GLOCOM MARKETING LIMITED
v
CONTRACT HAULAGE LIMITED

HIGH COURT.
DR. MATIBINI, SC, J.
8TH SEPTEMBER, 2010.
1998/HP/787.

[1] Civil procedure - Security of costs - Conditions to be fulfilled.

This was an application for security of costs. The application was made pursuant to Order 40, Rule 7, of the High Court Rules, and Order 23 Rule 1 of the Rules of the Supreme Court. (White Book)

Held:

1. Generally, costs are not determined until the claim is finally disposed of whether by consent, interim process, or trial.

2. The successful party recovers costs from the loser, and the outcome on the merits is only known when the judgment is obtained.

3. The order for payment of security of costs is not one that is made freely, and will not be made simply because the plaintiff appears impecunious.

4. Before exercising the discretion to order any plaintiff to give security of costs, the Court will have regard to all the circumstances of the case, and will grant the order if it thinks just to do so.

5. The circumstances which the Court may take into account include; the plaintiff's bona fides, and his prospects of success; whether the defendant has admitted on the pleadings or elsewhere that money is due; whether there is a substantial payment into Court, or an open offer of a substantial amount; whether the application for security is being used oppressively e.g. to stifle a genuine claim; whether the plaintiff's want of means has been brought about by any conduct of the defendant, such as delay in doing part of the work; the substantial rights of enforcement of judgment, and the stage of the proceedings at which the application is made.

6. An order for security of costs seeks to protect the party in whose favour it is made against being unable to enforce any costs order he may later obtain.

7. It is essential that applications for security of costs are made at an early stage in the

proceedings. Lateness may itself be a reason for refusing an order.

8. The amount to be imposed as security of costs should be such as the Court thinks just in all the circumstances of the case

Cases referred to:

1. Gent v Hanson [1893] 69 L.J. 303.
2. Sir Linday Parkinson and Company v Tripalan Limited [1973] Q.B. 609.
3. Procon (Great Britain) Limited v Provincial Building Company Limited [1984] 1 W.L.R. 55.
4. Porze Lack K.G. v Porze Lack U.K. Limited [1987] 1 W.L.R. 420.
5. Derby v Fitzgerald [1990] 1 W.L.R. 552.
6. Berkelely Administration Inve. v Mc Clelland [1990] 1 Q.B. 207.
7. Trident International Freight Services Limited v Manchester Ship Canal [1990] B.C.L. 263.
8. Flender Werft A.G. v Aegan Maritime Limited [1990] 2 Lloyds Rep. 27.
9. Nasser v United Bank of Kuwait [2002]3 ALL E.R. 406.
10. Summerset Leeke v Kay Trustees [2004] 3 ALL E.R. 406.
11. Long Staff International Limited v Baker and Mc Kenzie [2004] 1 W.L.R. 17.
12. Keen Exchange Holding Company Limited v Ingrid Andrea Lolten and Investment Bank Plc (2009) Z.R. 343.

Legislation referred to:

1. Companies Act, cap 388.
2. Foreign Judgement (Reciprocal) Enforcement Act, cap 76.
3. High Court Act, cap 27, Orders 40, Rules 7, and 11 Rule 4 (1).
4. Rules of the Supreme Court (White Book) Order 27, Rule 7; Order 2, Rule 2 (1) and Order 18, Rule 19 (3)

Works referred to:

1. Stuart Siame, A Practical Approach to Civil Procedure, Eighth Edition (Oxford, Oxford University Press, 2003).
2. J.R. Lewis, Civil and Criminal Procedure, (London, Sweet and Maxwell, 1968).
3. Simon Odger, On Civil Court Actions, Practice and Precedents. Twenty fourth Edition, (London, Sweet and Maxwell, 1966).
4. O'Hare and Browne, Civil Litigation, 12th Edition, (London, Thomson Sweet and Maxwell, 2005).

S. Musune of Messrs Mvunga and Associates for the plaintiff.
M.V. Kaona of Messrs Nakonde Chambers for the defendant.

DR. MATIBINI, SC, J.: This is an application for security of costs. The application is made pursuant to Order 40 rule 7 of the High Court Rules, and Order 23, rule 1 of the Rules of the Supreme Court (White Book). Order 40, rule 7, of the High Court Rules is couched in the following terms:

"The Court may on application of any defendant if it or he feels fit, require any plaintiff in any suit either at the commencement or at any time during the progress thereof to give security for costs to the satisfaction of the Court or judge, by deposit or otherwise, or to give further or better security, for costs of any particular proceedings undertaken in his interest."

