

**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

CV 35 of 2016

28/11/16
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BETWEEN: RAYMOND VAKA'UTA

Plaintiff

AND: 'AISEA TO'A

Defendant

BEFORE THE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mrs. L Niu for plaintiff.
 Mr. S 'Etika for the defendant.**

**Date of Hearing: On the papers at request of counsel
Date of Ruling: 25 November 2016**

**RULING ON APPLICATION FOR JUDGMENT BY DEFAULT AND
SECURITY FOR COSTS**

[1] This is a straightforward claim. The plaintiff alleges that the defendant has failed to account for the sale proceeds of potatoes sold on the plaintiff's behalf. The defendant denies he owes the plaintiff any money and counterclaims for a modest sum that he says represents payments made on the plaintiff's behalf.

- [2] There are before the court two applications namely:
- (a) An application by the defendant for judgment on its counterclaim based on the plaintiff's failure to file a defence.
 - (b) An application for security for costs.

Application for judgment

- [3] I understand that the defendant accepts that this application must be dismissed as the plaintiff has now filed a defence to the counterclaim and I so order. The defendant seeks costs on the application.
- [4] The file reveals that the counterclaim was served on the plaintiff on 15 September 2016. This application was made on 25 October 2016 which is outside, but not by a significant margin, the 28 days within which the plaintiff ought to have filed a defence to the counterclaim.
- [5] The defendant was entitled to apply for judgment but it appears to me that the application was opportunistic in the sense that the claim and counterclaim are related and the defendant must have been aware that the counterclaim would be disputed. In those circumstances it would ordinarily be expected that notice of an intention to apply for judgment would have been given. In this case that would have almost certainly avoided the need for the application to have been made at all.

[6] It is important that parties comply with time limits imposed by the rules and the court. There is equally a need for counsel to communicate fully and openly with each other in the conduct of litigation so as to avoid unnecessary costs and explore settlement options.

[7] Balancing these matters, I am inclined to make only a modest award of costs in the defendant's favour in the sum of TOP\$150.

Security for costs

[8] The defendant seeks security for costs in an amount of \$10,000. He relies upon O.17 Rule 1(a) and (b) Supreme Court Rules. He says that the plaintiff is ordinarily resident out of Tonga and that the plaintiff may be unable to pay costs if unsuccessful in this action. There is simply insufficient evidence that the plaintiff may not have the means to pay costs and I do not need to deal with that ground further.

[9] The application contains nothing to justify the amount sought by way of security. As I have said many times now, unfortunately it is the norm that applications for security for costs are not supported by satisfactory affidavit evidence. That evidence should include a proper assessment of the likely legal costs that are expected to be incurred in the action.

[10] A notice of opposition to the application has been filed but there is no affidavit from the plaintiff. I understand from Mr. Niu that he has not been able to get instructions from the plaintiff for some

time. It is accepted that the plaintiff resides in New Zealand but it is said that he carries on business in Tonga and that he is hardly going to stay away from Tonga just to avoid payment of costs in this proceeding which, it is submitted, will be modest and nothing like the \$10,000 claimed by the defendant. It is also argued that the plaintiff has the better claim.

The principles to be applied

[11] The principles to be applied in deciding whether to order the payment of security for costs were considered by the Court of Appeal in *Public Service Association Incorporated v Kingdom of Tonga* (Unreported Court of Appeal, AC 9 of 2015, 16 September 2015). The relevant principles are set out in paragraphs 22 to 27 of the judgment. Where one or more ground for the making of an order under O.17 Rule 1 is made out the Court has a broad discretion to order security for costs, but the discretion must be exercised in a principled manner. The Court of Appeal set out a four step enquiry in assessing applications of this sort. This Court must assess:

- [11.1] The approximate level of costs likely to be awarded to the defendant if successful.
- [11.2] Whether the plaintiff will be good for such an award.
- [11.3] Whether, in the light of the circumstances of the case, justice requires that the plaintiff should be required to give some security for those costs.

[11.4] The amount of the security that should be ordered and the means by which it should be satisfied.

[12] At each step of its consideration of the application the court should not lose sight of the fact that the onus of persuading it to make an order for security is borne by the applicant.

Discussion of this case

[13] I am satisfied that it has been established that the plaintiff is not ordinarily resident in Tonga for the purposes of O.17 Rule 1(a). I must now go on to consider the Court of Appeal's four step inquiry in *Public Service Association*.

[14] The first issue is the approximate level of costs likely to be awarded to the defendant if successful. There is no evidence before me of what costs the defendant is likely to incur or be awarded if successful. This is simply not good enough. The case is a simple one and modest sums are involved. The costs of this action should not exceed TOP\$5,000 in my view.

[15] The second issue is whether the plaintiff is good for such an award. It would appear that the plaintiff does not have assets in Tonga from which costs could be recovered. There is some force in the submission that the plaintiff, who is Tongan and does business here, would not stay away from Tonga just to avoid payment of costs. That said, in the absence of evidence that the plaintiff has any assets in Tonga there must be a risk that costs will not be paid.

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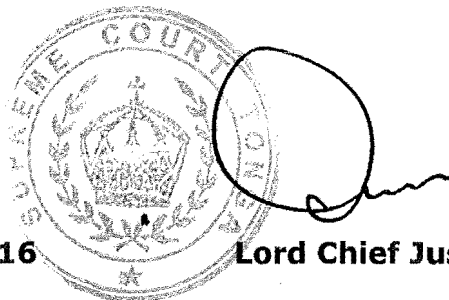
[16] The third issue is whether justice requires the plaintiff to give some security for costs. This involves the weighing up of factors which can include all of those noted by the Court of Appeal in paragraph 26 of its judgment in *Public Service Association*.

[17] The parties take a very different view of the facts and realistically I can make no meaningful assessment of the merits one way or other. However, as I have said there is a risk that the plaintiff will not meet an order of costs if unsuccessful. Related to this, I am concerned that for a considerable period now Mr. Niu has not been able to get instructions from the plaintiff who appears to have no real interest in pursuing the action diligently with the prospect that the defendant may face wasted costs. Finally, I note that the amount of any award for security in a case like will be modest and it cannot seriously be contended that any order I might make will prevent the plaintiff pursuing his action. Balancing these matters leads me to the view that security should be ordered.

[18] The final matter I must therefore consider is the amount of the security to be awarded and the manner in which it is to be provided. In recent times it has been common in standard cases for security to be ordered in the amount of TOP\$5,000. This is a simple case and the defendant failed to put forward evidence of his likely costs. Taking all matters into consideration I have decided, in the exercise of my discretion, to require payment of security in the sum of TOP\$3,000.

THE RESULT

- [20] The defendant's application for security for costs is successful. The plaintiff must provide security for costs in the sum of TOP\$3,000 within 21 days by paying that sum to the Registrar of the Supreme Court. Should security not be provided within that period this action will be stayed.
- [20] Costs on this application should follow the event and the defendant is entitled to costs which are to be fixed by the Registrar if not agreed.
- [21] This case will be called again for mention on 13 January 2017 at 9am.



Nuku'alofa: 25 November 2016

Lord Chief Justice