IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 51 of 2016

BETWEEN : **ALFAAZ ABDUL ROUF KHAN**

PLAINTIFF

AND : **HASIM KHAN**

DEFENDANT

Appearances : Vuataki Law for the Plaintiff
Maqbool & Co. for the Defendant

Ruling : 13 April 2017

RULING

1. The Defendant seeks an order for the Plaintiff to pay security for costs pursuant to Order 23 Rule 1 (a) and Order 25 Rule 2 of the High Court Amendment Rules 1993 and the inherent jurisdiction of the Court.

2. In support of the summons, the Defendant deposed an affidavit averring that the Plaintiff permanently resides in Australia and has no family or possessions in Fiji; that the Plaintiff falsely stated that he resides in Namaka, Nadi; does not have any assets in Fiji capable of paying costs, and must therefore pay security for costs in the sum of $15,000.

3. A scanned copy of an affidavit allegedly sworn by the Plaintiff was annexed to an affidavit averred by Miliakere Tamani, Chief Clerk for

the Plaintiff's solicitors. Ms Tamani deposed that the Plaintiff's original affidavit in opposition was being sent to Fiji by courier and that once with their office, would be sent for filing in Court. When this application came up for hearing, the original affidavit still had not been filed.

4. Counsel for the Defendant objects to the use of the scanned copy of the Plaintiff's affidavit in opposition, saying there is no proper affidavit before the Court. I agree. The Plaintiff's original affidavit has not been filed and no application has been made for leave to use the scanned copy of the said affidavit in these proceedings.

5. When this matter came up for hearing, counsel appearing on instructions of the Plaintiff's counsel told the Court that instructing counsel had no valid practising certificate but had instructed him to advise the Court that they would be relying only on written submissions. He was cautious and stated he did not think he ought to appear given that instructing counsel did not have a current practising certificate.

6. Mr. Sen objected to an adjournment, saying that the Plaintiff's counsel could have informed him about her predicament.

7. For the Court, I consider that counsel would have known about the expiry of her practising licence long before it expired. As a prudent counsel therefore, she could have applied early for renewal of licence, or file an application for adjournment of hearing, or even informed counsel on the other side of her predicament. She did none of these things. The instructions given to counsel who appeared and then withdrew his appearance at the hearing, could not be carried out given the status of her practising certificate. In light of the above, I directed for the hearing to proceed.

8. It is submitted for the Defendant that the Plaintiff does not reside in Fiji and has neither money nor assets in Fiji capable of paying costs. The nominal costs ordered against the Plaintiff were only paid after an unless order was made for payment.

The law

9. Order 23 Rule 1 (a) of the High Court Rules (the HCR) provides:

> Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court that the plaintiff is ordinarily resident out of the jurisdiction, 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.

10. The very wording of the rule makes it clear that the Court has a real discretion whether to award security for costs or not. (See also 23/3/3 of *The Supreme Court Rules 1999*). The White Book goes on to say:

> ...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, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. In particular, the former O. 65 r.6_B, 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 costs was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1). (Emphasis mine)

11. At 23/3/4, the White Book says:

> The onus is on the defendant to prove that the plaintiff is "ordinarily resident" out of the jurisdiction. The question is one of fact and degree; it does not depend upon the duration of the residence, but upon the way in which a man's life is usually ordered, and it contrasts with

occasional or temporary residence (See *Levene v. I.R.C.* [1928] A.C. 217 and *Lysaght v. I.R.C.* [1928] 2 A.C. 234...

In *R. v London Borough of Barnet, ex p. Shah* [1983] 1 All E.R. 226, HL, it was held that, in the context of the Education Acts, the phrase "ordinarily resident" should be construed according to its ordinary and natural meaning, and that a person is ordinarily resident in a place if he habitually and normally resides in such place from choice and for a settled purpose, apart from temporary and occasional absences, even if his permanent residence or "real home" is elsewhere.

Analysis

12. In this case, the Defendant merely deposes that the Plaintiff is permanently resident in Australia. No evidence has been placed before the Court in support of this allegation or even to say that the Plaintiff is "ordinarily resident" in Australia. The fact that I have rejected the scanned copy of the Plaintiff's affidavit does not, of its own, mean that I ought to automatically grant the application before me. I consider I need to be satisfied first and foremost, that the Plaintiff is ordinarily resident out of the jurisdiction before going on to consider all the other circumstances of the case on the question of whether to order payment of security for costs.

13. The authorities are clear that the Defendant bears the onus of proving that the Plaintiff is ordinarily resident out of the jurisdiction, the question being one of fact and degree.

14. In this case, I am not satisfied, on the evidence before the Court, that the Defendant has discharged this burden to the Court's satisfaction, such as to warrant the exercise of the Court's discretion to make an order of security for costs against the Plaintiff.

15. In light of the above, I do not think the question of the existence and adequacy of assets and properties capable of paying costs arises.

16. On the evidence before me, and having heard and considered counsel's submissions and the law, I come to the firm conclusion that the application for security for costs has not been made out. I refuse the application accordingly.

17. Orders:

1. The application for security for costs is refused.

2. Costs for the Plaintiff, in the cause.

HIGH COURT OF FIJI
LAUTOKA

S.F. Bull
Acting Master