Order 23, rule 1, of the Rules of the Supreme Court is in turn expressed in the following terms:

"Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court:

(a) that the plaintiff is ordinarily resident out of the jurisdiction;

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so or;

(c) subject to paragraph [2] that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation;

Then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.

(2) The Court shall not require a plaintiff to give security by reason only of paragraph (1) (c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive."

The application for security of costs in this matter is supported by an affidavit dated 4th November, 2009. The affidavit was deposed to by one Alex Malate Makapa, the Human Resources Officer in the defendant's company. Mr. Makapa deposed that the Plaintiff company, Glocom Marketing Limited of South Africa, where the defendant company allegedly procured the spare parts in dispute, is not registered in Zambia, either in the foreign register, or the general register. Mr. Makala further deposed that Godfrey Msiska, and his Glocom Marketing Limited are based in Malawi. In support of this contention, the deponent produced before me, and marked "AMM 1," a copy of a headed letter showing the address of Glocom Marketing Limited, as being P.O. Box 2369, Lilongwe, Malawi.

Furthermore, Mr. Makala deposed that the Registrar of Patents and Companies in Zambia has a company registered as Glocom Marketing Limited. The directors of the company are Andrew Msiska and Emily K. Msiska. The contention of Mr. Makapa is that Mr. Godfrey S. Msiska is not registered as the director of Glocom Marketing Limited, which is registered in Zambia. Mr. Makapa further alleges that

Mr. Godfrey Msiska has been coming to Court purporting to be a director, and an agent of Glocom Marketing Limited of South Africa. In this regard, Mr. Makapa contends that the controversy in the main action in part relates to the determination of the lawful nominee or agent of the plaintiff. In view of the foregoing, the defendant has urged me to order security for costs in the sum of K60 million.

This application is opposed. In opposing the application, one Godfrey S. Msiska claiming to be a director of the plaintiff company deposed that prior to the commencement of this action, he and the defendant had several discussions in his capacity as a director of the plaintiff company incorporated in Zambia. In this regard, Mr. Msiska referred me to a letter marked "GSM 1" as proof of his assertion. The letter marked "GSM 1" and dated 25th April, 1996, is on a headed letter of Glocom Marketing Limited, and bears a Lusaka postal address. Mr. Msiska however admits that he has acquired a temporary residence in Malawi for the sole reason of carrying on business. Mr. Msiska contends that he is not a "flight risk". To prove his citizenship, Mr. Msiska produced a copy of his Zambian national registration card marked "GSM 2".

Mr. Msiska contends that his company is duly incorporated in Zambia. However, Mr. Msiska alleges that the records at the Patents and Companies Registry were destroyed by his rival brother who at the material time purported to have an interest in the debt in issue. Thus, Mr. Msiska denies that he has been coming to Court purporting to be a director and agent of Glocom Marketing Limited of South Africa. Further, Mr. Msiska denies having been involved in a dispute as to who the agent or nominee of the plaintiff company should be.

Mr. Msiska contends that the application for security of costs is devoid of merit and has been made in bad faith. Mr. Msiska, is of the opinion that the application is designed to frustrate him from pursuing the claim which has reasonable prospects of success. Mr. Msiska contends that if I allow the application, I will deny him justice because he has no capacity to raise such a colossal sum of money under the guise of security costs. Mr. Msiska urged me to dismiss the application.

At the hearing of the application held on 8th July, 2010, counsel for the parties supplemented the affidavit evidence referred to above, with oral arguments. On behalf of the defendant, Mr. Kaona submitted that the application is made pursuant to Order 40, rule 7, of the High Court Rules, and Order 23, rule 1, of the Rules of the Supreme Court. These rules have been reproduced, and adverted to earlier on.

Mr. Kaona submitted that the gist of the application is that a search conducted at the Patents and Companies Registry, revealed that the Plaintiff company does not exist either in the general or foreign register. Further, Mr. Kaona submitted that the only record available, shows Mr. Msiska as the Plaintiff's representative who is resident in the Republic of Malawi. Given these two factors, Mr. Kaona argued that it would be difficult, if not impossible, for the defendant to secure costs if it were successful after trial of the action. In the circumstances, Mr. Kaona urged me to order the Plaintiff Company to pay security for costs.

