IN THE COURT OF APPEAL OF BELIZE AD. 2021

CIVIL APPEAL NO. 11 OF 2019

OSCAR SELGADO **APPELLANT**

V

EDWARD BROASTER **RESPONDENT**

Before the Honourable:

Madam Justice Minnet Hafiz Bertram **President (Ag)**
Mr Justice Samuel Awich **Justice of Appeal**
Mr Justice Murrio Ducille **Justice of Appeal**

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Mr. Mikhail Arguelles for the Applicant/Respondent
Mr. Anthony Sylvestre for the Respondent/Appellant

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By Written Submissions

10 May 2021

HAFIZ BERTRAM P (Acting)

Introduction

[1] This is an application made pursuant to section 18 of the Court of Appeal Act, Chapter 90 and Order II Rule 20(2) of the Court of Appeal Rules for security for costs by the applicant/respondent, Edward Broaster ('Mr Broaster'). The respondent/appellant is Mr. Oscar Selgado ('Mr. Selgado') who appealed the judgment of Arana (as she was then) ordering him to compensate Mr. Broaster the sum of $30,000.00 for defamation.

[2] The parties had agreed that this matter be determined by written submissions.

Brief Factual Background

[3] On 27 February 2019, Arana J gave judgment in favour of Mr. Broaster which was entered and perfected on 19 March 2019. It was ordered that Mr. Selgado pay Mr. Broaster the sum of $30,000,00 as compensation for defamation and costs in the sum of $12,500.00.

[4] By Notice of Appeal dated 8 April 2019, Mr. Selgado appealed the judgment of Arana J.

[5] On 22 July 2019, Mr. Broaster's attorney wrote to Mr. Selgado, copying the letter to his attorney, requesting security for costs in the sum of $15,000.00. This was done pursuant to Order II Rule 20 (1) of the Court of Appeal Rules.

[6] By a letter dated 2 August 2019, Mr. Selgado's attorney wrote to the attorney for Mr. Broaster, stating that Mr. Selgado was unable to accede to the demand for security for costs of $15,000.00.

[7] On 15 August 2019, Griffith J ordered a stay of execution of the order of Arana J, until the conclusion of the October Session 2020 of the Appeals Court, and granted costs in the cause.

[8] On 15 August 2019, Mr. Broaster issued an application for security for costs. On 9 September 2019, the appellant filed an affidavit in opposition to the notice of application for security for costs.

[9] The application for costs of the appeal and costs in the application is supported by the affidavit of Mr. Broaster sworn on 14 August 2019. He exhibited the letters sent to Mr. Selgado and his attorney requesting costs for the appeal.

Evidence in opposition to the application for security for costs

[10] By an affidavit sworn on 6 September 2019, Mr. Selgado opposed the application for security for costs.

[11] Mr. Selgado deposed that he has a strong case of appeal as shown by his grounds of appeal. These grounds being:

> "(i) The decision was erroneous in that the learned trial judge erred in concluding at paragraph [36] (page 46 of the judgment) that Luis Campos sustained injuries caused by the police, including the Respondent, but then determining that these injuries were "consistent with justifiable force meted out by the police in subduing Mr. Campos;
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> (ii) The learned trial judge erred in that she misunderstood what were the issues that were to be determined by the court; that is whether the words are true in substance and done by the respondent (as set out at para [2] page 3 of the judgment);
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> (iii) The learned trial judge erred in confusing the issue of the requirement of particulars for the defence of fair comment as distinct from the defence of justification: para 19, [36] page 45 & 46;

(iv) The learned trial judge erred in undertaking a proper assessment of the evidence of the witnesses Zayne Palacio and PC Munnings at para [25] page 36;

(v) The learned trial judge failed to give due regard to the expert evidence of Dr. Hotchandani viz a viz the injuries caused to Luis Campos chest: [26] page 36;

(vi) The learned trial judge erred in placing great weight and make adverse conclusions because the appellant did not give evidence at trial as the issue for determination was whether the words are in substance true did not require the appellant to give evidence: [36] page 47;

(vii) The learned trial judge erred in placing great weight on a tangential issue of whether the respondent worked under the appellant's command [36] page 47."

[12] Mr. Selgado further deposed that the application for security for costs was not made promptly after the filing and service of the notice of appeal on Mr. Broaster. That the application had been made four months after the filing and service of the notice of appeal.

[13] He deposed that he was not in a position to agree to security for costs in the sum of $15,000.00. Mr. Selgado said that he attempted through goodwill to $10,000.00 as security for costs but, because of his financial position, he was unable to do so.

