IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 186/2018

(arising in MA 94/2018 arising in CS 04/2012)

[2018] SCSC 1121

HEDGE FUNDS INVESTMENT MANAGEMENT LTD ("HFIM")

Applicant

Versus

HEDGEINTRO INTERNATIONAL LTD ("HIL")

Respondent

1. **RAMINDER PANESAR** Interveners
2. **ASHLEY FRENCH**

Heard: 27th September, 2018

Counsel: Mr. S, Rouillon for Applicant

Mr. J. Renaud for Respondent assisted by
Mr. A. Derjacques for Respondent

Delivered: 3rd December, 2018

ORDER ON MOTION

E. Carolus, J

[1] HFIM (the Applicant) has filed an Application for HIL (the Respondent) to furnish security for damages and security for costs of the Applicant in respect of a Petition filed by the Respondent to review taxed costs awarded to the Applicant in a judgment delivered by the Chief Justice on 6th February, 2017.

Background

[2] HFIM (the Applicant) filed a claim against HIL (the Respondent) before the Supreme Court in Commercial Side CC04/2012 ("the main case") pursuant to which the Chief Justice, M. Twomey, gave judgment for HFIM (the Applicant), on 6th February, 2017. Costs were also awarded to the Applicant including travel to Seychelles.

[3] On 13th March, 2017, HIL filed a Notice of Appeal against the judgment in SCA 14 of 2017. An Application for stay of execution of the judgment pending the appeal which had been filed before the Supreme Court on 9th March, 2017, in MA 76 of 2017 was dismissed by the Chief Justice on 8th May, 2017. Another Application for stay of execution of the judgment filed in the Court of Appeal on 7th March, 2017 in MA05 of 2017 was also dismissed.

[4] Counsel for HFIM filed a Bill of Costs which was taxed by the Registrar on 26th May 2017, and a Taxed Costs Order in the sum of USD 613, 871.31 made on the same date.

[5] On 17th November, 2017, the Chief Justice granted HFIM's Application in MA309 of 2017 for validation of attachment of monies which had been provisionally seized on 7th May, 2012, in the hands of Barclays Bank (Seychelles) Ltd ("the Garnishee") in the name of HIL. She ordered the Garnishee to pay the balance of moneys attached in its hands (USD 497,138.40) to HFIM after deduction of its charges (transfer charges SR750 and USD25 correspondent bank charges).

[6] On 28th November, 2017, Counsel for HFIM filed a Notice of Motion supported by Affidavit for security for costs and damages in respect of the Appeal in SCA 14 of 2017 in terms of Rule 27 of the Seychelles Court of Appeal Rules. By an Order dated 3rd July, 2018, B. Renaud, J.A. granted the application and maintained the sum of SR50,000 set by the Registrar as security for costs, and ordered the Appellant (Respondent in the present

proceedings) to additionally provide security for costs and damages in terms of Article 16 of the Civil Code of Seychelles Act in the sum of one million Seychelles Rupees (SR1,000,000.00) or its equivalent in any hard currency, either in cash or by irrevocable bankers' guarantee or other form of securities to be approved by the Court. He further ordered the said securities to be furnished by 1st October, 2018, failing which the Appeal would be deemed to have been withdrawn. The records show that to date the Order of the Court has not been complied with.

[7] HFIM filed an Application before the Queen's Bench Division of the High Court in the United Kingdom for permission to register the Taxed Costs Order dated 26th May, 2017, as a Judgment of that Court. The Application was granted on 22nd March, 2018 and the High Court further ordered that the costs of the Application made before it were to be added to the judgment sum. In the same Order the High Court also granted permission to HIL to apply to set aside the registration of the Taxed Costs Order as a Judgment of that Court. A copy of the Order of the High Court was served on both Counsels for HIL namely Mr. J. Renaud and Mr. A. Derjacques on 19th April, 2018.

[8] On 10th April, 2018, HIL filed a Petition in MA 94 of 2018 to review the taxation of costs made by the Order of the Registrar dated 26th May, 2017 ("the Review Petition") and for execution of the Order to be stayed pending the review.

[9] By an Application dated 5th May, 2018, HIL applied to the Queen's Bench Division of the High Court in the United Kingdom to set aside the Order of 22nd March 2018 (See paragraph 7), to register the Taxed Costs Order as a Judgment of that Court. By an Order dated 22nd March, 2018, the Court ordered that the Application be relisted for hearing.

[10] The Review Petition came before me on 6th June, 2018, and HFIM (the Applicant) having already filed its Reply, hearing of the matter was fixed for 27th September, 2018.

Application for Security for Costs and Damages

[11] On 24th July, 2018, HFIM filed the present Application for HIL to furnish security for costs and damages in respect of the Review Petition on the grounds that the Respondent is a non-resident.