In response, Mr. Musune submitted first, that this action was commenced sometime in 1998. The defendant then decided to enter unconditional appearance; implying that it was ready to defend the action. Yet, Mr. Musune submitted that Order 11, rule ,1 Sub rule 4 of the High Court Rules provides for entry of conditional appearance pending setting aside of the writ. Second, Mr Musune submitted that he was relying on Order 2, rule 2, sub rule 1 of the Rules of the Supreme Court in support of the proposition that an application for irregularity shall not be allowed unless it has been made within reasonable time, and after taking fresh steps to make good the irregularity. Third, Mr. Musune drew my attention to Order 18, rule 19, sub rule 3, of the Rules of the Supreme Court 1999 edition. In this respect Mr. Musune argued that where a statement of claim is been attacked, an application must be made before the defence is served. Mr. Musune referred to the case of Gent v Hanson (1), where it was held that any application to strike out pleadings ought to be made as soon as possible after service of the offending pleadings. Thus, Mr. Musune submitted that in the matter before me, the defendant became aware of Mr. Msiska's involvement in this matter on 5th May, 2003. And on 26th October, 2003, the defendant filed its defence, and later amended the defence on 29th May, 2009. The defence, Mr. Musune submitted does not show that defendant does not dispute the fact that Mr. Msiska is an agent of the Plaintiff. I must state at once that all these arguments are totally misconceived, and irrelevant to an application for security of costs. Therefore, it is unnecessary for me to address them.

Mr. Musune continued that the application for security for costs in the sum of K60 million is colossal and unmeritorious. Mr. Musune argued that Mr. Msiska is a Zambian who often travels to this country to see members of his family. His residence in Malawi is temporary, and is for the sole purpose of pursuing business interests Mr. Musune submitted that if any judgment is entered against the Plaintiff, it is amenable to be registered under the Foreign Judgments (Reciprocal) Enforcements Act, chapter 76 of the Laws of Zambia. Mr. Musune also submitted that he was alive to the fact that the rationale for security of costs is to guard against frivolous or vexatious actions. This action, Mr. Musune argued is not frivolous or vexatious. Mr. Musune argued that during the trial of the main action, the Plaintiff company will demonstrate that it is registered under the Companies Act, and thus prove its existence. It will also be shown at trial that the records at the Patents, and Companies Registry, were destroyed by a rival brother who purported to have an interest in the debt. Ultimately, Mr. Musune urged me to dismiss the application because, it is aimed at frustrating a meritorious claim.

In reply, Mr. Kaona submitted that the gist of the application is that the plaintiff resides outside the jurisdiction of the Court. Mr. Kaona pointed out that Mr. Msiska does not contest the fact that he resides in Malawi. Mr. Kaona argued that Mr. Msiska admitted that he has a temporal resident permit in Malawi. This admission, Mr. Kaona argued, reinforces the defendant's right to the relief sought. Mr. Kaona also argued that even assuming Mr. Msiska was given the benefit of doubt that the records relating to the Plaintiff company were destroyed by his rival brother, Mr. Msiska should have retained copies of the records which should have been exhibited in the context of this application. Finally, Mr. Kaona submitted that he has demonstrated that this is a proper case for the grant of the order sought; security of costs.

Prior to addressing the various issues, arguments, and submissions raised by counsel, it is

necessary to place in perspective the subject of security of costs. According to Stuart Siame, A Practical Approach to Civil Procedure, Eighth Edition (Oxford, Oxford University Press, 2003), at page 401, generally, the question of who pays for the costs of a claim is not determined until the claim is finally disposed of, whether by consent, interim process, or trial. This is because the usual rule is that the successful party recovers costs from the loser, and the outcome on the merits is only known when the judgment is obtained. The learned author goes on to state that it is for this reason that the parties are not generally allowed to anticipate the eventual costs order by asking for interim orders that their opponents provide funds as security to pay for the costs of the claim. Despite this, the learned author points out, it is accepted that there have to be exceptions for cases where there is significant risk of defendants suffering the injustice of having to defend proceedings with no real prospect of being able to recover costs if they are ultimately successful.

