

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

CLAIM NO. SLUHCV2018/0118 heard together with
SLUHCV2018/0119 and
SLUHCV2018/0120

BETWEEN:

DR. IFTEKHAR AHMED SHAMS
ASHWIN PATEL
GURJEET SINGH VILKHU

Claimants

and

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

BEFORE: Her Ladyship, the Honourable Justice Kimberly Cenac-Phulgence
(A JUDGE IN CHAMBERS)

APPEARANCES:

Ms. Sueanna Frederick holding for Mr. Dexter Theodore QC for the Claimants
Mr. Mark Maragh with Mr. Rene Williams for the Defendant

2019: June 17, 26.

JUDGMENT

[1] CENAC-PHULGENCE J: By way of separate claim forms all filed on 27th February 2018, the claimants, Dr. **Iftekhar Ahmed Shams ("Dr. Shams")**, **Askwin Patel ("Mr. Patel")** and **Gurjeet Singh Vilkhur ("Mr. Vilkhur")** each brought actions against the Attorney General for damages including aggravated and exemplary damages for malicious prosecution, interest and costs. Defences were filed on 30th April 2018.

[2] The claims are being heard together as they arise from similar sets of facts. Case management directions were given on 21st June 2018 but to date there has only

been compliance by the claimants with the filing of their lists of documents. The trial was scheduled for 13th, 14th and 20th March 2019. However, these dates were vacated as the case management directions had not been complied with and there have been at least two joint applications for extensions of time to file the said witness statements citing the fact that the documentation in the matter is voluminous. On 17th June 2019, an order was made granting the parties another extension of time to 9th September 2019 and ordering further case management on 17th September 2019.

- [3] This decision concerns an application for security for costs to be given by the claimants filed by the Attorney General on 6th March 2019. The grounds for the application are that the claimants do not ordinarily reside in the jurisdiction and they have no real assets within the jurisdiction. The application is supported by an affidavit of the Hon. Attorney General filed on 6th March 2019 and an affidavit in reply filed on 11th June 2019. The claimants filed a reply to the application on 17th May 2019.
- [4] The Attorney General deposes that the claimants left Saint Lucia in early 2018 and have not returned. This is admitted by the claimants in their reply. He says that the claimants require a visa to re-enter Saint Lucia and that he has been advised by the Head of the Immigration Department that no application for the issue of a visa has been made by the claimants. In his later affidavit, the Attorney General deposed to the fact that there indeed was an application for a multiple entry visa which had been granted for one year.
- [5] The claimants, the Attorney General says are not ordinarily resident in Saint Lucia and no longer reside at the addresses stated in their claim forms being, Careillie, Castries in the case of Dr. Shams and Hospital Road in the case of Mr. Patel and Mr. Vilkhur. This is not denied by the claimants.

- [6] The Attorney General deposes that searches at the Land Registry indicate no records that the claimants own any property in Saint Lucia. Searches at the Registry of Companies and Intellectual Property revealed that the Dr. Shams is a director/shareholder in two companies, namely, Muskateers of the Caribbean Inc. and Lambirds Academy Inc. These companies no longer trade. The Attorney General says that he believes that the claimants have no assets in Saint Lucia to satisfy an order for costs in the event such order were to be made before them. All of this was admitted by the claimants in their affidavit in reply at paragraph 13 thereof. The defendant says he has a realistic prospect of defending the claims as the claimants although alleging malicious prosecution have not alleged that the prosecution was motivated by any ulterior motive.
- [7] The defendant therefore seeks security for costs in the sum equivalent to the amount of prescribed costs in relation to the claims.
- [8] The claimants' affidavit in reply was filed by one Teffany Edward who is a legal secretary in the firm of counsel for the claimants, Theodore & Associates who avers that she is authorized by the claimants to swear the affidavit.

Issues

- [9] The only issues for the **Court's determination are:**
- (a) Whether the defendant is entitled to security for costs;
 - (b) If so, what is the quantum of the security to be given.

