the Plaintiff.*
2. *Mr. I. Fa for the Defendant.*
3. *File: ERCC No.1 of 2012.*