

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 304 of 2014

BETWEEN : IMEX INDUSTRIES PTY LTD a limited liability company incorporated in Australia and having its registered office at Mack Partners Pty Ltd, 13 Marion Street, Bankstown, NSW 2200, Australia trading as MAX KOLECT.

1<sup>ST</sup> PLAINTIFF

BETWEEN : IMEX INDUSTRIES PTY LTD a limited liability company incorporated in Australia and having its registered office at Mack Partners Pty Ltd, 13 Marion Street, Bankstown, NSW 2200, Australia trading as RECLAME ME.

2<sup>ND</sup> PLAINTIFF

BETWEEN : IMEX INDUSTRIES PTY LTD a limited liability company incorporated in Australia and having its registered office at Mack Partners Pty Ltd, 13 Marion Street, Bankstown, NSW 2200, Australia trading as YOUR THIS AND THAT.

3<sup>RD</sup> PLAINTIFF

AND : SAAD AMJAD trading as POT LUCK of 40 Bowalu Street, Lautoka, Businessman.

1<sup>ST</sup> DEFENDANT

AND : NAZMEEN NISHA trading as POT LUCK SIGATOKA of Main Valley Road, Sigatoka, Businesswoman.

2<sup>ND</sup> DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Ravi Singh with Ms Lagilevu - for the Plaintiff  
Ms. Lanyan - for the Defendant

Date of Ruling : 10<sup>th</sup> July, 2018

RULING

*[1<sup>st</sup> and 2<sup>nd</sup> Defendant's Application for Security for Costs pursuant to Order 23 of the High Court Rules, 1988 and the Inherent Jurisdiction of the Court]*

**A. INTRODUCTION**

1. On 13<sup>th</sup> May, 2016, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed Summons for Security for Costs against the Plaintiff and sought for the following Order-
  - (a) *That the Plaintiff do deposit with the Court within fourteen (14) days of making such order to give security for the costs of the Defendants in the sum of \$30,000.00 or such sum as the Court may think just and that pending he giving of such security;*
  - (b) *That until such security in the sum of \$30,000.00 is given the proceedings herein be stayed;*
  - (c) *That in default of such Security in the sum of \$30,000.00 being given the proceedings herein be dismissed with costs.*
  - (d) *That costs of this Application be awarded to the Defendants on an indemnity basis;*
  - (e) *Further and/or other relief as this Honourable Court may deem just.*
2. This application is made pursuant to *Order 23 Rule 1 (a) of the High Court Rules, 1988 and the Inherent Jurisdiction of this Court.*
3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants rely on the Affidavit in Support deposited by the Nazmeen Nisha.
4. The Plaintiff relies on the Affidavit in Response deposited by Asad Khan.

**B. THE LAW ON SECURITY FOR COSTS**

5. *Security for costs of action, etc. (O.23, r.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) .....
- (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.*

*The Rule states that "having regard to all circumstances of the case, the Court think, it just to do so, it may order" confers upon the Court a discretion whether or not to order security for costs.*

**C. ANALYSIS AND DETERMINATION**

6. The issue for this court to determine is 'Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to Security for Costs' as sought for in their application?
7. Mr. Asad Khan in his capacity as the Director of the Plaintiff Company deposited an affidavit on 21<sup>st</sup> July, 2016 and stated : ' I have lived and worked in Sydney, Australia and have recently moved to Fiji and have

set up a Company known as Black Salt Holdings Ltd. The Company that my wife and I operated in Australia was Imex Industries Pty Ltd (Imex) and other trading names under which Imex operated. Through Imex we would supply goods and trade with the Defendants business in Fiji. In 2014 my wife and I relocated to Fiji and wrapped up our interests in Australia. This included the selling of our homes and ceasing the operations of our business. Our intention is to live in Fiji and to operate business in Fiji. We have registered the Company Black Salt Holdings Ltd.... Our business in Fiji was set up in 2014 with our two retail outlets and a bulk store. The Defendants will not have much difficulty in enforcing any costs that may be awarded against the Plaintiffs because the sole Director and shareholder of Imex am now based in Fiji."