Issue (a)

Whether the defendant is entitled to security for costs

The Law

- [10] Rule 24.3(1) of the Civil Procedure Rules 2000 provides as follows:
- "The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order ..."**

- [11] The rule goes on to outline the various circumstances in which an order for security for costs may be made. The defendant relies on sub-paragraph (g) which speaks to the circumstance where the claimant is ordinarily resident out of the jurisdiction.
- [12] The claimants have admitted that they are ordinarily resident out of the jurisdiction in their affidavit in reply but do not indicate where they reside. Ms. Edward who deposes to the affidavit in reply says that she has been informed by Dr. Shams that he applied for a 12 month multiple entry business visa on 27th December 2017 and for an extension of his residence permit on 29th December 2017. He was only granted an extension of the residence permit to 8th April 2018 and was told that they are conducting further security checks. Ms. Edward also avers to Dr. Shams informing her that he has made several applications for a further extension of his work permit but he was refused.
- [13] After being denied the 12-month multiple entry visa, Ms. Edward says Dr. Shams was warned that he had to leave the country and so he was left with no option but to leave. That is the reason Dr. Shams no longer resides in Saint Lucia.
- [14] There is nothing to support the averments made as relates to the denials of his applications for the multiple entry visa, extension of his residence permit and work permit. **The affidavit in reply is bare. All it does is explain Dr. Shams' absence** from the jurisdiction whilst admitting that he does not ordinarily reside in Saint Lucia. There is nothing to contradict the allegations that he has no assets in Saint Lucia save that he admits to being a director/shareholder of the two companies. **The Attorney General's evidence is that Dr. Shams' work permit was for one year ending 23rd May 2015.**
- [15] There is nothing in the affidavit in reply as relates to the other two claimants, Mr. Patel and Mr. Vilkhur save the admission that they ordinarily reside out of Saint Lucia. There is nothing to suggest that they own any assets in Saint Lucia. In the

affidavit in reply filed by the Attorney General, he avers that Mr. Patel and Mr. Vilkhur were granted extensions to stay in Saint Lucia up to 17th March 2018.

- [16] The case of *Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.*¹ addresses the scope of security for costs as provided for in CPR 24. In that case, Webster JA [Ag.] said:

“[9] ...The object of an order for security for costs is to provide a successful defendant with a relatively simple way of obtaining payment of costs that the court may order an unsuccessful claimant to pay.

[10] If the claimant is not resident in the jurisdiction, the defendant may be faced with difficulties in enforcing any costs award the court may make. This brings sub-rules (f) and (g) into play, but it does not mean that the court will make a security for costs order in every case where the claimant is ordinarily **resident outside the jurisdiction. ... The authorities from England and the Eastern Caribbean establish that this is only a starting point that, in effect, gives the court the jurisdiction to make the order. Invariably, the court will go on to consider the overarching condition of whether it is just to make the order, having regard to the circumstances of the case.”**

[11] A typical example of when the court will order a claimant who is ordinarily resident outside the jurisdiction to put up security, is when he does not have assets in the jurisdiction. The combination of residence abroad and no assets within the jurisdiction increases the risk that a costs order may be difficult to enforce, or be unenforceable, and the court will be more **inclined to make an order in these circumstances.”**

Analysis

- [17] In relation to Mr. Patel and Mr. Vilkhur there is no doubt that a security for costs order should be made against them as they have admitted to being ordinarily resident outside of Saint Lucia and the evidence shows that no assets could be found belonging to them. The Court therefore has no hesitation in making an order for security for costs against these two claimants.

- [18] As regards, Dr. Shams, he admits to being ordinarily resident out of Saint Lucia.² I accept the evidence of the Attorney General that he has no assets in Saint Lucia.

¹ SLUHCVP2017/0051, (delivered 18th September 2018, unreported).

² See paragraph 5 of the affidavit in reply filed by the claimants.

