SECURITY FOR COST BY FOREIGN LITIGANTS – A SCARE?

A frequently asked question by foreign litigants is as to what the position of Nigerian law is towards security for cost, particularly as regards quantum and our usual response has always been that cost in Nigeria is not awarded on an indemnity basis. Indeed given the quantum of cost awarded over the years it is fair to state that the basis is more symbolic than actual. The quantum of cost awarded in civil/ commercial actions has never exceeded 1, 000 USD. It is with this background in mind that the recent decision of the court of appeal in C.V**. SCHEEPV AARTONDERNEMING HOUTMANGRACHT, C.V. AARTONDERNEMING HOUTMANGRACHT RAAMGRACHT AND JIMI ODUBA** delivered on the 1st of June, 1994 aroused interest in legal circles.

The plaintiff, a ship owner filed an action in the High Court against the defendant, a legal practitioner, claiming a declaration that the sum of 283, 697,84 British pounds and USD 34, 487. 83 paid to the defendant as professional fees was made under duress having being paid as a pre-condition set by the defendant for the early release of its ship MV REAL ENGRACHT from arrest. The Defendant applied to court for security for costs to the tune of USD 84, 279. 76. The basis of this sum was founded on his oath that he required 22 witnesses in proof of his case. The learned trial Judge in an unprecedented exercise or lack of discretion granted the entire sum. The plaintiff appealed against this decision and the Court of Appeal in overturning it observed as follows:

“ It is also important to observe that although the amount of security to be awarded must be fair and just having regard to all the circumstances of the case, it

cannot be the practice of courts to order such an amount that may appear to be on a full indemnity basis. In this case, the learned trial Judge ordered as security for costs, the whole amount which the Respondent estimated to be his expenses for calling the 22 witnesses from abroad. This is not guided by any law and is not an equitable decision. The trial judge has not in my view exercised his discretion judicially in this matter. The action of the learned trial Judge will in my respectful view, create a false impression in minds of all foreigners that according to the machinery of justice in this country, a foreigner who puts a claim in our courts can only be allowed to prosecute his claim, if he pays to the court an equivalent amount of what he is claiming. This is rather unfortunate. This is infact not so, has never been so, and t is hoped that it would never be so. This is infact not so. The effect of this wrong impression would be to discourage the foreigner from suing thereby stifling his claim, which may be genuine…"

This decision has certainly occasioned relief. The relevant law certainly confers on the court the power to order security as he thinks fit and hitherto this is a discretion that has been exercised with great circumspection. Consequently, the High Court Judge's decision was unprecedented and the court of appeal has maintained the proper position.

Finally, it must be noted that the judicial convention of awards of reasonable amounts as security for cost is a reflection of a legal system where costs are not founded on an indemnity basis, as opposed to other common law systems. Until the system changes in this regard, the award of cost as security at the onset of a case or indeed at the conclusion of a case will continue to be symbolic.
ADEMOLA AKINRELE [DECEMBER 1994]