8. The **Plaintiff's** submitted that they have sufficient properties or assets within the Jurisdiction to satisfy any costs awarded in favour of the Defendants. The Defendants have not justified their claim that the Plaintiff's do not have any assets and properties within the Jurisdiction to meet their costs. They have only based their security for costs applications on the grounds that the Plaintiffs are not resident within the Jurisdiction. Further, the Defendants have not established a basis for seeking \$30,000 costs and the practice has been that one third of the total possible costs is usually awarded.
9. The **Defendants** contention is that the Plaintiffs does have a prima facie case since there is no reasonable cause of action. The **Plaintiffs** admit that the Agreement between the parties was not written and they admit all orders for goods were made verbally with no documentation. Grant of security for costs will not stifle the Plaintiff's claim since there is no evidence that they will be financially affected and/or will be prejudiced.
10. **Security for Costs** is not ordered because a Plaintiff is ordinarily resident outside of Fiji. The Court must consider other factors incidental to the proceedings.
11. Reference is made to the case of *Inspired Destinations (Inc) Ltd v Bayleys Real Estate (Fiji) Ltd [2015] FJHC 812; HBC180.2013 (20 October, 2015) wherein the issue of security for costs was discussed and observed as follows:*

*"That the Plaintiff is a non-resident and has no assets in Fiji is a circumstance of great weight favouring a security order. I am of course mindful to the fact that the making of an Order for security for costs is discretionary and the Courts no longer adapt a rigid rule. [see, M. J. Raine, "In locals we trust - Foreigners pay cash; rethinking security for costs against Foreign Residents (2012) 1 JCIVP 210 at 214P]."*

*'Returning to the instant case, although the grounds for security for costs have been proved by the Defendants, I am not bound to make an order.'*

12. In the High Court of Fiji in *Furuuchi Susian Company Limited v Hiroshi Tokuhisa and Others Civil Action No.95 of 2009*, Justice Byrne ordered Security for Costs against a Plaintiff company incorporated and operating in Japan as the Plaintiff was ordinarily resident out of the jurisdiction. In reaching this decision, Justice Byrne relied on what Sir Nicolas Brown Wilkinson V.C said in *Porzelsack KG v Porzelsack (UK) Limited 1987 1 All ER 1074 at p.1076*

*"That 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 the court against which it can enforce a 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 resident within the jurisdiction".*

13. The **Defendants** will only be entitled to costs if the Plaintiff's claim is ultimately dismissed with costs. The Defendants are not entitled to security for costs as of right. If the Court feels that the Plaintiffs have a good claim with good prospects for success, it may not be inclined to make any order for security for costs.

14. In *Ali v Chandra [2014] FJHC 710; HBA14.2013 (30 September 2014)*, Judge Kumar also saw fit to highlight a portion from *Porzelack K.G v. Porzelack (supra)* and further enunciated as follows:;

3.26 The threshold for exercise of discretion is that Respondent (Plaintiff) "does not ordinarily reside in Fiji".

3.27 The term "resident" or "ordinarily resident" cannot be given a precise definition.

3.28 Whether a person is resident or ordinarily resident will depend on various factors such as person's address, type of employment, duration of stay at a particular address, ownership of real properties and so on.

3.29 Once the Court determines that the Respondent (Plaintiff) "does not reside" or "does not ordinarily reside" in the country then Court has to exercise its discretion as to whether to make an Order for security for costs or not.

3.30 Of course in exercising discretion whether to make an Order for security costs, Court needs to take various factors into account. Some of the factors which Court may take into account are available funds within jurisdiction properties owned by the Respondent within jurisdiction and their values; (*Sharma v. Registrar of Titles*) chances of Plaintiff's claim succeeding (*Para 25.13.1 White Book. Vol 1, 2011*).

3.31 It must be made clear that the factors listed in preceding paragraph are not exhaustive and Court is free in exercise of its discretion to take into consideration any relevant factors.

15. As reported in the White Book (1997) at page 407 (23/1-3/2) on Security for Costs it states that:

*"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 '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 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 6B 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).*

16. Lord Denning as reported in *Sir Lidsy Parkinson & Co Ltd v Farripian Ltd [1973] 2 A.E.R. 273 at 285-286.*

*.....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. The court has a discretion which it will exercise considering all the circumstances of the particular case. ....The court might also consider whether the application for security was being used oppressively-so as to try and stifle a genuine claim."*

17. An exception applies if it is established that a foreign **Plaintiff** has **substantial assets within the Jurisdiction which are available to satisfy a costs order**. In that exceptional case, security for costs will not be ordered.
18. In *Babu Bhai Patel v Moanohan Aluminium Glass (Fiji) Ltd, Civil Appeal 19/1997*, an appeal from the Magistrates Court, Chief Justice Fatiaki held to the effect that to come within the exception a non-resident Plaintiff has the onus to prove that he has suitable property within Fiji.