However, J.R. Lewis in his book entitled, Civil and Criminal Procedure (London, Sweet and Maxwell, 1968), observes at page 77, that the order for payment of security of costs is not one that is made freely, and will not be made simply because the Plaintiff appears impecunious. The circumstances in which it may be ordered against a plaintiff or a counter claiming defendant, are detailed in Order 23, rule 1, referred to above.

Simon Odgers on Civil Court Actions: Practice and Precedents' Twenty Forth Edition, (London, Sweet and Maxwell, 1966), cautions at page 337, that before exercising the discretion to order any plaintiff to give security for costs, the Court will have regard to all the circumstances of the case, and will grant the order if it thinks just to do so. The circumstances which the Court may take into account include: the plaintiff's bona fides, and his prospects of success; whether the defendant has admitted on the pleadings or elsewhere that money is due; whether there is a substantial payment into Court or an open offer of a substantial amount; whether the application for security is being used oppressively e.g. to stifle a genuine claim; whether the plaintiff's want of means has been brought about by any conduct of the defendant, such as delay in making payment, or in doing part of the work; the substantial rights of enforcement of judgment, and the stage of the proceedings at which the application is made.

In conclusion, O Hare and Browne, Civil Litigation 12th Edition (London, Thomson Sweet and Maxwell, 2005), states at page 359, that an order for security of costs seeks to protect the party in whose favour it is made against being unable to enforce any costs order he may later obtain. The order if complied with, will provide the party in whose favour it is made with funds normally held in Court available for the payment of any costs the Court later awards.

On the application for security of costs, Lord Denning M.R. observed in the case of Sir Lindsay Parkison and Company v Triplan Limited (2), that the following matters or issues are vital. Wit:

(a) whether the claimant's claim is bona fide, and not a sham. Factors to be taken into account in this regard are:

(i) whether the claimant has reasonably good prospects of success;

(ii) whether the defendant has made any admissions in its statement of case, or elsewhere; and

(iii) whether there has been substantial payment into Court (as opposed to a small amount in order to get rid of a nuisance claim.)

(b) whether the defendant is using the application for security oppressively so as to stifle a genuine claim; and

(c) delay in making the application.

Some of these factors will be discussed briefly below.

PROSPECTS OF SUCCESS

Prospects of success at trial is one of the matters that is taken into account in an application for security of costs. However, it is important to bear in mind that if this factor is taken too far, there is a risk that the application can be turned into an investigation similar to a trial of an action itself. In a passage approved by the Court of Appeal in Trident International Freight Services Limited v Manchester Ship Canal (7), Browne Wilkson V.C., in Porzelack K.G. v Porzelack U.K. Limited (4), observed as follows at 423:

"Undoubtedly if it can clearly be demonstrated that the claimant is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can be properly weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure."

STIFLING GENUINE CLAIM

It is argued by Stuart Siame, (supra) at page 406 that the question of stifling a genuine claim is a corollary to the question whether the claimant's claim is a sham. The learned author goes on to point out that the essential policy is that the need to protect the defendant has to yield to the claimant's right of access to the Courts to litigate the dispute if it is a genuine claim. Stuart Siame (supra) goes on to state that in deciding whether a claim is likely to be stifled by an order for security of costs, the Court is entitled to take into account any ability the claimant may have of raising money from friends, relatives, or if it is a company, its directors, shareholders or other backers or interested persons. Stuart Siame (supra) concludes that as this information is likely to be entirely within the claimants knowledge, it is generally for the claimant to satisfy the Court that it would be prevented from continuing the litigation by reason of the order. (See Flender Werft A.G. v Aegean Maritime Ltd (8)).

DELAY IN APPLYING

It is essential that applications for security of costs are made at an early stage in the proceedings. Lateness, may itself be a reason for refusing an order.

RESIDENT OUTSIDE THE JURISDICTION

The other material factor in weighing whether to grant the order for security of costs is whether a claimant is resident outside the jurisdiction. Stuart Siame (supra) observes at page 406, that where security is sought against a claimant outside jurisdiction, the order should reflect the obstacles in the

way of or the costs of enforcing the judgment against the particular claimant or in the particular country concerned. (See Nasser v United Bank of Kuwait (9)). In this regard, it is the difficulty of enforcing in the place where the assets are likely to be, rather than enforcement in the country where the respondent happens to live that has to be considered. Stuart Siame (supra) notes at p.407 that orders have been refused on account of the ease of enforcement (see Sumerset Leeke v Kay Trustees (10), and Longstaff International Ltd v Baker and Mc Kenzie (11)).