[12] The Application is made by way of Notice of Motion supported by a very lengthy Affidavit of 20 paragraphs sworn by Tushar Patel who avers that he is the Managing Director of HFIM. He deponed in his Affidavit that it is just and necessary that HIL be ordered to furnish security for –

- the Applicant's costs of GBP 30,000 or such other amount as the Court considers appropriate.
- the damages awarded under the Taxed Costs Order dated 27th May, 2017 for USD 613, 871.31,

and that in the meantime all further proceedings by the Respondent be stayed, for the reasons set out in paragraphs 4 to 18 of his Affidavit which are dealt with further below.

[13] The Application came before me for the first time on 17th September, 2018, and Counsel for the HIL requested for time to file a Reply. In view that hearing of the Review Petition had been set for the 27th September, 2018, which was only ten days away and that the Application for security for costs had to be heard before the Review Petition, I ordered HIL to file its Reply by the 27th September, 2018, when both Parties would address the Court on the Application if they so wished. The Review Petition was stayed pending determination of the Application for security for costs.

[14] An Affidavit in Reply sworn by Mr. Raminder Panesar on behalf of HIL was duly filed on 26th September, 2018, one day before the matter was to be heard.

The Capacity of Mr. Raminder Panesar to represent HIL

[15] At the hearing of the Application, Counsel for HFIM stated that he wished to rely on the Affidavit evidence of Mr. Tushar Patel in support of the Application. He also sought to produce additional documents in reponse to the Affidavit of Mr. Raminder Panesar for the purpose of showing that Mr. Panesar was not authorised to swear an Affidavit on behalf of HIL.

[16] Mr. Derjacques, Counsel for HIL strenuously objected to the production of such documents on the basis that the Respondent did not have sufficient notice of the production of such documents. He argued that at all documents should have been filed by Mr. Rouillon Counsel for the Applicant, with the Application. When it was pointed out to him that the documents pertained to the capacity of Mr. Panesar to sign the Affidavit which had been served on Mr. Rouillon the day before, leaving him little time file any objections and documents, he stated that Mr. Rouillon should have asked for an short adjournment and filed any documents at the Registry which would then have been served on the Respondent's counsels. He further stated that the documentation sought to be produced was frivolous and vexatious and intended to prevent the Respondent from proceeding with the main issue before the Court, that is, the Review Petition.

[17] The Affidavit in Reply of Mr. Panesar was filed only on 26th September, 2018, a day before the hearing and that Mr. Rouillon stated that that he had been served with it at 4 o'oclock the previous day. This left him with very little time to respond to it and file any documents in support of his objections. Taking into account the circumstances in which and the purpose for which the documents were sought to be produced I found the contention of Mr. Derjacques that such documentation was frivolous and vexatious and intended to prevent the Respondent from proceeding with the Review Petition unfounded.

[18] In the circumstances I granted time to Counsels for the Respondent to go through the documents and thereafter allowed production of the documents. In any event, later during the hearing, Mr. Derjacques informed the Court that he was instructed to allow production of the documents.

[19] Mr. Rouillon produced the Memorandum and Articles of Association of HIL. Paragraph 5.1(g) of the Memorandum provides for the power of the Company to prosecute and defend legal proceedings conducive or expedient for the advantage or protection of the company. The Articles provide for powers of Directors of the Company which include all powers necessary for managing, directing and supervising the business and affairs of the Company and empowers them to exercise all such powers of the Company not required to be exercised by the Shareholders (Paragraph 8.1) The Articles also provide for the

appointment of attorneys of the Company by the Directors by power of attorney (Paragraph 8.9), the appointment of officers or agents of the Company by Resolution of Directors and the duties of such officers and agents (Paragraphs 11.1 and 11.2), the appointment of agents of the Company by Resolution of Directors and the powers and authority of such agents (Paragraph11.5). Mr. Rouillon submitted that Mr. Panesar had no capacity to swear an Affidavit on HIL's behalf, and that there was no proof that he was authorised to represent HIL in the present proceedings because he was neither a Director nor an agent appointed by a formal resolution of HIL, nor was he authorised to represent it by a power of attorney. Mr. Rouillon also stated that the averment at paragraph 21of Mr. Panesar's Affidavit in Reply that he is authorised to act on behalf of HIL by its two directors is not sufficient to confer capacity on him but that he should have been authorised in that behalf by a Resolution of the Company. He stated that an intervener cannot without such authorisation represent one of the Parties to the case.

[20] Mr. Derjacques submitted that Mr. Panesar was duly authorised to swear the Affidavit on behalf of the Respondent and drew attention to paragraph 21 of the Affidavit in Reply in which Mr. Panesar deponed as follows: " That the Deponent acts on behalf of HIL being authorised by the two directors of HIL and having a close experience and knowledge of the facts in the case, and being authorised make this Affidavit, confirm that the statements made herein are true and correct to the best of his knowledge, belief and information ..." He also sought to produce two emails purporting to be emails from Rashpal Sahota and Ashley French both stating as follows: "I authorise Mr. Raminder Panesar, as a beneficial owner of HIL to sign the affidavit in reply to the cost application." This was objected to by Mr. Rouillon on the basis that the emails were self-serving statements as well as computerised documents, the production of which was regulated under the Evidence Act, the provisions of which had not been complied with. The email was admitted in evidence with the reservation that the Court would attach the necessary weight to it.