'Once it is established that the Plaintiff was not ordinarily resident in Fiji, as in this case they are resident in Australia, the 'onus' then shifted to the Plaintiffs to satisfy Court that they have property within the Jurisdiction which can be made the subject to the process of this court. However, even if the Plaintiffs have no assets in Fiji, they may still avoid having to pay security for costs if they are able to convince the court pursuant to Order 23 of the High Court Rules, 1988, that having regards to all the circumstances of the case, it would not be just and fair to order security for costs or that it would be oppressive to do so in the circumstances.'
19. In the current case before this Court, **the Plaintiffs claim is for goods sold by the Plaintiffs to the Defendants for which payment has not been made**.
20. The **Plaintiffs** have argued that in terms of the Plaintiff's '**assets**' in Fiji, the Plaintiffs business in Fiji was set up in 2014. They have **two (2) retail outlets** and a **bulk store** located in Suva. The Plaintiffs also have a Company known as Black Salt Holdings Ltd. The fact that assets are owned in Fiji, are available for the purposes of satisfying costs which could be awarded in favour of the Defendants. Therefore, the **Defendants** will not have much difficulty in enforcing any costs orders that may be awarded against the Plaintiffs because the sole Director and shareholder of Imex is now based in Fiji.
21. The **Defendants** argued that the application for security for costs was only made after realising that should the Plaintiff fail in his case, there is nothing fettering him to remain in Fiji and pay any costs ordered against them. So far the Defendants have accrued a cost of \$30,000. The only ground for the objection by the Plaintiffs to the security for costs is that the Director and shareholder of the Companies are now residing in Fiji and therefore payment of any costs ordered by the Court will not be an issue.
22. **Prima facie**, bearing in mind the **Defendants** contention as based hereinabove together with their Defence, and the Statement of Claim of the **Plaintiff** as set out within the Statement of Claim, after a careful consideration in its entirety, the **Plaintiffs** may have an arguable case with good prospects of success on the substantive issue of **the Plaintiffs claim for goods sold by the Plaintiffs to the Defendants for which payment has not been made by the Defendants**.

Likewise, the **Defendants** may also have a good prospect of defending the Plaintiffs claim against them, otherwise.

However, this court at this stage of the proceedings cannot delve itself into the merits of the parties' case, since that would be determined upon a proper hearing accordingly. Evidence of both sides need to be put at a test.

23. In '*Kadavu Shipping Company Ltd v Dominion Insurance Ltd*' 2009 HBC 508 Master Udit said in relation to the 'Strength or bona fides of a claim'

*'Under this criterion, the respondent is to show that it has a prima facie regular claim, which disclosed a reasonable cause of action. It is not the court's duty to divulge into a detailed analysis of the merits of the case unless it can be clearly demonstrated that there is a relatively high degree of success or failure. Once it is established, the Court is to proceed on the basis that the claim is bona fide.'*

24. In '*Allan v Hill View Limited* [2003] HBC 366, Connors J said:

*'.....another matter of importance for the Court is exercising its discretion is the Plaintiff's prospect of success in the action and of course as in any such situation that does not require the Court at this point in time to make any detailed determination of the likelihood of success but merely to do so based on the pleadings as they appear before the court.'*

25. The **balance of convenience** lies in the Court accepting that the Plaintiff has a regular bona-fide claim which has a chance of success without making any detailed determination as to the likelihood of success.
26. The **Defendant's** main contention is that since the Plaintiffs are resident out of this Jurisdiction, they should be required to pay security for costs. On the other hand, the **Defendants** will only be entitled to costs if the Plaintiff's claim is dismissed.
27. The **Plaintiffs** have initiated this proceeding and he has the prosecution of the case to ensure they bring it to the conclusion on the balance of probabilities. And it is for the Defendants to counter the claim in terms of their Defence.

However, it is obvious in the circumstances that expenses in terms of costs will be incurred and therefore the parties to the proceedings must be ready to cater for the costs. In this case the 1<sup>st</sup> and 2<sup>nd</sup> **Defendants** have sought for security for costs against the **Plaintiffs** in the sum of \$30,000.

#### Quantum of Costs

28. No formula for ascertaining the quantum of the security for costs was furnished to court by any of the Counsels. However, a very helpful guide is provided for in *Halsbury's Law of England (4<sup>th</sup> edition) Vol. 37 para 307, which states as follows-*

*'The amount of security for costs ordered to be given is in the discretion of the court, which will fix such sum as it thinks just to do so, having regards to all the circumstances of the case. It is not the practice to order security for costs on a full party and party, still less on an indemnity basis. In the case of a Plaintiff resident out of the jurisdiction the more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up the stage of the proceedings for which security is ordered, but there is no hard and fast rule.'*

29. Reference is made to the New Zealand Court of Appeal case of *Mclachlan & Others v. Mel Network Limited [2002] NZCA 215 (29 August 2002)* at paragraph 27 of the Judgment wherein His Lordship, Mr. Justice Gault said-

'[27] The amount of security is not necessarily to be fixed by reference to likely costs awards: *National Bank of New Zealand Ltd v Donald Export Trading Ltd [1980] 1 NZLR 97*, at 103-  
'It is rather to be what the court thinks fit in all the circumstances...'

30. I find no concrete evidence has been tendered to this Court by the Plaintiffs to establish that the Plaintiffs are not Resident out of the jurisdiction of this Court, nor that the Plaintiffs have sufficient or any assets within the Fijian Jurisdiction to satisfy and will be in a position to pay any costs that may be ordered by this court upon their failure to succeed in establishing their substantive claim pending before this court.
31. It is not sufficient for the Plaintiffs to only state that 'they have two (2) retail outlets, a bulk store located in Suva and have a Company known as Black Salt Holdings Ltd. They must have some black and white documentary evidence to substantiate the ownership of the assets, if any. Further, that sole Director and shareholder of Imex is now based in Fiji. No passport evidence has been tendered for court to cite and ascertain that the sole Director is now in Fijian Jurisdiction and will continue to be present in the Jurisdiction until such time the substantive matter is heard and determined.
32. Accordingly for the aforesaid rational, I grant an order for a sum of **\$7,500** as security for costs against the Plaintiffs to be paid within **14 days timeframe**. The same to be paid and/or deposited into the Chief Registrar's interest bearing account and will only be released once the entire case is heard and determined by the Court.
33. Not only that, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants may be at liberty to make a second or consequent application and seek any additional Security for Costs if any costs ordered is insufficient to cover for the actual costs that will be incurred in the final determination of this case.
34. There will be an order for Costs of this application in the sum of **\$500** against the Plaintiff and to be paid to the Defendants within 14 days.
35. At this stage of the proceedings, it is appropriate to impose an **Unless Order** against the Plaintiffs and upon their failure to abide by the orders for the payment of the security for costs in the sum of **\$7,500** and cost of this application of **\$500**, the total sum of **\$8,000** will result in court proceeding to strike out and dismiss the Plaintiff's Substantive action accordingly.
36. For the abovementioned rational, I grant the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's application and proceed to make the following final orders.

**D. ORDERS**

- (i) The Plaintiffs are hereby ordered to pay a sum of \$7,500 as security for costs into the Chief Registrar's interest bearing account within 14 days.
- (ii) The Plaintiff's Writ of Summons and the Statement of Claim will be struck out and Dismissed upon the non-payment of the ordered security for costs and costs within the set time frame of 14 days.
- (iii) Parties to proceed with the next appropriate cause of action in terms of the substantive claim.
- (iv) Cost of this action is summarily assessed at \$500 against Plaintiffs and to be paid to the Defendants within 14 days.
- (v) The case will now be scheduled for further directions accordingly.

DATED AT SUVA THIS 10<sup>TH</sup> DAY OF JULY 2018



  
.....  
Master  
VISHWA DATT SHARMA

cc: *Parshotam Lawyers, Suva*  
*M. A. Khan Esq., Suva.*