

JFA HOLDINGS v LATITUTES CONSULTING

(2011) SLR 342

P Pardiwalla for the applicants

B Hoareau for the respondent

Ruling delivered on 19 September 2011 by

EGONDA-NTENDE CJ:

The applicants are the defendants in the head suit and applicant no1 is the counter-claimant in the counter-claim. In this application the applicants are seeking an order for security for costs and applicant no1 is seeking security for damages against the respondent and a stay of proceedings in this matter until such time as the security that may be ordered by this court is provided by the plaintiff/respondent. The motion is brought under section 16 of the Civil Code of Seychelles, hereinafter referred to as CCS, and it is supported by an affidavit sworn by a director of applicant no 1.

The respondent opposes the application on the ground that it is intended to stifle its right to pursue a claim against the applicants. An affidavit in opposition was filed by the respondent. This affidavit was objected to by counsel for the applicants, Mr Pesi Pardiwalla on the ground that it had not complied with Seychelles law, given that it was sworn outside of Seychelles. I have looked at this affidavit. It appears to me that the only factual element contained in it is the fact that the respondent is a non-resident company in Seychelles. The rest of the content is essentially an argumentative narrative of non-factual matters and whether one took it into account or not it would have no effect on the outcome of this application.

It is clear that under article 16 of the CCS and the authorities that have been cited to me this court has the discretion in appropriate cases to grant orders for security for costs and damages. With regard to the security for costs this is usually an estimate of costs (party to party costs) that would be incurred by a party by the close of the proceedings. An estimate of the costs in this case for the applicants has been put at R272,611.

The affidavit supporting this application states that the respondent is not known to have any property or assets in Seychelles. This is not challenged by the respondents. I take it that it is established that the respondent is a non-resident company with no assets or property in this jurisdiction. Under article 16 of the CCS if a party is a non-resident, the court may, for good reason, issue an order for security for costs and damages. As the respondent has no assets in this jurisdiction there is, no doubt, a risk as to the recovery of costs and damages should the applicants be successful on both the main suit and the counter-claim. I am inclined to allow the order for security for costs. The sums claimed for security for costs is not unreasonable. I would allow the security in the sum of R272,611.

With regard to security for damages it is not the practice to order the whole amount claimed as damages to be paid as security for payment of damages. Such a

possibility has been frowned upon in the jurisprudence of the Court of Appeal of Seychelles. See *Village Management Ltd v Albert Geers and Anor* SCA No 3 of 1995. The court cannot order security for payment of the damages as claimed as at that stage the court would not have assessed the same and may well in due course not award the amount claimed even if the suitor is successful on liability.

It has been suggested by the respondents that the counter-claim is brought in bad faith to stifle the respondent's claim against the applicants. No evidence of the bad faith was put before the court. It cannot simply be inferred from the filing of the counter-claim. In any case the respondent has not filed its defence to the counter-claim, preferring to first deal with its own motion for amendment of the plaint. Its answer to the claim for damages is unknown at this stage as it is not on the court record.

As noted above the respondent is non-resident in Seychelles. It has no assets or property in Seychelles. The claim for damages on its face is not fanciful. In the event that applicant no 1 proves successful on its counter-claim it would be hard put to recover the fruit of such judgment in this jurisdiction. I am satisfied that this is good reason to order the respondent to furnish security.

On the other hand it is possible that if the respondents were ordered to deposit, let say 30% of the claim for damages, it may be contended that it so substantial that they may be forced to abandon their claim. I note that the claim for the respondent is substantial, well in excess of one million Euros. The counter-claim for the applicants in respect of which the claim for security for damages arises is for €1,530,000

The applicants have claimed security for payment of damages on their claim of €1,530,000. I do not take it that they have claimed the payment of this sum upfront as security. It is up to the court to determine the amount of the security. Such security must not be such an amount as would discourage the other party from pursuing its claim before this court. At the same time such security ought to assure applicant no 1 that the pursuit of its claim for damages will not be in vain.

I am inclined to award security for damages in the sum of 10% of the claim for damages by the applicants, which would be €153,000. Security for costs and damages decided above must be deposited with the Registrar of this Court within 60 days from today. Proceedings in this action shall be stayed pending compliance with this order.