IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-1011
[2014] NZHC 1699

UNDER	the Defamation Act 1992
BETWEEN	RAZDAN RAFIQ Plaintiff
AND	MEDIAWORKS TV LIMITED First Defendant
	M19 NEW ZEALAND LIMITED Second Defendant

Hearing:	21 July 2014
Counsel:	BJ Thomson for respondents
Appearance:	R Rafiq, applicant in person
Judgment:	21 July 2014

JUDGMENT OF FAIRE J

This judgment was delivered by me on 21 July 2014 at 3pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:	Simpson Grierson, Auckland
To:	R Rafiq, Auckland

[1] The plaintiff has filed proceedings which include an application for summary judgment. That application was given a date of hearing of 9am on 17 June 2014.

[2] The defendants filed an application for security for costs on 23 May 2014. They were given dates of hearing for 5 June 2014.

[3] Fogarty J made a number of orders on 5 June 2014. Two are relevant to the matters before me and were as follows:

(a) The application for security for costs was adjourned for a fixture. That is the matter that I am to deal with today;

(b) The plaintiff's summary judgment application was adjourned for mention only to today.

[4] The defendants apply for security for costs. They are represented by the same solicitor and counsel. Counsel confirmed that one order was sought in view of the joint representation.

[5] The plaintiff opposes the application. He advances the following grounds in his notice of opposition:

(a) The security for costs is discretionary and premised on prospect and or merits of the claim and or tenable causes of action. There are well justified causes of action in the amended statement of claim. Therefore, it is wrong for the second defendant to assert that this proceeding is "not worth candles".

(b) Granting security for costs shall prolong and result the proceeding to bounce up and down the judicial hierarchy in form of an appeal.

(c) Moreover, security for costs is a mechanism imposed to avoid public scrutiny of private and public enterprises.

(d) It would be contrary to the interest of justice to grant security for costs in particularly in this proceeding.

(e) Further it is inappropriate to grant security for costs at the interlocutory stage in particularly when there is a "live" summary judgment in the proceedings.

(f) The security for costs requisite by the second defendant is grossly excessive. In the event if the security for costs is granted then the proceeding is stayed pending to the payment of security for costs.

[6] The relevant part of r 5.45 of the High Court Rules dealing with security for costs provides:

> **5.45 Order for security of costs**
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> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
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> …
>
> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.

[7] The rule involves a two-stage process. The first stage has been referred to in the cases as the threshold test. That stage requires a finding that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

[8] The plaintiff is an undischarged bankrupt. He was adjudicated bankrupt on 1 August 2013. In addition, the defendants draw attention to the fact that the plaintiff has sought leave to appeal to the Supreme Court against decisions dismissing applications to review decisions by the Registrar of the Court of Appeal refusing to waive security for costs. The underlying appeals were in respect of an order for security for costs made against the plaintiff by the High Court in a claim in which he is suing the Chief Executive of the Ministry of Business, Innovation and Employment for defamation.[1]

[9] The threshold test has been met in this case. The plaintiff is unable to pay costs.

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[1] *Rafiq v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZSC 7, *Rafiq v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZSC 72.

[10] The result is that I must proceed to the second stage of the inquiry. That involves the discretion as to whether security for costs should be ordered or not.

[11] In *McLauchlan v MEL Network Ltd*, the Court of Appeal gave helpful guidance of the approach which should be taken on applications for security for costs.[2] When dealing with the discretion, the Court said:

> [13] Rule 60(1)(b) High Court rules provides that where the Court is satisfied, on the application of a defendant, that there is reason to believe that the plaintiff will be unable to pay costs if unsuccessful, "the Court may, if it thinks fit in all the circumstances, order the giving of security for costs". Whether or not to order security and, if so, the quantum are discretionary. They are matters for the Judge if he or she thinks fit in all the circumstances. The discretion is not to be fettered by constructing "principles" from the facts of previous cases.
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> [14] While collections of authorities such as that in the judgment of Master Williams in *Nikau Holdings Ltd v Bank of New Zealand* (1992) 5 PRNZ 430, can be of assistance, they cannot substitute for a careful assessment of the circumstances of the particular case. It is not a matter of going through a check list of so-called principles. That creates a risk that a factor accorded weight in a particular case will be given disproportionate weight, or even treated as a requirement for the making or refusing of an order, in quite different circumstances.
>
> [15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the courts for a genuine plaintiff is not lightly to be denied.
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> [16] Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

The reference in the judgment to r 60(1)(b) is a reference to the predecessor to the current hcr 5.45.

[12] The plaintiff's summary judgment application is flawed. On its face, the application appears to have been made in reliance on the former High Court Rules. They were the rules substituted by s 10 of the Judicature Amendment Act (No 2) 1985. Those rules were substituted as from 1 February 2009 by s 8(1) of the Judicature (High Court Rules) Amendment Act 2008.