[21] I agree with Mr. Rouillon that according to the Memorandum and Articles of Association of HIL, Mr. Panesar as a shareholder of the Company, albeit a beneficial owner thereof, should have been authorised by a Resolution of Directors of the Company in order for him to swear an Affidavit in support of the present Application. There is no evidence that he

has been so authorised other than by the document produced by Mr. Derjacques purporting to be emails from Rashpal Sahota and Ashley French. I note firstly that these emails do not comply with the legal provisions relating to admissibility of documents more particularly the provisions of the Evidence Act thereby putting in question their authenticity and secondly that there is no evidence that this authorisation is supported by any resolution of the Respondent company. I therefore attach no weight to the email.

[22] Mr. Rouillon further drew the Court's attention to the fact that the Affidavit was signed by Mr. Panesar as "Attorneys for the Review Petitioner". There is however no other indication that Mr. Panesar is an attorney for HIL and this appears to be an error. Counsels should be minded to ensure that pleadings and other documents are properly drafted as particularly in the case of Affidavits, mistakes such as this may invalidate an Affidavit.

[23] Mr. Rouillon also stated that it is very important in an Affidavit to differentiate between what a Deponent has actual knowledge of and what the Deponent has been informed and pointed out that there are many averments involving points of law in Mr. Panesar's Affidavit, and that Mr. Panesar has no knowledge of Seychelles law.

[24] In an Affidavit a Deponent may assert matters of fact which are personally known to him. He may also assert matters based on information and belief. It is however essential for the validity of the Affidavit that the Deponent states which matters are personally known to him and which matters are based on information and belief and in the latter case disclose the source of the information and the grounds for the belief. Vide **Union Estate Management (Proprietary) Limited v Herbert Mittermayer (1979) SLR 140**, and **Erne v Braine (unreported) MA 290/2015 and 230/2016 arising out of CS 127/2011**. I note that the averments in the Affidavit relate mostly to matters of record and of law of which the Deponent is not required to have personal knowledge, and that very few factual matters are averred. Had Mr. Panesar been advised as to the law, it would have been proper for him to aver the same, which he has not done, but there is nothing before the Court to show that he does not have the required knowledge of Seychelles law which prevents him from making such averments. In line with established case law, it would also have been proper for him to state which matters are personally known to him and which matters are based

on information and belief and in the latter case disclose the source of the information and the grounds for the belief, which he has not done. However I do not find it necessary to make any findings on this issue for reasons which will become apparent.

[25] Mr. Rouillon further contended that Mr. Panesar could not represent HIL in these proceedings as this presented a gross conflict of interest. In that respect he stated that at the time the Plaint in the main case was filed in which HFIM was suing HIL, Mr. Panesar was a 50% shareholder of HFIM. In addition he stated that Mr. Panesar was involved in a number of cases that demonstrate that his representing HIL presents a conflict of interest. In support he produced the 1st page of two matters filed before the Court as follows: A Plaint in Civil Side No. 157 of 2011 citing Mr. Raminder Panesar as Plaintiff and Mr. Ashley French as the 1st Defendant and HIL as the 2nd Defendant, a Notice of Appeal in SCA 6 of 2017 in which Mr. Raminder Panesar is cited as the Appellant in an appeal against the decision of the Chief Justice in CS157 of 2011. In my view although these cases tend to indicate a conflict of interest, it would not have prevented Mr. Raminder Panesar from acting on behalf of HIL if the circumstances had changed and if he was properly authorised in that behalf.

[26] Mr. Derjacques also submitted that the Applicant having cited Mr. Raminder Panesar as an intervenor in his Application, cannot now object to Mr. Panesar swearing an Affidavit in response to the Application and that to deny him the right to be heard would be an violation of his Constitutional rights.

[27] In that respect, I note that the Plaintiff in the main case is HFIM and that the Defendant is HIL. Mr. Raminder Panesar and Mr. Ashley French are only intervenors in the main case and it is in that capacity that they are being cited in both the Review Petition and the present Application for security for costs. I further note that the Review Petition is supported by duly notarised and apostilled Affidavits of Mr. Ashley French and Mrs. Rashpaul Kaur Sahota both Directors of HIL and therefore empowered to swear the Affidavits on behalf of HIL. The Affidavit in Reply to the present Application for security for costs, on the other hand, is sworn by Mr. Raminder Panesar who is not a Director but a shareholder of the Respondent Company. In her Judgment in the main case the Chief Justice comments

adversely about the unusual procedure followed and the manner in which pleadings were filed as well as the nature of the pleadings. At paragraph 8 of her Judgment she states of Mr Panesar and Mr. French "On 12th June 2013 ... these two individuals were permitted to file a joint defence on behalf of the Defendant Company. They were shareholders but not Directors of the company. It has not been demonstrated that they were in a position to represent the Defendant Company." It appears that a similar situation pertains in the present Application.