The fact that he is a director/shareholder of two companies does not translate to **him having assets in the jurisdiction. The companies' assets are not his and so** would not ordinarily be available to settle a costs order which may be made against Dr. Shams personally.

[19] In addition, the evidence of the Attorney General suggests that Dr. Shams' application which he says he made for a multiple entry visa in December 2017 was granted for a period of one year for the period 4th April 2018 to 3rd April 2019 and exhibited a letter from the Immigration and Passport Office. That letter states that it is a provisional visa approval letter and is not a visa and that the actual visa will be endorsed in the passport at the port of entry. The Attorney General avers that there is no evidence that Dr. Shams has entered Saint Lucia since his departure or since that letter. I note however that the copy of the letter exhibited is not signed and so I attach little weight to it. Notwithstanding, it is to be noted that the mere fact that Dr. Shams requires a visa to enter Saint Lucia speaks to the fact that it may be difficult to enforce a costs order against him as there is no guarantee of Dr. Shams returning to Saint Lucia or even if he were to, knowing when that would likely be or even whether he would be granted a visa.

[20] Although I am not to conduct a mini trial in this matter or delve into the details of the case on an application for security for costs, an assessment of whether it is just in all the circumstances to grant the application must involve the Court having regard **to the claimants' and defendant's prospects of success. The claimants claim is for** damages for malicious prosecution. To be successful on a claim for malicious prosecution, the claimants must prove all the elements of the tort. Having reviewed the claims and the defence filed and assessed the relative strengths and weaknesses of each case, I am satisfied that it is just that an order for security for costs be made against the claimants.

Issue 2

Quantum of Security for Costs

- [21] The defendant submits and the claimants admit³ that the amount of security for costs should be based on prescribed costs. The defendant therefore submits that Dr. Shams should pay the sum of US\$341,205.19 and Mr. Patel and Mr. Vilkhur, EC\$7,500.00 each.
- [22] That the amount of security is to be decided in accordance with the prescribed costs regime was confirmed in the case of Dr. Martin Didier which followed the case of Ultramarine (Antigua) Ltd. v Sunsail (Antigua) Ltd.⁴ In the Ultramarine case, the Court of Appeal held that in awarding security for costs, a judge must exercise his or her discretion within the parameters of the applicable costs regime. There is no evidence of any other costs regime having been ordered by the Court and so the applicable costs regime would be prescribed costs.
- [23] In the case of Dr. Shams, he claimed special damages in the sum of US\$53,741,038 plus aggravated and exemplary damages. Prescribed costs calculated on that amount is US\$315,989.80 and not US\$341,205.19 as submitted by the defendant.
- [24] In the case of Mr. Patel and Mr. Vilkhur, their claims do not specify a value. The claimants in their affidavit in reply admit that the security to be paid by these two claimants would be based on a value of \$50,000.00 as their claim forms do not specify the amount of damages claimed. The prescribed costs would therefore be \$7,500.00 for each of these claimants.

Conclusion

- [25] In light of the foregoing, I make the following order:
- (1) The claimant, Dr. Iftekhar Ahmed Shams is to pay security for costs in the sum of US\$315,989.80 or its EC equivalent.

³ Paragraph 13-15 of the affidavit in reply of the claimants.

⁴ ANUHCVP2016/0004, (delivered 7th April 2017, unreported).

- (2) The claimant, Ashwin Patel is to pay security for costs in the sum of EC\$7,500.00.
- (3) The claimant Gurjeet Singh Vilkhur is to pay security for costs in the sum of EC\$7,500.00.
- (4) The said sums are to be paid by the claimants into Court to the Registrar of the High Court in Saint Lucia **within 30 days of today's date and in any event** on or before 30th July 2019.
- (5) Claim numbers SLUHCV2018/0118, SLUHCV2018/0119 and SLUHCV2018/0120 are stayed until the security for costs in relation to each has been paid by the respective claimant.
- (6) If the security ordered is not paid by the respective claimants in accordance with the terms of this Order and by the date specified, their respective claim shall be struck out.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar