

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 146 of 2023**

B E T W E E N

KENNETH SCHWEITZER

Appellant

AND

CARTER ENTERPRISES LIMITED

Respondent

BEFORE: **The Honourable Sir Michael Barnett, P
The Honourable Mr. Justice Isaacs, JA
The Honourable Madam Justice Charles, JA**

APPEARANCES: **Mr. Osman Johnson, Counsel for the Appellant**

**Mr. Harvey Tynes, KC with Ms. Roshar Brown, Counsel for the
Respondent**

DATES: **12 March 2024, 3 April 2024**

Civil appeal – Security for costs of an appeal – Appellant not residing in the jurisdiction – No known assets within the jurisdiction- Sole issue of quantum – Volte face rejected –Rules 24(5) and 30 (3) of the Court of Appeal Rules

The respondent seeks security for costs of the appeal in the amount of \$175,000. The respondent relies on the fact that the appellant resides out of the jurisdiction and does not have any assets in the jurisdiction. During the hearing, the appellant conceded that security for costs must be paid but submitted that the figure claimed by the respondent was too high. He sought an opportunity to file written submissions on quantum.

By way of written submissions, the appellant made a volte face submitting that security for costs should not be ordered.

Held: the appellant to pay security for costs in the amount of \$85,000 within 28 days hereof into an escrow account to be held in a joint account of Counsel. In default of the security being given within the time stipulated herein, the appeal shall stand dismissed with costs.

The power of the Court to make an order requiring an appellant to give security for a respondent's costs of an appeal is a discretionary one. It derives its genesis in Rule 24(5) of the Court of Appeal Rules. The Rule gives the Court the power to order security for costs in "special circumstances".

The Court is satisfied that the respondent is not seeking to use the order to oppressively stifle the appellant's appeal. There is no evidence that the appellant is ordinarily resident in the jurisdiction or has any assets here which is probative evidence in favour of granting an order for security for costs. The amount of security ought to be an amount that the Court considers just having regard to all the circumstances. To assist the Court to decide on quantum of security, it is the applicant/respondent's duty to provide materials to the Court, usually by way of a statement of costs or bill of costs that will enable the Court to come to a view as to the amount of security to be given.

Allan Crawford and Sharon Crawford v Christopher Stubbs and Shanna's Cove Estate Company Limited SCCivApp. No. 59 of 2020 considered
Procon (GB) Ltd. v Provincial Building Co. Ltd and others [1984] 2 All ER 368 mentioned

JUDGMENT

Judgment delivered by the Honourable Madam Justice Charles, JA:

1. By Notice of Motion filed on 22 August 2023, the respondent seeks an order for the appellant to give security in the sum of \$175,000 for the costs of and occasioned by his appeal from the Judgment of a Supreme Court Judge which was delivered on 4 August 2023. The application for security for costs was supported by an affidavit of Tanisha L. Tynes-Cambridge deposed to on the same date. In summary, the affidavit alleged that:
 - (1) The appellant's address is stated as Hobe Sound, Florida, 33455, USA and;
 - (2) The respondent is unaware that the appellant has any assets whatsoever located in The Bahamas.
2. The affidavit is also supported by a draft Bill of Costs containing an estimate of the costs that the respondent is likely to incur in defending the appeal. That cost is estimated at \$194,452.00: Exhibit "TLTC2." Additionally, the respondent filed a "Respondent's Outline of Submissions" on 8 March 2024 seeking an order that the appellant within 14 days give security for costs and in default, for the appeal to be dismissed with costs to be taxed if not agreed.

3. As detailed in the affidavit of Mrs. Tynes-Cambridge, Counsel for the respondent wrote twice (on 4 August and 18 August 2023 respectively) to Mr. Johnson, Counsel for the appellant, requesting that the appellant provide security for the respondent's costs of the appeal. Counsel for the appellant did not reply to the request.
4. When the matter came up for hearing before us on 12 March 2024, the appellant had not filed any affidavit evidence in response or any submissions. Simply put, the appellant was not ready for the hearing. When pressed to deal with the application since he had ample notice of the hearing, Counsel for the appellant conceded that the sole issue before the Court is one of "quantum" of the security for costs. At page 9 of the Transcript of Proceedings dated 12 March 2024, the President stated:

“THE PRESIDENT: Is there a basis that you could, as a responsible officer of the court, offer to us why we ought not hear an application for security for costs which was filed in August of 2023 and in which you have not bothered to filed (sic) any affidavit evidence in response to the affidavit in support of the application for security for costs? Bearing in mind that the security for costs was ordered in the court below, bearing in mind that the appellant is outside the jurisdiction, and bearing in mind that the appellant has no assets in the jurisdiction, what would be the basis upon which you could persuade the court not to order security for costs when you have lost in the court below?”