[28] In the circumstances and for the above reasons, this Court, not being satisfied that Mr, Raminder Panesar is authorised to swear an Affidavit on behalf of HIL, finds that the Affidavit is invalid and consequently disregards his Affidavit evidence. In considering the Application however, I will take into account submissions of Counsels for HIL on non-factual matters.

The Law

[29] Security for costs and damages are provided for by Article 16 of the Civil Code of Seychelles Act ("the Civil Code") and sections 219 to 222 of the Seychelles Code of Civil Procedure ("SCCP").

[30] Article 16 of the Civil Code provides that -

"When one of the parties to a civil action is a non-resident, the Court may, at the request of the other party, and for good reason, make an order requiring such a non-resident to give security for costs and for any damages which may be awarded against him."

[31] Section 219 of the SCCP provides that -

"The court may, on the application of the defendant, require the plaintiff to give security for costs in all cases in which under the Civil Code such security may be required and also when the plaintiff is known to be insolvent."

[32] A reading of the Affidavit in support of the Application shows that it is based on both Article 16 of the Civil Code and section 219 of the SCCP.

[33] In paragraph 12 of his Affidavit Mr Tushar Patel states "That I am advised by local counsel that Article 16 of the Civil Code of Seychelles states that when one of the parties to a civil action is non-resident, the Court may, at the request of the other party, and for good security make an order requiring such a non-resident to give security of costs and any damages which may be awarded against him. HIL is an International Business Company controlled by non-resident directors and non-resident beneficial owners namely the two interveners herein and the nominee respectively. HIL has no assets in the Seychelles." It is clear from this paragraph that he seeks security for costs under Article 16.

[34] It is equally clear that he seeks to invoke the provisions of section 219 of the SCCP by his averments at paragraphs 17 and 18 of his Affidavit which are reproduced below:

> "17. HIL has no assets in Seychelles. There are good reasons to believe that it will be unable to pay the HFIM's costs if ordered to do so, as it has done so (sic) Taxed Order dated 26 May 2017 for USD $613,871.31.
>
> 18. That HIL is Insolvent, its liabilities exceed its assets following the Judgment in CC4 of 2012. Unless the interveners, shareholders and/or directors personally put up sufficient Security for Costs for the hearing, there will be a shortfall in any cost order and HFIM will suffer."

Preliminary Points

[35] Before dealing with the merits of the Application, I wish to clarify three preliminary points.

[36] Firstly, whereas under Article 16 of the Civil Code, *either party* may make an Application for security for costs from a non-resident party on good cause, section 219 of the SCCP entitles *only the Defendant* to seek security for costs in all cases in which under the Civil Code (Article 16 of the Civil Code) such security may be required, and also when the plaintiff is known to be insolvent.

[37] HFIM is the Respondent in the Review Petition and by analogy, may be considered as a Defendant in that Petition in terms of section 219 of the SCCP, thereby entitling it under that section to make an Application for security for its costs in defending the Review

Petition. If however this argument is deemed untenable, I am of the view that the words "for good reason" in Article 16 on the basis of which an order for security for costs may be sought, are wide enough to include the ground of insolvency or at least impecuniosity.

[38] Secondly, Counsels for the Respondent submit that under Article 16 of the Civil Code read with Section 219 of the SCCP, security for costs may only be applied for in a "civil action" which in terms of section 2 of the SCCP is defined to mean "a suit or proceeding commenced by way of Plaint". They contend therefore that the Review Petition not being a suit or civil action because it is not commenced by a civil plaint, Article 16 of the Civil Code and section 219 of the SCCP are not applicable to it.

[39] The Review Petition is not a civil "action" commenced by way of a Plaint but it is a Petition to review costs that were awarded in the main case which was itself commenced by way of a Plaint. Article 16 of the Civil Code only requires that "one of the parties to a civil action" is a non-resident and if this condition is fulfilled the other party may make an application for security for costs. Article 16 does not specify that the application must be made with respect to costs of the main action only, and in my view the power of the Court to grant security for costs is not limited to costs incurred in the main action but the Court has the power to grant such security for costs in ancillary applications such as a Review Petition. I find accordingly.

[40] Thirdly, Article 16 provides for the provision of security for costs as well as security for damages, both of which are being applied for by the Applicant in the present Application.

[41] I am of the view that it is perfectly in order for the Applicant to make the present Application for security for its costs of the review Petition. However, the "damages" for which the Applicant is claiming security are in fact costs that were awarded in the main case, and which after taxation was awarded under the Taxed Costs Order, which is sought to be reviewed by the Review Petition. In my view the Applicant should have made any Application for security for his costs in the main case as a motion in the main case and not as a motion in the Review Petition. For that reason I decline to consider his Application for security for damages and will only consider his Application for security for costs.

Merits

[42] Having dealt with these preliminary points, I now proceed to deal with the merits of the Application.

[43] As stated at paragraphs 33 and 34 above, the Application is made under Article 16 of the Civil Code and section 219 of the SCCP. The Application is made on the grounds that the Respondent is a non-resident, that it is an International Business Company controlled by non-resident Directors and non-resident beneficial owners and that it has no assets in the Seychelles. It is further averred that the Respondent will be unable to pay HFIM's costs if ordered to do so and that it is insolvent.

