



[2] Mr Nair has applied for an order for security for costs and a stay of proceedings until security of \$15,000 is provided. This judgment resolves that application.

[3] Mr Sharma is an agent for Modern Auto and is the second plaintiff. Mr Morgan represents Mr Nair. They both agree that the application for an order of security for costs could be dealt with on the papers without submissions.

### **The application for an order of security for costs**

#### *The grounds relied on for the application*

[4] The grounds for the application for security for costs are summarised and set out below:

- (a) Modern Auto and Mr Sharma have failed to comply with the Authority's determinations dated 21 January 2025 and 7 March 2025.<sup>3</sup>
- (b) Mr Nair has been required to apply for a compliance order from the Authority to secure the monies owed to him.
- (c) The past conduct of Modern Auto and Mr Sharma suggests a risk of non-payment of any future costs ordered by the Court.
- (d) Evidence has been provided by Modern Auto to the Authority that "[it] is heavily in debt to third parties and is struggling to meet [its] current financial commitments".

[5] Mr Nair has affirmed an affidavit in support of the application for an order for security for costs.

#### *The opposition to the application*

[6] Modern Auto and Mr Sharma oppose the application for security for costs. Some of the grounds for opposing an order are about the findings in the substantive

---

<sup>3</sup> *Nair v Modern Auto Repair Centre Ltd* [2025] NZERA 28; and *Nair*, above n 1.

determination. One of the grounds is a lack of clarity from the determinations about what amount was required to be paid and why. There is reference to the additional stress ordering security for costs would have on the company and Mr Sharma and that it could close the company and lead to more debts.

*The Court's power to make an order of security for costs*

[7] In the recent judgment *DSJ Joinery Ltd v Da Silva*, Chief Judge Inglis raised an issue about whether the Court has a broader power to order security for costs beyond the express provisions in the Employment Court Regulations 2000 (the Regulations).<sup>4</sup> As observed by the Chief Judge in *DSJ Joinery*, there are numerous instances where the Court has accepted jurisdiction to order security for costs beyond these express provisions.<sup>5</sup>

[8] Where jurisdiction has been accepted by the Court, the requirements in reg 6(2)(a) of the Regulations have been relied on. Regulation 6(2)(a) provides for a situation where no form of procedure has been provided by the Employment Relations Act 2000 (the Act) or the Regulations or rules under s 212(1) of the Act. The Court must in those circumstances dispose of the case “as nearly as may be practicable” in accordance with several provisions including the High Court Rules 2016 (the Rules). In making an order for security of costs, the Court has, in the absence of express provisions, applied r 5.45.

[9] Neither party raised an issue as to the jurisdiction of the Court to order security for costs. I will consider the application under r 5.45 and return to the issue of jurisdiction.

## **Analysis**

[10] Rule 5.45(1) provides that sub-cl (2) applies if a Judge is satisfied, on the application of a defendant, that a plaintiff is resident out of New Zealand or that there

---

<sup>4</sup> *DSJ Joinery Ltd v Da Silva* [2025] NZEmpC 231. Two express provisions are referred to in the judgment for ordering security for costs. The first is reg 64(3), which provides for the power to order a stay of proceedings and that such an order may be made subject to conditions, including as to the giving of security. Second, reg 69 provides for security for costs where a party seeks to appeal to the Court of Appeal against a judgment of this Court.

<sup>5</sup> See for example *Burgess v Tutton Sienko and Hill Partnership* [2025] NZEmpC 133.

is reason to believe that a plaintiff will be unable to pay the defendant's costs if the plaintiff is unsuccessful in the proceedings.

[11] The Court needs to consider whether there is a reason to believe that Modern Auto and Mr Sharma will be unable to pay Mr Nair's costs if unsuccessful. There is no standard of proof or onus, but the Court needs to be satisfied about an inability to meet an award of costs.

[12] If this threshold test is satisfied, then there is a discretionary consideration as to whether an order for security for costs would be "just in all the circumstances" and, if so, what amount should be ordered payable. Balancing the respective interests of the parties is the overriding consideration. This includes the right to access to justice. To the extent that an assessment of merits is possible, that may be relevant. Relevant factors as to the quantum of the security may involve consideration of the amounts at stake and probable costs if the plaintiffs are unsuccessful.

[13] The main evidence relied on is the fact that remedies and costs ordered by the Authority have not been paid and an order for compliance has been sought from the Authority.

[14] One of the grounds in support of the application was evidence in the Authority about financial difficulties faced by either Modern Auto and/or Mr Sharma, but that evidence is not before the Court and accordingly no weight can be placed on that.

[15] Modern Auto and Mr Sharma do not specifically address their financial positions in their opposition to the application for security for costs. It could be inferred that an order for security for costs would cause some stress and difficulty for Modern Auto and Mr Sharma and that there are debts owed by Modern Auto.

[16] Mr Nair does not have to prove an inability on the part of Modern Auto and Mr Sharma to pay an award of costs should they be unsuccessful. There must, however, be some credible evidence for the Court to reasonably infer that Modern Auto and Mr Sharma will be unable to pay. There is no evidence that there has been

an attempt at enforcement of the Authority orders through the District Court processes or that Modern Auto is no longer trading.

[17] I am not satisfied that there is credible evidence of an inability on the part of Modern Auto and Mr Sharma to pay costs if the challenge is unsuccessful. There may be an unwillingness or reluctance to pay, but that is different from an inability to pay.

[18] I have also reflected on whether an order for security for costs would be just in all the circumstances.

[19] I balance in the exercise of my discretion the right to access to justice and the interests of Mr Nair. The nature of the litigation is relevant. The litigation is confined to a challenge of the costs determination. It is not complicated. I suggested that the challenge could be dealt with on the papers but, given the requirement for an interpreter, an in-person hearing was preferred. Given the nature of the proceeding, I conclude that it would not be oppressive to Mr Nair if an order for security for costs is not made.

[20] It is difficult to assess, with any degree of certainty, the merits of the challenge to the costs determination, which is on a de novo basis. The amended statement of claim focuses on whether the discretion as to costs was exercised properly by the Authority taking all matters into account. A conclusion is not available that the challenge is completely without merit.

[21] The proximity of the hearing date is such that the hearing may also be jeopardised if an order for security of costs is made.

[22] For the avoidance of doubt, I would not have found it to have been just to order security for costs in the circumstances of this case for the above reasons if satisfied that there was reason to believe that Modern Auto and Mr Sharma will be unable to pay Mr Nair costs if unsuccessful.

[23] It is not necessary therefore to decide whether the Court has the power to order security for costs where there is no express provision in the Act or the Regulations to do so.

### **Conclusion**

[24] The defendant's application for an order of security for costs is declined.

[25] Costs will be decided following the substantive hearing given its proximity.

Helen Doyle  
Judge

Judgment signed at 3 pm on 28 January 2026