[14] Mr Selgado deposed as to his impecuniosity as follows:

(i) He is a sole practitioner and does not have a fixed monthly income. Further, his income fluctuates significantly from month to month and he has not been earning a steady income exceeding $5,000.00 and this is inclusive of his monthly pension of $2,408.52;

(ii) He was recently charged with a criminal offence which has affected his ability to earn a modest living in his profession as an attorney-at-law;

(iii) He has a monthly residential mortgage of $1,130.10 and a personal loan with payment of $1,043.46 monthly. He exhibited letters from Belize Bank evidencing these monthly financial payments;

(iv) Other monthly expenses being (a) $650.00 for rent of premises in Belize City during the weekly; (b) $180.00 to $200.00 for electricity; (c) $150.00 for water; (d) $800.00 for food; (d) $800.00 for fuel; and (e) $300.00 for incidentals.

[15] He deposed that it would be unjust to order security for costs on a litigant who is not in a financially stable position and where a party has a strong case as shown at para 43 of ***Knox v Deane***. As such he prayed that the Court will not grants the orders sought by Mr. Broaster.

Submissions for Applicant – Mr. Broaster

[16] Mr. Arguelles submitted that Mr. Selgado has no reasonable prospect of the appeal succeeding. He relied on the Belize Court of Appeal case of **Thomas Pound et anor v George Dueck,** Civil Appeal No. 15 of 2017, at paragraphs 11 -16, 23 and 25 where Awich JA discussed the following principles when ordering security for costs:

> "[11] The objective in ordering the appellant to furnish security for costs of an appeal is to **ensure fair process as between the appellant and the respondent** – see an appeal case from the Court of Appeal of Ireland: **Farrell v Bank of Ireland** [2012] 2 I.L.R.M. 183. The need to ensure fair process arises from two countervailing reasons based on statutory laws. On the one hand, the Legislature has, by statute, given to a person who believes that a trial court erred in deciding his case, the right to appeal as of right, or by leave; that right should not be stifled or unnecessarily burdened and made a sham by requiring the appellant to pay a sum of money as security for the costs of the respondent as a condition for the appellant exercising his right to appeal. On the other hand, the Legislature, by authorising that, "in special circumstances", the Court may order that

security for costs of appeal be given, “as may be just”, recognised that it will not be fair to allow all intending appellants unlimited freedom to subject all persons who have already established their rights in judgments of courts of justice to unnecessary additional costs. It cannot be fair to allow an appellant to subject a respondent to an appeal process when there is no realistic prospect of the respondent recovering the additional costs, in the event the appeal is not successful – see Ali v Hudson [2003] EWCA Civ. 1793, and **Keary Developments Ltd. v Tarmac Construction Ltd. and Another** [1995] 3 All E.R. 534.

[12] **Keary Developments Ltd**. was an appeal case against an order of a tribunal dismissing an application by a defendant company for an order that the plaintiff company give security for costs of the claim. Nonetheless, for the purpose of this application, some of the considerations in deciding whether it was just to order payment of security for the costs of the claim apply in deciding whether it will be just to order security for the costs of this appeal. In the case (Keary Developments Ltd.) Peter Gibson LJ in his judgment included among, “the relevant principles” (i. e. considerations), a balancing exercise. He stated that, the court must carry out a balancing exercise; it must weigh the injustice to the plaintiff against the injustice to the defendant, of making or not making an order of security for costs.

[13] I adopt the reasoning of Peter Gibson LJ. and apply it to this application. Accordingly I proceed to state that: In order to decide whether on the facts of this case, special circumstances obtain in which it is just under s. 18 of the Court of Appeal Act, to order that security for the costs of this appeal be given, this Court must carry out a balancing exercise of the probable injustice to Mr. Pound, the appellant, against the probable injustice to Mr. Dueck, the respondent. The Court must weigh the probable injustice to the appellant, if prevented from pursuing this appeal by an order of security for the costs of the appeal, against the probable injustice to the respondent-applicant, if no security for the costs of this appeal is ordered, the appeal is dismissed, and Mr. Dueck is unable to recover from Mr. Pound the costs of the appeal.

[14] Justification for an order of security for costs of appeal aside, the approach of the courts in deciding what will be regarded as special circumstances, and whether it will be just to make an order of security for costs of appeal in those circumstances under s. 18 of the Act, is to consider all the relevant circumstances – see **Sir Linsey Parkinson Co. Ltd. v Tristan Ltd.** [1973] All E.R. 273. From that approach, certain particular facts have been accepted over the years as important considerations. However, the courts have recognised that, this is an open-ended matter, the list of relevant factors must be left open-ended.

