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04.08.17
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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 45 of 2016**

BETWEEN: **FRANZ STRAUSS and GUDREN STRAUSS**

Plaintiffs

AND: **DIANNE WARNER**

Defendant

BEFORE THE LORD CHIEF JUSTICE

Counsel: **Mr. D. Corbett for the plaintiffs**
Mr. L. Niu SC for the defendant

Date of Hearing: **31 July 2017**
Date of Ruling: **3 August 2017**

RULING

[1] This ruling concerns an application by the plaintiffs to set aside an order made on 22 June 2017 requiring them to provide security for costs (the order). The plaintiffs primarily rely on O.13 Rule 7(1) Supreme Court Rules which permits the Court to set aside an order where a party has not been served with an application and claims to have been adversely affected by it. In the alternative they ask the Court to exercise its inherent jurisdiction to set the order aside.

Rec'd 04/08/17

[2] The application is opposed by the defendant who says that the plaintiffs were served with the application for security for costs and have put forward nothing to suggest that the order was wrongly made.

The facts

[3] At a mentions hearing on 26 May 2017 I ordered that the defendant was to file any application for security for costs by 2 June 2017 and the plaintiffs had until 16 June 2017 to file any opposition. Counsel requested that I deal with the matter on the papers without a hearing.

[4] The defendant's application for security for costs was filed on 2 June 2017 in accordance with the timetable. The plaintiffs did not file any opposition to the application by 16 June 2017 or at all. I issued a written ruling on 22 June 2017 ordering the plaintiffs to provide security for costs.

[5] In a memorandum filed with this application Mr. Corbett explained that Counsel had come to an arrangement that he would collect the application from Mr. Niu's offices. He did not do so for some time due pressure of other work. He finally collected the application on the afternoon of 15 June 2017. That was the day before the plaintiffs were to have filed their opposition. Mr. Corbett did not contact the Court to advise that he had just taken service of the application nor did he seek an extension of time to file papers in opposition.

[6] Having not heard anything to suggest that the plaintiffs intended to oppose the application I issued a ruling on 22 June 2017.

[7] I note that notwithstanding that he had not made contact with the Court there was still a week after Mr. Corbett accepted service of the application for security for costs within which he could have filed the opposition and had it considered by the Court before its ruling was issued.

The grounds relied upon

[8] Mr. Corbett's primary submission was that O.13 Rule 7(1) applied in this case. I find that he is not correct about that. That rule applies when a person has not been served with a copy of an application notice before an order is made. In this case Mr. Corbett accepted service of the application on 15 June 2017, a week before the order was made. Service of the application on him was service upon his client (O.11 Rule 3).

[9] Mr. Corbett submitted that if O.13 did not apply the Court has inherent jurisdiction to set aside the order so as to do justice between the parties. He relied upon *Apex Insurance Brokers Ltd v Finau* [2012] Tonga LR 112 (CA). He submitted that his clients should not be prejudiced by any failings on the part of their Counsel.

[10] I accept that the Court has inherent jurisdiction to set aside the order. However I can see no basis for doing so. In *Apex Insurance* the Court of Appeal set aside a default judgment because it was satisfied that there were 'a number of serious issues to be tried, and a prima facie case of fraud'. In this case the plaintiffs have put no evidence before the Court that suggests to me that there is a serious issue that the order should not have been made.

[11] Mr. Corbett submits that the order will prevent the plaintiffs from pursuing this action. I am very mindful that it is a basic principle that a person who appears to have an arguable case should not be ordered to give security when that would act as a bar to the pursuit of the action (*Public Service Association Incorporated v Kingdom of Tonga* [2015] Tonga LR 439 (CA) and *Highgate on Broadway Ltd v Devine* [2012] NZAR 1017 at 1026). However as the Court of Appeal noted in *Public Service Association*:

> An order for security for costs made against an impecunious litigant when justified by a factor other than mere impecuniosity does not

> offend the general rule that poverty is no bar to the litigant": *The Airtourer Co-operative Ltd v Millicer Aircraft Industries Pty Ltd [2004] FCA at [38] per Branson J.*

[12] What then is the evidence that the order made will act as a bar to the pursuit of this action by the plaintiffs? There are affidavits of the plaintiffs filed in support of this application. They are in similar terms. The relevant paragraph in the affidavits reads:

> Now that the defendant has used a legal tactic to prevent me proceeding to trial against her by having a ruling in her favour for security for cost in the large sum of $30,000. The defendant knows that it will be very difficult for me to obtain this money as security for costs as she stated in her supporting affidavit to the application for security for costs that the receivership has removed all the assets I had in the lodge and the restaurant business including my income generated from these businesses.

[13] That evidence falls well short of satisfying me that the order will bring the plaintiffs' claim to a dead halt. The plaintiffs do not assert in their affidavits that it will. The plaintiffs have not put before me any affidavit evidence of their present financial circumstances, the absence of any avenues open to them to satisfy the order nor have they explained (if in fact they have no prospect of satisfying the order) how it is they are funding this litigation.

[14] Mr. Niu submitted that the potential for hardship to the plaintiffs must be weighed against the absence of any merit in the claims that they advance. He argues that the claims are without merit and the amounts claimed simply plucked from the air. I accept his submission. I am very aware, and was when I made the order, that the Court must have a clear impression that a claim lacks merit before it would be right to order security for costs which might deprive a plaintiff of the capacity to bring a claim. My assessment is that the threshold has been reached in this case for reasons

which I have already set out in my earlier ruling. In addition to that, not only do the claims as they are formulated appear to lack merit but the case has been pursued in a manner that has and will continue to add unnecessary costs for the parties.

[15] In summary then I refuse the plaintiffs' application for the following reasons:

a) O. 11 Rule 3 has no application to the circumstances of this case.

b) There are no grounds for the Court to exercise its inherent jurisdiction to set aside the order:

i) There is no evidence that the order will act as a bar to the action.

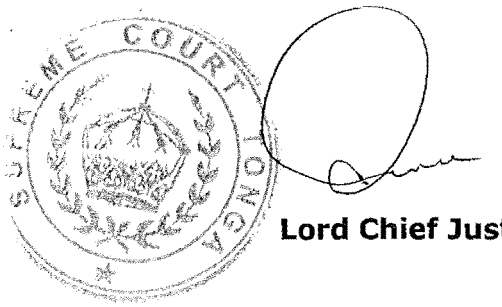
ii) No other grounds are advanced for setting aside the order.

iii) The claims as presently formulated lack obvious merit.

iv) The case has been pursued in a manner that has and will cause unnecessary costs to be incurred.

Result

[16] The plaintiffs' application is dismissed. The defendant is entitled to costs to be fixed by the Registrar if not agreed.



Nuku'alofa: 3 August 2017 **Lord Chief Justice**