[44] The issues to be determined are –

(a) Whether the Respondent is a non-resident?

(b) Whether there is "good reason for granting an Order for security for costs

Is the Respondent is a non-resident.

[45] Counsels for the Respondent submit that HIL against whom security for costs is being claimed, is a resident company, and therefore does not come within the ambit of Article 16, in terms of which security for costs may only be claimed against a party who is a non-resident. In that respect they state that HIL is a company incorporated under the International Business Companies Act and that section 2 thereof defines "resident person" as meaning inter alia, "a company registered under [this] Act."

[46] I do not agree with Counsels for the Respondent. In my view HIL (the Respondent) is a non-resident for the purposes of Article 16 of the Civil Code, for the following reasons:

[47] The Civil Code and the SCCP are laws of general application and govern civil procedure generally unless a specific law displaces their application. The International Business Companies Act ("IBC Act") on the other hand is not a law of general application. It regulates the incorporation of international business companies in Seychelles.

[48] The IBC Act does not seek to generally regulate the procedural aspects of civil litigation where such companies are concerned, its only provision governing an aspect of civil process being limited to section 116 which provides for civil proceedings being heard by a Judge in chambers in certain instances. The IBC Act specifically regulates only that aspect of civil proceedings, and more specifically court procedure.

[49] Therefore the Civil Code and the SCCP are applicable for any other aspects of civil procedure as they were specifically enacted to deal generally with all aspects of civil procedure not dealt with under specific laws irrespective of residential status. The Civil Code and the SCCP also deal with civil procedure specifically in so far as civil suits involving non-residents are concerned. In that respect Article 16 of the Civil Code and section 219 of the SCCP deal with security for costs, with section 16 doing so specifically where non-residents are concerned. If the legislature intended to create a new civil procedure regime for international business companies where security for costs are concerned, it would have done so expressly but there is nothing in the IBC Act which seeks to do so. Hence, the procedure for security for costs and damages for International Business Companies remains regulated under the Civil Code and the SCCP respectively.

[50] Further, the rule according to which a general provision must yield to an express provision is strictly speaking not applicable in this instance. In **Delorie v Government of Seychelles & Ano. (CP 8/2014) [2017] SCCC 4 (04 April 2017) para 49**, the Court expressed the rule as follows "The rule of implied exception (or generalia specialibus non derogant) is that when there are two provisions of a statute, or statutes which are in apparent conflict with each other, and one of them is more specifically dealing with the matter while the other is more general in application, the conflict is resolved by applying the specific provision to the exclusion of the general one." In my view there is no conflict between the IBC Act and the Civil Code and SCCP. The IBC does not regulate security for costs, these latter two instruments do, and they do so in both general and specific terms. Thus, there is no conflict to settle. The Civil Code and the Civil Procedure Code clearly apply.

[51] I am confirmed in my view by the case of **Village Management v Geers (1995) SCAR 187** in which the Court held that, "A company is a resident of the Seychelles if it carries

on business in Seychelles in a defined place." Section 5(1) of the IBC Act defines an IBC as meaning "a company incorporated or continued, or converted into a company, under this Act and whose memorandum states that it is subject to the restrictions referred to in subsection (2)". These restrictions include in section 5(2)(a) that "A company shall not subject to subsection (3) carry on business in Seychelles".

[52] I therefore find that HIL is a non-resident in terms of Article 16 of the Civil Code and consequently the present Application for it to provide security for costs was properly made under that provision.

[53] Is there "good reason" for granting an Order for Security for Costs

[54] Having found thus, I look to whether there is "good reason" for ordering the Respondent to provide security for the Applicant's costs as required under Article 16 of the Civil Code.

[55] It is not disputed that, as averred by HFIM, that HIL is an International Business Company controlled by non-resident directors and non-resident beneficial owners namely the two interveners herein and the nominee respectively, and that HIL has no assets in the Seychelles. Further, the Affidavit in Reply of Mr. Panesar having been found to be invalid, Mr. Patel's Affidavit evidence as to the fact that the Applicant does not own any property in Seychelles remains unchallenged and I therefore find that the Respondent does not own any property in Seychelles. In that respect I also take into account the Ruling of the Court of Appeal in SCA 14 of 2017 regarding granting security for costs and damages, in which it stated that "there is no indication that the Appellant has assets in Seychelles."

[56] In **Rhodes Trustees Ltd v Gamble and Others MA 131/2011 SCSC 72 (06 November 2011)** the Court stated "The main ground I suppose on this Application is that the Respondents are non-residents in Seychelles and have no property here to which the Applicant may resort in case it succeeds on its defence. This is ordinarily good enough reason for an order to furnish security for costs."

[57] In **JFA Holdings v Latitutes Consulting (2011) SLR 343**, in an Application made by the Defendant in a commercial action for the Plaintiff to pay security for costs, the Court found that it was established that the Respondent was a non-resident company with no assets or

property in the jurisdiction, and in allowing security for costs stated "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."