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2 *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

[13] Putting that to one side for the moment and dealing with the position as if the application were appropriately amended, I observe that summary judgment applications are made pursuant to Part 12 of the current High Court Rules. The operative rule is r 12.4 which provides:

> **12.4 Interlocutory application for summary judgment**
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> (1) Application for judgment under rule 12.2 or 12.3 must be made by interlocutory application.
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> (2) An application by a plaintiff may be made either at the time the statement of claim is served on the defendant, or later with the leave of the court.
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> (2A) If an application by a plaintiff is made at the time that the statement of claim is served on the defendant in Australia under section 13 of the Trans-Tasman Proceedings Act 2010, the hearing date allocated (under rule 7.33) for the application must be after the period (under section 17(1)(a) or (b) of that Act) within which the defendant may file an appearance or response document.
>
> (3) An application by a defendant may be made either at the time the statement of defence is served on the plaintiff, or later with the leave of the court.
>
> (4) The party making the application must file and serve on the other party the following documents:
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> (a) an interlocutory application on notice in form G 31:
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> (b) a supporting affidavit:
>
> (c) if the party is a plaintiff applying at the time the statement of claim is served,—
>
> (i) a notice of proceeding in form G 13; and
>
> (ii) a statement of claim:
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> (d) if the party applying is a defendant applying at the time the statement of defence is served, a statement of defence.
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> (5) The affidavit—
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> (a) must be by or on behalf of the person making the application:
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> (b) if given by or on behalf of the plaintiff, must verify the allegations in the statement of claim to which it is alleged that the defendant has no defence, and must depose to the belief of the person making the affidavit that the defendant has no defence to the allegations and set out the grounds of that belief:

(c) if given by or on behalf of the defendant, must show why none of the causes of action in the plaintiff's statement of claim can succeed.

[14] The plaintiff has filed:

(a) A statement of claim dated 30 April 2014;

(b) An amended statement of claim dated 9 July 2014;

(c) A second amended statement of claim dated 16 July 2014.

[15] The plaintiff's applications do not verify the allegations in any of the amended statements of claim. The applications do not comply with r 12.4. If the applications are to proceed at all it is apparent that a further affidavit would need to be filed by the plaintiff. It will need to verify the plaintiff's most recent statement of claim. The issue that then arises is as to whether it is appropriate for the plaintiff in this case to swear an affidavit to the effect that he verifies the allegations in the statement of claim to which he alleges that the defendant has no defence in view of the issues raised by the defendants and notified to the plaintiff.

[16] In his statement of claim, the plaintiff claims that two articles published by the first and second defendants respectively defame. The defendants say that they will oppose the plaintiff's application for summary judgment on the basis that:

(a) The statements that the plaintiff claims carry defamatory imputations are not capable of bearing the pleaded meanings;

(b) The statements are protected by qualified privilege (fair and accurate reporting of judgments of the Court); and

(c) Are true or not substantially different from the truth; or

(d) Comprise honest opinion.

[17] I do not resolve the summary judgment application. On the face of it, however, it would seem that an application for summary judgment in this case is unlikely to succeed. That is a matter that I must take into account in dealing with this security for costs application.

[18] The position, in summary, is that the plaintiff cannot meet the threshold test. My review of his case is that his application for summary judgment is, at best, a weak one. When one exercises the discretion, it is clear to me that this is an appropriate case where an order for security for costs should be made in respect of the summary judgment application. The defendants invite the court to order that the sum of $5,970 be paid as security for costs and that the proceeding be stayed until that security is given. The application further seeks leave to apply for security for costs for subsequent stages, depending upon the outcome of the summary judgment application.

[19] The costs sought based on a summary judgment interlocutory application and Part 14 and Schedules 2 and 3, when one applies Items 23, 24, 26, 28 and 29 indicate that a figure in excess of that sought on a 2B basis in the application is justified. There would also be disbursements, which I have not included in the calculation.

[20] The above leads me to the conclusion that, at this stage of the proceeding, the alternative orders sought in the applications are justified. However, because it is one counsel and solicitor on the record who appears for both parties, one order only should be made to cover both applications.

[21] Accordingly, I order that:

(a) the plaintiff pay security for costs in the sum of $5,970 in respect of the first stage of the proceeding, up to and including the determination of the application for summary judgment by the plaintiff;

(b) If such security for costs is not paid by 11 August 2014 to the Registrar of this court the proceeding shall be stayed until such security is paid;

(c) In the event that security for costs is paid, the summary judgment application shall be listed in the summary judgment list at 9am on Tuesday, 25 August 2014. In that event, the defendants must file and serve their notices of opposition and affidavits not less than five working days before that listing. The court, at that time, would then consider appropriate directions for the disposal of the summary judgment application and any subsequent application that might be filed on the defendants' behalf; and

(d) Leave is reserved to apply by memorandum to have the issue of further security for costs determined in the event that the plaintiff's summary judgment application is dismissed.

[22] Counsel for the defendants advised that the defendants do not seek costs on this application.

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JA Faire J