[15] Some of the set of facts, that is, circumstances, that have been frequently considered are these. ….. 2. Where the appeal does not have prospect of succeeding, but not where the appeal is merely a weak one. This will include where the appeal is brought for an ulterior motive. ….. 5. Impecuniosity of the appellant may or may not suffice.

[16] In the **Midland Bank Limited v Crossley-Cooke** case, Walsh J. referred in sufficient details to three cases in which the Court of Appeal of Ireland decided that, special circumstances existed for the Court to order appellants to give security for the costs of the appeals. The cases are helpful examples to note. At page 60 Walsh J. stated the following:

> "In Oakes v. Lynch and White (Supreme Court: 27 November, 1953), the plaintiff had obtained judgment in the High Court against the two defendants, both of whom appealed. In that case the Court directed security to be given because the first defendant had left the country, apparently without any likelihood of return, and he had not assets in this country and, while the second defendant resided in this country, the Court was not satisfied that he had any apparent assets with which to meet the plaintiff's judgment. In Blackhall and Others v. Patrick Wood Ltd. (Supreme Court: 12th March, 1959), the unsuccessful plaintiff was directed by the Court to give security for costs in the appeal on the grounds of lack of means and no apparent prima facie case for a reversal of the judgment on appeal. Lastly, there is the case of **Greham v. Mulderrig** (Supreme Court: 29th October. 1958)
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> [17] – [22] …..
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> [23] The conclusion that I have arrived at is that, Mr. Pound is impecunious, and has no assets in Belize. ….. The evidence is largely from his own affidavit sworn on 24 July 2017, so it should be reliable.
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> [24] The facts, the circumstances, regarding Mr. Pound and this case are remarkably similar to those in: **Clarke v Roche** in 1877; **Greham v Mulderrig** in 1958; **Blackhall and Others v Patrick Wood Ltd** in 1959; and several recent cases in which special circumstances were found to justify making orders of security for costs of appeals….."

[17] Mr. Arguelles relying on **Pound** submitted that there are special circumstances for the Court to order security for costs as Mr. Selgado has no reasonable prospects of his appeal succeeding.

[18] Mr. Arguelles addressed the grounds of appeal and contended that the trial judge correctly found that the injuries of Luis Campos were "*consistent with justifiable force meted out by the police in subduing Mr. Campos*". Further, that it was within the discretion of the court to so find as the decider of facts taking into account the witnesses and evidence before her.

[19] Mr. Arguelles submitted that the judge correctly addressed the evidence of the witnesses, Palacio and Munnings. Further, the judge also addressed the evidence of Mr. Hotchandani and attached the proper weight as shown at paragraph 9 of the judgment.

[20] Counsel further argued that the trial judge did not err in confusing the issue of the requirements of particulars for the defence of fair comment as distinct from the defence of justification and the judge was correct in her finding at paragraphs 18, 19, and 36.

[21] Mr. Arguelles relied on the case of **Knox v Deane** [2012] CCJ 4 (AJ) where Justice Nelson, JCCJ stated that "*an applicant should have regard to the merits of the case, although following Porzelack KG v Porzelack (UK) Ltd. [1987] 1 All ER 1074, at 1077, the court should not do so unless there was a high degree of probability of success or failure*." Counsel submitted that in this case, Mr. Selgado has a high degree of probability of failure and as such, this presents a special circumstance where security for costs ought to be granted.

[22] He further argued that Mr. Selgado has not disclosed in his affidavit evidence that he cannot raise the security of $15,000. He disclosed only his current financial obligations. See **Locke v Bellingdon Ltd**. (2002) 61 WIR 68 at 83; **William Newman v Wenden Properties Limited & Anor** [2007] EWHC 336 (TCC) at paragraph 24.

[23] Counsel further argued the burden lies on the party resisting the application for security that there is no prospects of funds available from other sources of funding. See **Newman**. Even further that Mr. Selgado has not submitted any evidence that the proposed cost of $15,000. in the appeal is not proportionate.

[24] Counsel submitted that there was no injustice or prejudice to Mr. Selgado in relation to the 3 months and 10 days which passed before an application was made for security.

Submissions for Mr. Selgado

[25] Learned counsel, Mr. Sylvester submitted that the application for security for costs was not made promptly in accordance with Order II Rule 20(2). He relied on the Eastern Caribbean Court of Appeal case of **Ultramarine (Antigua) Ltd. v Sunsail (Antigua) Ltd**.