[58] As in **Rhodes Trustees Ltd v Gamble and Others MA 131/2011 SCSC 72 (06 November 2011)**, I find that the Respondent in the present Application has "no property here to which the Applicant may resort in case it succeeds on its defence" and as in **JFA Holdings v Latitutes Consulting (2011) SLR 343**, "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]."

[59] However, even where the Respondent in an Application for security for costs is a non-resident and has no assets in the jurisdiction giving rise to a very real risk that the Applicant will not be able to recover costs in the main case, the Court has the discretion whether or not to grant the application. In exercising its discretion the Court has to take into account all the circumstances of the case, which I proceed to do below.

Stifling of genuine claim

[60] In that respect, the Court, in **Rhodes Trustees Ltd v Gamble and Others MA 131/2011 SCSC 72 (06 November 2011)**, having stated that the fact that the Respondents are non-residents in Seychelles and have no property here to which the Applicant may resort in case it succeeds on its defence, is ordinarily good enough reason for an order to furnish security for costs, goes on to state "However it must be emphasised the remedy is still within the discretion of the court, and care must be taken that it is not used as a bar to stifle a good or worthy claim against a defendant."

[61] It is therefore necessary in my view to ascertain whether HIL has a good and worthy claim and in order to do so I look at the merits of the Review Petition. In that respect, Mr. Patel avers at Paragraphs 4 and 5 of his Affidavit that -

"4. "That the HIL Petition for the review of the Taxed Costs Order is significantly out of time limit and should be dismissed immediately. The Petitioner should have filed the Review Petition promptly (within 14 days) after the Taxed Court Order or, strictly, at least within three months of the date of the taxation using the correct procedures for a Judicial Review of the Order under the Seychelles Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunal and Adjudicating Authorities) Rules 1995 [SR 1 ipp79-81]."

5. The HIL Petition is without merit. It is a frivolous application made solely to confuse and obfuscate proceedings before the English Court and the English Order. The HIL Application was made and served on HFIM on 15th May 2018 after the English Court Order of 22nd March 2018 and more than 340 days after the taxation of the Taxed Costs Order. On these matters HFIM has already set out the matters in a detailed reply to the HIL Petition."

[62] Without prejudging this issue, which moreover I find would more properly be dealt with at the hearing of the Review Petition, I am unable to at this stage find any merit in HFIM's contentionS that the Review Petition is filed outside the time limit and that it should have been filed as a Petition for Judicial Review.

[63] On the other hand I find that the delay in filing the Review Petition gives credence to the Applicants contention that the Review Petition is made solely to confuse and obfuscate proceedings before the English Court and the English Court Order. In that respect I note that judgment in the main case was delivered on 6th February, 2017. Taxation of costs in the main case took place on 26th May, 2017, some three months later. The Order of the English Court granting permission to register the taxed Costs Order was made on 22nd March, 2018. The Review Petition was filed on 10th April, 2018, some ten months after taxation of costs and 19 days after the Order of the English Court. Subsequently on 5th May, 2018, Application was made to the English Court to set aside its Order granting permission to register the Taxed Costs Order.

[64] I am mindful however of what the Court stated in **Trident International Freight Services Ltd v Manchester Ship Canal Co and another [1990] BCLC 263** that "On an

Application for security for costs it is not appropriate to go into the merits of the case unless it can be clearly demonstrated one way or the other that there is a high probability of success or failure."

[65] In the present matter, on the face of the pleadings in the Review Petition, I am unable to find with certainty that there is a high probability of either success or failure, and I am consequently unable to make any pronouncement at this stage as to whether HIL has a good and worthy claim or not.

[66] However the matter does not end there. There are other matters which the Court may take into consideration in exercising its discretion whether to grant an Application for security for costs or not.

[67] In **JFA Holdings v Latitutes Consulting (CS 49/2011) [2011] SCSC57 19 September, 2011**, Egonda Ntende, CJ stated the following on security for damages claimed by the Applicant/ Defendant and Counter-claimant in the main suit "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 the Applicant that the pursuit of its claim for damages will not be in vain." A balance therefore needs to be struck between the competing rights of the Parties.

[68] In that light I go on to consider whether the amount of security claimed would discourage HIL from pursuing the Review Petition. Linked to that is its ability to meet such security because it is either insolvent or impecunious, both of which are discussed below.

Insolvency of HIL

[69] Section 219 of the SCCP empowers the Court to require a Plaintiff to provide security for costs in all cases in which security for costs may be given under the Civil Code *and also when such Plaintiff is known to be insolvent.*

[70] Mr. Tushar Patel states in his Affidavit at paragraphs 17 and 18 respectively as follows:

"17. HIL has no assets in Seychelles. There are good reasons to believe that it will be unable to pay the HFIM's costs if ordered to do so, as it has done so (sic) Taxed Order dated 26 May 2017 for USD $613,871.31.

18. That HIL is Insolvent, its liabilities exceed its assets following the Judgment in CC4 of 2012. Unless the interveners, shareholders and/or directors personally put up sufficient Security for Costs for the hearing, there will be a shortfall in any cost order and HFIM will suffer."