Since the effectiveness of enforcement where a claimant is resident outside the jurisdiction is the most important consideration, the following factors, Stuart Siame (supra) argues at p.407, need to be taken into account if present:

(a) where the claimant has substantial assets within the jurisdiction. (See Debry v Fitzgerald (5)).

(b) the degree of permanence of those assets, and whether the claimant has a substantial connection with this country; and

(c) the ability of the claimant to transfer the assets around the world. (See Berkeley Administration Inc. v McClelland (6)).

To illustrate the application of the principles under discussion, I will refer to the case of Keen Exchange Holding Company v Ingrid Andrea Lolten and Investrust Bank PLC (12), to be reported in the 2009 edition of the Zambia Law Reports. The Keen Exchange Holding company case, was decided by Imasiku, J. The facts in this case were that the 1st defendant a Jamaican national resident in Johannesburg, in the Republic of South Africa, was served with a writ of summons, and statement of claim, issued by a plaintiff resident in Kingston, Jamaica, claiming several declaratory remedies. Counsel for the 1st defendant applied for security of costs.

In delivering the ruling, Imasiku, J, observed that it was not in dispute that the plaintiff company, was a foreign company resident abroad, and therefore is subject to the prima facie rule that he ought to give security for costs in an action which is brought in this country. Imasiku, J, however observed that the rule is subject to certain exceptions, one being that, if there is in this country property which can reasonably be regarded as available to meet the defendant's rights to have his costs paid, then there would be no order for costs.

Thus, on the facts of the case, Imasiku, J, opined that the only issue for him to determine was whether or not the plaintiff had assets within Zambia. If the plaintiff had assets in Zambia, then the 1st defendant would not be entitled to the order for security of costs. In opposing the application, the plaintiff's representative deposed that the plaintiff has substantial moneys within the jurisdiction of the Court. The money in question was deposited in the 2nd defendant's bank, and was subject of a freezing order by the Drug Enforcement Commission.

Ultimately, Imasiku, J, was satisfied that on the facts of the case before him, and the authorities referred to, the sum of US7,000,000.00, the subject of the action, was substantial property which would be available in the event of the defendants being entitled to the costs of the action. Imasiku, J,

concluded that the 1st defendant was not entitled to the order for security of costs.

IMPECUNIOUS LIMITED COMPANY

Another factor that may be taken into account in an application for security of costs is whether or not a limited company is impecunious. The rationale behind ordering security against an impecunious company is to safeguard the defendant against the prospect of encountering difficulty in enforcing any order for the costs of the claim. According to Stuart Siame (supra) (at page 407), the critical question is whether the company will be able to meet the costs order at the time the order has to be paid. The Court is therefore required to consider the nature, and liquidity of the company's assets. (See Longstaff International Limited v Baker and McKenzie (11)). The Court is also required to take into account whether the company's want of means has been brought about by any conduct by the defendant, such as, in a claim for breach of contract, delay in payment, or the defendants delay in performing its part of the contract.

AMOUNT

Lastly, the amount to be imposed as security of costs should be such as the Court thinks just in all the circumstances of the case. (See Procon (Great Britain) Ltd v Provincial Building Company Limited (3). Stuart Siame (supra) points out at page 408, that the Court needs assistance on the amounts of costs the defendant is likely to incur in the action. And for this reason, it is usual to exhibit a summary of the costs to the defendant's evidence in support. Security may be ordered for the entire costs of the action, or up to future point in the action such as setting down for trial, and may include past as well as future costs.

Stuart Siame (supra) notes at p.408, that there is no rule of practice that the Court will always reduce the defendants estimate by a third. (See Procon (Great Britain) Ltd v Provincial Building Company Limited (supra).)

However, Stuart Siame (supra) observes that it is usual to make a deduction from the defendant's costs estimate to take into account any likely reduction on assessment of costs, and also to make an arbitrary discount in respect of future costs to take account of the chances of settling. I will now proceed to apply the principles highlighted above to the facts of this case.

