

IN THE SEYCHELLES COURT OF APPEAL

**ATTORNEY GENERAL**

APPELLANT

versus

**F.C.L. PUBLIC RELATIONS CC**

RESPONDENT



Civil Appeal No: 56 of 1998

*[Before: Silungwe. Pillay & De Silva, JJ.A]*

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Mr. A. F. T. Fernando, Attorney General, for the Appellant  
Mr. A. Derjacques for the Respondent

**JUDGMENT OF THE COURT**

*(Delivered by Silungwe, J.A)*

This is an appeal against the quantum of security for costs (i.e. US\$10,000.00) awarded to the appellant by the Supreme Court.

In the court below, the appellant and the respondent were defendant and plaintiff, respectively.

The conspectus of this matter is that the respondent, which describes itself in the plaint as "a close corporation registered in the Republic of South Africa and carrying on the business of public relations", launched a claim against the appellant for the recovery of the sum of US\$400,000.00 in respect of an alleged breach of an oral contract. The said contract had allegedly been entered into between the parties in London on or about March 6, 1997, by Messrs Gillian Gamsy and Dennis Gamsy as representatives of the respondent and a Mr. P. Kumar De, depicted in the plaint as "Director-General (Finance) of Seychelles." Under the alleged contract, the appellant undertook to pay to the respondent the

sum of US\$400,000.00 as an “agreed fee” in consideration of “introducing and promoting the 1997 Miss World Pageant to Seychelles.”

In an affidavit sworn on the appellant’s behalf, Mr. Francis Chang-Leng, the Principal Secretary in the Ministry of Finance and also Chairman of the 1997 Miss World Organising Committee, denied not only the respondent’s claim but also the existence of the alleged agreement. Paragraphs 5, 6 and 7 of the affidavit read as follows:

“(5) The defendant will have to incur a considerable amount of expenses in interviewing several witnesses, most of whom are abroad, namely in the United Kingdom, India and South Africa before filing its statement of defence to the plaint.

(6) The defendant will have to incur a considerable amount of expenses in flying down its witnesses, most of whom are abroad, to testify at a hearing.

(7) I state that the expenses referred to at paragraphs 5 and 6 above would amount to US\$200,000.”

At once, the appellant filed a Notice of Motion in terms of section 219 of the Seychelles Code of Civil Procedure, read with Article 16 of the Civil Code and Section 318 of the Companies Act of 1971, for an “order requiring the plaintiff, who is non-resident, to give security for costs and for any damages which may be awarded against it, in a sum of US\$299,000.00...” (Emphasis is supplied).

It was essentially on these facts and the submissions made thereon by both sides that the Supreme Court (Amerasinghe, J) saw it fit to cut down the quantum of security for costs from US\$200,000.00 to US\$10,000.00 and made an order to that effect.

It is common cause that the action in the instant case was brought by a non-resident party with the result that the appellant's application for an order for security for costs was competent in terms of Article 16 of the Civil Code as read with section 219 of the Seychelles Code of Civil Procedure. Further, it is trite law that the amount of security for costs to be given is in the discretion of the court which is entitled to fix such sum as it thinks just, having regard to all the relevant circumstances of the case. Vide Order 23/1-3/29 of the Supreme Court Practice 1993, Vol. 1 and paragraph 307, Halsbury's Laws of England, 4<sup>th</sup> Ed. Vol. 37.

The fundamental question that arises on appeal boils down to this: did the Supreme Court err in the exercise of its discretion, i.e. did the court exercise its discretion improperly, regard being had to all the relevant circumstances of the case?

The learned Attorney-General vehemently urges the Court to overturn the Supreme Court's ruling but to sustain the appellant's application for US\$200,000.00 as security for costs, in the light of what Mr. Chang-Leng deponed, on behalf of the appellant, in paragraphs 5, 6 and 7 of his affidavit already referred to above which, significantly, remains unchallenged. The import of paragraphs 5 and 6 of the affidavit is that, in order to adequately prepare the appellant's defence and to lead evidence, should trial materialise, considerable expenses would of necessity be incurred to fly in several witnesses, most of whom live abroad in the United Kingdom, India and South Africa, initially for purposes of being interviewed and, subsequently, for bearing witness at the trial. Paragraph 7 then reckons that the expenses aforesaid would come to



US\$200,000.00. This sum, according to Mr. Fernando, includes the cost of investigating the respondent's legal existence.

However, Mr. Derjacques' approach to the question under consideration is that the Supreme Court exercised its discretion judicially and that its ruling should thus be upheld. He contends that the sum of US\$200,000.00 which is sought by the appellant represents 50% of the respondent's claim which is prohibitively expensive and, therefore, unreasonable. What's more, he argues, there is no breakdown to show how the sum sought was arrived at.

In order to determine whether or not the Supreme Court exercised its discretion properly, it is pivotal to look at all the relevant circumstances of this case in the context of proof of the quantum of the security for costs sought by the appellant. Such relevant circumstances are exemplified by, and limited to, the appellant's notice of motion and the affidavit, in particular, paragraphs 5, 6 and 7 thereof. In other words, what the appellant sought to establish is embraced by the notice of motion which is specifically buttressed by paragraphs 5, 6 and 7 of the affidavit. A reference to the notice of motion shows that the Supreme Court was implored to order the appellant to furnish "security for costs and for any damages which may be awarded against it in the sum of US\$200,000.00 ..." (emphasis is provided)

Although Mr. Fernando properly conceded during the hearing of the motion, and has reiterated this before us, that it was not the appellant's intention to include damages in the motion, no leave was sought to amend the motion and this state of affairs remains unchanged. It may thus be presumed, on the face of the notice of motion, that the sum sought was inclusive of damages. It was not until the other side had taken up the matter and demonstrated that no damages were claimable at that stage, as neither the appellant's defence nor counterclaim had been filed, that

the concession was made. But despite the concession, the sum sought remained the same! No wonder the learned trial judge could not resist making a remark on the matter (prior to his ruling) to which Mr. Fernando replied, substantially along the lines already indicated above.

In any event, paragraphs 5, 6 and 7 of the affidavit relied upon by the appellant are devoid of cogent evidence to support the application and to pointedly show, on a balance of probabilities, how the sum sought was computed. Consequently, one is left with the inescapable conclusion that the figure was evidently arbitrary. There is, in any case, merit in Mr. Derjacques' submission to the effect that the appellant can mitigate costs (at least the initial costs) by making use of modern technology to interview potential witnesses for the appellant prior to trial.

When all is said and done, it is crystal clear that the appellant has failed to show that the trial court exercised its discretion improperly. Evidently, the sum of US\$200,000.00 was not only arbitrary but also grossly inflated. Hence, the trial Court was, on the facts, fully justified in coming to the following conclusion:-

“[T] The material placed before the Court on behalf of the defendant is insufficient to justify the award of one half of the plaintiff's claim by way of security for costs. The quantum of security sought is arbitrarily made, without any specific basis, and the pleadings fail to disclose the need for any considerable expenses to be incurred in respect of witnesses outside the Republic.”

For the reasons given, we dismiss the appeal with costs.

  
A.M. SILUNGWE

JUSTICE OF APPEAL

  
A. G. PILLAY

JUSTICE OF APPEAL

  
G. P. S. DE SILVA

JUSTICE OF APPEAL

Dated at Victoria, Mahe this 13 day of August, 1999.