[71] In that respect I note that HFIM has not brought any evidence that HIL is insolvent and no Order for security for costs should be made on that ground. However, in my view, in deciding whether there is "good reason" to grant an application for security for costs under Article 16 of the Civil Code, the Court should take into consideration the *impecuniousity* of the Respondent.

[72] Although as stated there is no evidence of insolvency of the Plaintiff before this Court, it is telling that after having gone to the trouble and expense of filing a Notice of Appeal before the Court of Appeal as well as two Applications for stay of execution, HIL (the Respondent) has failed to comply with the Court's Order to provide security for costs for the Appeal proceedings resulting in the Appeal being withdrawn. The irresistible inference to be drawn from this is that, although it has not been proved that HIL is insolvent, it is far from fully capable of discharging its liabilities, and therefore there is a significant risk that HFIM, if it ultimately successfully defends the Review Petition, will not be able to recover its costs. Bearing in mind that the objective of an Order for security for costs is to ensure that the party in whose favour the order is made would be able to recover the costs of the proceedings if it ultimately succeeds, I find that the Court should in the circumstances of this particular matter grant the Application insofar as it concerns security for costs. Having found thus this Court now needs to consider the quantum of security to be provided.

Quantum

[73] In light of what Egonda Ntende, CJ stated in **JFA Holdings v Latitutes Consulting (CS 49/2011) [2011] SCSC57 19 September, 2011**, reproduced at paragraph 67 above, I find

it necessary to ascertain whether the amount of the security claimed would discourage HIL in pursuing the Review Petition while at the same time arriving to a quantum that will not make HFIM's pursuit of its costs indefending the Review Petition in vain.

[74] In the above mentioned case Egonda Ntende CJ further stated "With regard for 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." **Further in Rhodes Trustees Ltd v Gamble and Others MA 131/2011 SCSC 72 (06 November 2011)** the Court stated "... at this stage it is only an estimate of party to party costs. The Court must be able to see how the figure claimed has been arrived at."

[75] In the present case, HFIM at paragraph 19 of the Affidavit in support of the Application prays for an order for the Respondent to furnish security for costs in the amount of GBP 30,000,000 or RS540,000 (calculated at the rate of GBP £1=Rs18) or such other amount as the Court considers appropriate, and also to provide security for damages awarded under the taxed cost order for USD 613, 871.31. I have already stated that this is not an appropriate case for granting security for damages.

[76] As to the claim for security for costs, the Applicant supports the amount of GBP 30,000,000 or RS540,000 claimed, in paragraphs 13 to 16 of his Affidavit, as follows:

[77] He states at paragraph 13 that "in the main appeal SCA MA 14/2017 the Seychelles Court of Appeal has made an express order for HIL to put down a security for costs of R1,000,000/- in hard currency equivalent as a condition prior to the appeal being set down and heard and if such security is not furnished as stated by the Court of Appeal the appeal will be deemed to be withdrawn Court of Appeal ruling SCA 28/2017. It is averred that a similar condition should also be imposed on HIL for this Petition as a precondition before the hearing can proceed."

[78] I note that the sum of one million Seychelles Rupees ordered by the Court of Appeal to be provided by the Respondent is for both security for costs and damages. Similarly the sum of one million Seychelles Rupees prayed for in the instant Application, is for both security for costs and damages, the latter which I have ruled is not appropriate. Further, this Court

cannot be expected to order the same sum as security for costs for a Review Petition as the Court of Appeal ordered in the Appeal before it, the costs of defending an Appeal not being comparable to the costs involved in defending a Review Petition.

[79] The sum of £30,000 or RS540,000 is averred at paragraph 14 to be an estimate of total legal costs of "dealing with the HIL Petition and attending the hearing by the Director and the HFIM lawyers". This estimate is stated to be based on experience and the ruling of the Seychelles Court of Appeal on the issue of security for costs. With respect, I do not think that this court should be guided by the experience of Counsel with no other objective basis of the estimate provided. Moreover I do not find anything in the Ruling of the Court of Appeal to show me how the Court decided on the figure of one million Seychelles Rupees other than that it took into consideration the taxed bill of costs in the sum of USD 613,871.31 plus interests. Further as stated costs of defending an appeal cannot be compared to costs of defending a Review Petition.

[80] HFIM also avers at paragraph 14 that the costs estimates which also include costs incurred to date are the costs of English Counsel for advice, attendance, travel costs and accommodation amounting to GBP £27,000. It is averred that the English Counsel advice will be required because HFIM is a FCA regulated company incorporated in England, there are also matters arising in English Courts and under English Law and Procedures that may need to be dealt with as they are mentioned in the HIL Petition. I note that there is no breakdown of these costs and no evidence to substantiate them.

[81] It is further averred at paragraph 14 that HFIM costs including that of travel and accommodation by the Director from England to attend the hearing for one full day and disbursement and costs will amount to GBP £3,000. Again I find no evidence to support these figures.