[26] Mr. Sylvester argued that the power to order security for costs is an extraordinary jurisdiction of the Court as it can be used as a weapon to stifle the claim. He relied on the case of **Knox v Deane**.

[27] Learned counsel contended that Mr. Selgado is not required at this stage to establish that the grounds of appeal will succeed, nor the Court at this stage is required to venture into a determination of the merits of the appeal. That what is required is a consideration of whether the appeal is arguable.

[28] Mr. Sylvester referred to the grounds of appeal and specifically addressed ground (iii) which concerns defence of fair comment as distinct from the defence of justification. Counsel argued that the trial judge erred with respect to the requirement of the particulars for the defence of fair comment as distinct from the defence of justification. He submitted that Mr. Selgado's defence was strictly that of justification. Further, the dicta relied upon by the trial judge was erroneously applied. See **Said Musa** case.

[29] Mr. Sylvester submitted that the $15,000.00 security for costs is not proportionate as the judgment order being appealed is $30,000.00. He submitted that if the Court is minded to grant the application a sum of $7,500.00 would be more proportionate.

Discussion

Security for costs in the Court of Appeal

[30] The power of the Court to order security for costs on appeal is provided for in section *18* of the *Court of Appeal Act ('the Act')*, Chapter 90 of the Laws of Belize. The Court has a discretion whether to order security for costs after taking into consideration all the relevant circumstances. Section 18 of Act provides:

> "The Court may make any order as to the whole or any part of the costs of an appeal as may be just and may, in **special circumstances**, order that such security shall be given for the costs of an appeal as may be just."

[31] The Court has a discretion pursuant to section 18 of the Act whether to order security for costs after taking into consideration all the relevant circumstances.

[32] Further, Mr. Broaster had to show that there are 'special circumstances' which entitle him to costs of the appeal (section 18 of the Act).

[33] The Court has to consider other factors as shown in *Order II, Rule 20* of the Court of Appeal Rules (in so far as is relevant). It provides:

> "20 (1) Before an application for security for costs is made, **a written demand** shall be made by the respondent and if the demand is refused or if an offer of security be made by the appellant and not accepted by the respondent, the Court or the Court below shall in dealing with the costs of the application consider which of the parties has made the application necessary.
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> (2) An application for security for costs may be made at any time after the appeal has been brought and must be made **promptly** thereafter.

(3) An order for security for costs shall direct that in default of the security being given within the time limited therein, or any extension thereof, the appeal shall stand dismissed with costs."

[34] In accordance with the Rules there must be a prior written demand and the application must be made promptly.

Prior written demand for security

[35] Mr. Broaster made a prior written demand for security for costs thereby complying with Order II Rule 20 (1) of the Court of Appeal Rules. The evidence shows that on 22 July 2019, Mr. Broaster's attorney wrote to Mr. Selgado requesting security for costs in the sum of $15,000.00. Mr. Selgado's attorney responded to that letter on 2 August 2019 and stated that Mr. Selgado was unable to accede to the demand for security for costs in the sum of $15,000.00.

Whether application made promptly

[36] Order II Rule 20 (2) provides that an application for security for costs may be made at any time after the appeal has been brought and must be made promptly thereafter. In other words, there should not be any undue delay in filing such application. The Rules does not specify a time limit. It is for the Court to look at the circumstances of the case.

[37] Mr. Selgado's evidence was that the application for security for costs was not made promptly by Mr. Broaster, as it had been made four months after the filing and service of the notice of appeal.

[38] Mr. Sylvester submitted that the application for security for costs was not made promptly in accordance with Order II Rule 20(2). He relied on the Eastern Caribbean Court of Appeal case of **Ultramarine (Antigua) Ltd. v Sunsail (Antigua) Ltd**. Mr. Sylvester relied on a portion of paragraph 3 where it was held that applications must be

made promptly and the reason for that is to prevent a claimant from "*being lulled into a belief that it would be permitted to proceed to trial without being asked to give security*..".

[39] The delay in **Ultramarine** was 3 years and the court awarded security for costs as the delay itself was not a determining factor as shown at the latter part of paragraph 3 of the judgment. The Court considered whether there existed any evidence from the claimant which showed that the delay has caused him prejudice. (See para 64 of the judgment).

[40] Mr. Selgado has not brought any evidence to show that he had been prejudiced by the four months delay and there is no evidence of detriment to be considered by this Court. The record is ready in this matter but there was no case management on the substantive appeal and as such the appeal was not ready for hearing when the application was made for security for costs. The evidence showed that it was ready for Case Management Conference but not ready for hearing. In any event, no prejudice had been shown by Mr. Selgado and as such the delay of four months cannot be a factor for the denial of the application.