MR. JOHNSON: My Lord, if I may just respond by saying that as her Ladyship alluded to, this argument really is one concerning quantum. I accept the fact that the court is highly likely to grant the security requested. But we are asking for a consideration to be given as to the amount so ordered. [Emphasis added]

5. The discussion continued. At page 12, the President asked whether there was any progress. Mr. Johnson stated:

“MR. JOHNSON: ...The only proposal I could make, my Lords, if the court is minded is that we be allowed to present our written arguments concerning the quantum of costing to be ordered and if your Lordships would be prepared to give a decision after having considered those

written arguments. That would allow me at least, my Lords, the opportunity to address the court properly on why we take the view that these figures are too high. I accept that security must be paid.” [Emphasis added]

6. The Court gave both Counsel an opportunity to speak and to try and agree on a figure to represent reasonable security for costs. When the parties could not agree, the Court gave Counsel for the appellant 48 hours to file an affidavit in reply as well as submissions.
7. On 14 March 2024, the appellant filed the Affidavit of Nakia Mitchell, a legal assistant employed by the law firm of Counsel for the appellant. She deposed that the contents of her affidavit are derived from her own information and from documents and other sources referred to in the affidavit and are true or are from the sources which she believed to be true and correct. On the same day, written submissions opposing the respondent’s application for security for costs were also filed. The submissions went far beyond addressing the singular issue of the quantum that the appellant ought to pay as security for costs in order for him to prosecute his appeal. In fact, Counsel for the appellant now opposed the application for security for costs on a litany of grounds. We disallow the belated attempt by Counsel to re-argue what he had conceded.
8. In Ms. Mitchell’s affidavit, we discern that there is no suggestion that (i) the appellant is ordinarily resident in the Bahamas; (ii) he has assets within the jurisdiction to satisfy a costs order, should one be made against him or (iii) he is impecunious and does not have the means to provide security in the sum requested.
9. Against this background we consider the singular issue before us. The power of the Court to make an order requiring an appellant to give security for a respondent’s costs of an appeal is a discretionary one. It derives its genesis in Rule 24(5) of the Court of Appeal Rules, 2005 (“COA Rules”) which provides:

“24. (5) The court may make such 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.”
10. Rule 24(5) does not give the respondent a right to be granted security for costs but gives the Court the power to do so in “special circumstances”: Sir Michael Barnett P in **Allan Crawford and Sharon Crawford v Christopher Stubbs and Shanna’s Cove Estate Company Limited** SCCivApp. No. 59 of 2020 (delivered on 24 February 2021) at para 10.

11. In the exercise of our discretionary powers under Rule 24(5) and having regard to all the circumstances of the case, we order that the appellant do pay security for the costs of this appeal. This was also conceded by Counsel for the appellant during the hearing before us when he stated that the issue before us is the quantum that the appellant ought to pay as security for costs.
12. In making the order for security for costs, we are satisfied that the respondent is not seeking to use the order to oppressively stifle the appellant's appeal as suggested by Counsel for the appellant in his written submissions. We must balance what we consider to be the legitimate interest of the respondent against trying to stifle the appellant's appeal. There is no evidence that the appellant is ordinarily resident in the jurisdiction or has any assets here which is probative evidence in favour of granting an order for security for costs.
13. The amount of security ought to be an amount that the Court considers just having regard to all the circumstances: **Procon (GB) Ltd. v Provincial Building Co. Ltd and others** [1984] 2 All ER 368. That amount is also discretionary.
14. To assist the Court to decide on the quantum of security, it is the applicant/respondent's duty to provide materials to the Court, usually by way of a statement of costs or bill of costs that will enable the Court to come to a view as to the amount of security to be given. The respondent has complied with its duty and has presented a Bill of Costs in this appeal estimated at \$194,452.00.
15. The sum requested is exorbitant even though the appeal contains 21 grounds of appeal. In our opinion, the appeal will last, at most, one day as opposed to the bifurcated 7 days in the Supreme Court. The security for costs in the Supreme Court was \$100,000. All things considered, we are of the view that the sum of \$85,000 is reasonable.
16. We order that the appellant do pay as security for costs the sum of \$85,000 which is to be paid within 28 days hereof into an escrow account to be held in a joint account of Counsel. In accordance with Rule 30(3) of the COA Rules, we direct that in default of the security being given within the time stipulated herein, the appeal shall stand dismissed with costs.
17. Rule 30(2) of the COA Rules provides:

“30. (2) No application for security for costs may be made unless the applicant had made a prior written demand for such security and if the demand is refused or if an offer of security is made by the appellant and not accepted by the respondent, the court shall in dealing with the costs of

the application consider which of the parties has made the application necessary.” [Emphasis added]

18. The respondent wrote twice to Counsel for the appellant and received no answer. Indubitably, the appellant caused this application to be made. Consequently, the appellant will pay the respondent’s costs to be taxed if not agreed.

The Honourable Madam Justice Charles, JA

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Isaacs, JA