[82] Furthermore I am not satisfied of the necessity of English Counsels and the Director to attend a simple hearing to review taxation of costs. A Party should not be expected to provide security for costs of an opposing Party which are incurred unnecessarily by the latter.

[83] In that respect, I note the averments at paragraphs 8 to 10 of the Affidavit in support of the Application to the effect that Counsel for HFIM requested that the Review Petition be dealt with by written submissions to avoid further unnecessary costs that a full day hearing and the attendance of parties and their lawyers to attend the hearing would entail as HFIM has already filed a detailed Reply to the Petition. However Counsels for HIL insisted that the Review Petition be heard by oral presentations and for the matter to be set for a whole day hearing as they wished to formally and fully address the court. It is also averred that Counsels for HIL have suggested that they are bringing Lawyers and Experts from abroad to attend the hearing. All these averments are confirmed by the proceedings of the 6th June, 2018, which show that Counsels for HIL sought a date for hearing of the matter whereas Counsel for HFIM wanted the Court to proceed only on written submissions of the Parties.

[84] In view of the foregoing HFIM avers that it would also now have to prepare itself accordingly, and recruit and consult the relevant expertise to respond to this new trajectory for the hearing of the Review Petition which would incur significant costs. HFIM further avers that in order to deal with a full day hearing HFIM will incur further legal and other costs both in Seychelles and England including costs of attendance of the HFIM representative and English Counsel at the hearing as well as provision of legal advice. It is in consequence of this that HFIM has made the present Application requesting that HIL provides good and sufficient security for the payment of all such costs of the hearing and ancillary costs including travelling and accommodation costs that may become payable.

[85] I reiterate my views as stated above that a Party should not be expected to provide security for costs of an opposing Party which are incurred unnecessarily by the latter. In that respect I take into account the remarks of the Chief Justice in her judgement in the main case at paragraph 7, where she states "As to the evidence adduced it is yet another unpleasant aspect of the case which I shall address later", and at paragraph 21 where she states " As I have stated, a substantial amount of evidence was adduced in this case and much of it is totally irrelevant" and yet again at paragraph 62 where she states: "I have earlier referred to the fact that an enormous amount of evidence was adduced in this case. Most of it was completely unnecessary and a complete and utter waste of time and money."

[86] In the result, although I find that security should be provided by HIL, for the aforementioned reasons, I am not convinced as averred by the Applicant at paragraph 15 of the Affidavit in support of his Application that "the HFIM estimated costs are appropriate, proportional and reasonable." I find that half of the estimated security for costs (which is to be distinguished from security for damages) will be more appropriate in all the circumstances of this case.

[87] Two other matters were raised by HFIM which I proceed to deal with below:

No Application for Stay

[88] HFIM avers at Paragraph 7 of its Affidavit that "HIL has made two formal Applications for a stay of execution of the main Judgment in CC4 of 2012 subject of this set of proceedings, which included the order for costs, which was presented and heard before both the Supreme Court [MA75/2017] and the Court of Appeal [SCA MA 5/2017] and both were denied by the respective courts on 8 May 2017 and 28th August 2017. Therefore there is no stay of execution and no prior application for review of the Taxed Cost Order."

[89] In my view the fact that there is no stay of execution of the judgment in the main case which includes the order for costs does not prevent a Review Petition and an Application for security for costs of that Petition from being filed or granted. If a stay of execution had been granted it would have prevented HFIM (the Applicant) from executing the Judgment debt pending determination of the Appeal. It would not have prevented HIL (the Respondent) from Petitioning the Court to review a Taxed Costs Order with which it is dissatisfied. A Petition for Review of taxed costs is a separate matter from an Appeal and a Judgment Debtor may enter a Petition for review of taxed costs irrespective of whether it appeals against the Judgment granting such costs or not. If subsequently the Appeal is dismissed, the Order of the Court made pursuant to the Review Petition still stands. If the Appeal is granted the Order will simply fall together with the Judgment of the Court awarding such costs as the costs form part of the Judgment.

Failure to pay Taxed Costs Order

[90] HFIM avers at Para 6 that "HIL has failed to pay Taxed Cost Order to HFIM within the 14 days after the date of the Taxed Cost Order dated 27th May, 2017. Given that HIL has filed a Review of the Taxed Cost Order in my view the fact that it has not complied with the Taxed Cost Order is not a ground for granting an Application for security for costs.

[91] <u>Decision</u>

[92] In view of my findings –

(a) I decline to grant the Application to the extent that it seeks for an Order requiring HIL (the Respondent) to provide security for damages

(b) I Order HIL (the Respondent) to furnish security for costs of the Applicant for proceedings in the Review Petition in the sum of Two hundred and seventy thousand Seychelles Rupees or its equivalent in any hard currency, either in cash or by irrevocable bankers' guarantee or other form of securities to be approved by this Court on or before the 31st January, 2019, failing which the Review Petition will stand dismissed.

[93] Signed, dated and delivered at Ile du Port on 3rd December, 2018

E. Carolus
Judge of the Supreme Court