Applicable principles to be considered

[41] In the case of **Pound**, the Court discussed the relevant principles that should be considered in exercising a discretion whether to grant security for costs. On the one hand, the appeal should not be stifled and on the other hand where there are special circumstances (section 18) the Court should order security for costs.

[42] The Court in **Pound** relied on **Keary** where Peter Gibson LJ set out the relevant principles, such as a balancing exercise to weigh the injustice against the applicant and respondent. Also, the Court should have regard to all the relevant circumstances in the exercise of it discretion, as shown in **Sir Linsey Parkinson Co**. case. These circumstances include, stifling of the appeal, prospect of success and injustice to either party.

Whether appeal would be stifled with order for security for costs

[43] Mr. Sylvester argued that the power to order security for costs is an extraordinary jurisdiction of the Court as it can be used as a weapon to **stifle the claim**. He argued that Mr. Selgado is impecunious and it would be unjust to require him to provide security for costs. Learned counsel relied on the case of **Knox v Deane** where the Court at paragraph 41 said that:

> "[41] The power to order security for costs is an extraordinary jurisdiction ..In the hands of an opponent, it may be used as a weapon to stifle claim …"

[44] In my opinion, it is for Mr. Selgado to satisfy the Court that he would be prevented from continuing his appeal by an order of security for costs. It is not sufficient for him to say that he is financially unstable. There is no satisfactory evidence from him to show that he is unable to raise the security for costs from other sources. See **Ultramarine** at paragraphs 22, 23, 25 and 26. See also **Keary** discussed in **Pound**. In these cases the principle established is that the appellant must show that he is unable to raise the money elsewhere if he does not have it himself.

[45] As such, I am not satisfied that it is probable that the appeal will be stifled if an order for security for costs is granted by the Court.

Prospect of success

[46] Mr. Arguelles submitted that Mr. Selgado has no reasonable prospect of the appeal succeeding. Mr. Sylvester argued that Mr. Selgado is not required at this stage to establish that the grounds of appeal will succeed or to venture into a determination of the merits of the appeal. He contended that there should be a consideration of whether the appeal is arguable. Mr. Selgado's defence at trial was justification. In my view, the defence of fair comment as distinct from the defence of justification is arguable. I cannot come to a conclusion on the pleadings and evidence before the Court that there is a

high degree of success or failure on the issue of the defence of justification and therefore, will not venture into the merits of the case.

Balancing exercise to determine injustice

[47] The Court is required weigh the possibility of injustice to Mr. Selgado if he is prevented from pursuing his appeal by an order for security for costs. The Court must also weigh the possibility of injustice to Mr. Broaster if no security is ordered and the appeal fails. In my view, Mr. Broaster may be unable to recover from Mr. Selgado the costs to be incurred by him in response to the appeal because of Mr. Selgado's financial circumstances. See **Keary.**

[48] Mr. Selgado deposed that he was not in a position to agree to security for costs in the sum of $15,000.00. but he attempted through goodwill to $10,000.00 as security for costs but, because of his financial position, he was unable to do so. Though, I accept Mr. Selgado's evidence that he is impecunious, I am not satisfied that he cannot raise the funds to pay the security for costs. Further, he has not paid the costs in the court below. In my view, Mr. Selgado's financial circumstances are special circumstances which gives this Court the discretion to make an order for costs. (section 18 of the Act). There is no evidence from Mr. Selgado in relation to seeking the security for costs from another source. Therefore, in my opinion, it would be just to make an order for security for costs.

[49] This will not be a very complex appeal and the likely cost, if Mr. Selgado does not succeed should not be more than the costs awarded in the court below. I would therefore, propose the sum of $10,000.00 as security for costs in the appeal.

Disposition

[50] For the foregoing reasons, I would propose the following order:

Order

(i) The appellant/respondent give security for costs for the appeal in the sum of $10,000.00 within 30 days;

(ii) The sum of $10,000.00 to be paid in an escrow account of the appellant's/respondent's counsel;

(iii) Pursuant to section 23 of the Act, the appeal shall stand dismissed, if the security for costs is not paid within the 30 days period.

(iv) Costs of the application to be in the appeal.

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HAFIZ BERTRAM P (Acting)

AWICH JA

[51] I concur.

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AWICH JA

DUCILLE JA

[52] I have perused the draft judgment of Hafiz Bertram, Acting President, and I am satisfied with the reasoning and the disposition of it.

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DUCILLE JA