PROSPECTS OF SUCCESS AT TRIAL

The Plaintiff's claim as endorsed on the writ of summons dated 23rd April, 1918, is for the sum of US61,007.04, and US82,613.71, as interest, for the supply of motor spare parts to the defendant. In elucidating the claim, the Plaintiff avers in the statement of claim dated 28th June, 2005, that by an agreement in writing, the Plaintiff agreed to supply to the defendant motor spare parts valued at US203,245.11. Out of this sum, the defendant paid the sum of US142,007.04, leaving the unpaid balance in the sum US61,007.04, the subject of this action. Sometime in October, 1994, the Plaintiff alleges that it was agreed that interest would be charged at the rate of 5%, until full payment. The Plaintiff contends that both the principal sum, and the interest have been outstanding since October, 1994.

The defendant denies ever entering into an agreement with the Plaintiff for the purchase of motor spares in the sum of US203,245.06. However, the defendant admits having had dealing with a South African company called Glocom Marketing Limited. The company is based in South Africa, and the agent is a Mr. G.S. Msisika, who is based in Malawi. The defendant further states in its defence, that the agent has not sanctioned litigation against the defendant in Zambia, and therefore his action is frivolous, and is unauthorized.

The plaintiff has in its Bundle of Documents filed in Court on 31st July, 2007, produced letter dated 23rd June, 1995. The letter is at page 2 of the Bundle of Documents. In the letter of even reference, the Chief Accountant by the name of H. R. Mukupa of the defendant company confirmed that upon reconciliation of the spares account, the defendant company confirmed that it owed Glocom Marketing of P.O. Box 32312, Glenstanton of South Africa, the sum of US61,007.04. Further, the Chief Accountant indicated that the payment date would be communicated in writing after consulting with the Receiver Manager.

In another letter dated 10th January, 1996, addressed to Glocom Marketing of South Africa, R. Ravi Sanka, the Chief Accountant of the defendant company confirmed the debt in the sum of US61,007.04. Further, the Chief Accountant confirmed that the defendant was under receivership with effect from 2nd February, 1999. The Chief Accountant went on to state that the amount due was pre-receivership and was unsecured. The Chief Accountant also advised that the company was in the process of paying off preferential, as well as secured creditors. The defendant envisaged that the unsecured creditors would be attended to as soon as funds were made available for payment of unsecured creditors. It is clear that although the defendant denies in the defence owing the Plaintiff any monies, the correspondence between Mr. Msiska and the agents of the defendant, confirms an outstanding debt.

I find that there appears to be some prospects of recovering the debt, albeit the company is still under receivership.

STIFLING GENUINE CLAIM

Prima facie, the Plaintiff appears to have a genuine claim against the defendant. In weighing and deciding whether the Plaintiff's claim is likely to be stifled by an order of costs, I am required to take into account the ability of a claimant to settle the sum applied for as security for costs. In this case, Mr. Msiska has deposed that granting the defendant the order sought will be a denial of justice because he does not have the capacity to raise such a huge sum of money purported to be security for costs. Further, Mr. Msiska deposed that the application is made in bad faith, and is designed to frustrate him from pursuing a claim that has reasonable prospects of succeeding.

RESIDENT OUTSIDE THE JURISDICTION

Another significant factor in deciding whether or not to grant an Order for security costs is whether a claimant is resident outside the jurisdiction. In exercising the discretion whether or not to

grant the order, it is instructive to bear in mind the guidelines provided in Order 23, rule 1, of the Rules of the Supreme Court. To recapitulate, Order 23, rule 1, provides that where on the application of a defendant to an action or other preceding in the High Court it appears to the Court, inter alia, that:

(a) the Plaintiff is ordinarily resident out of the jurisdiction;

(b) that the Plaintiff [not being a plaintiff who is suing in a representative capacity] is a nominal plaintiff, who is suing for the benefit of some other person, and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, then if having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action, or other proceedings as it thinks just.

According to the affidavit in support of this application, (deposed to by Mr. Mukupa), a search at the Patents and Companies Registry revealed that the directors of Glocom Marketing Limited are Andrew and Emily Msiska. Exhibit marked "AMM 1" in the affidavit in support also shows that Mr. G.S. Msiska is a representative of Glocom Marketing Limited of Lilongwe, Malawi. However, the Plaintiff's Bundle of Documents containing correspondence between the plaintiff and the defendant, show that the Plaintiff company is based in Pretoria, in the Republic of South Africa. This assertion is also confirmed in the defendant's defence. I therefore find that the Plaintiff company is based in Pretoria, South Africa. Further, I find that there is no evidence to prove that Mr. Msiska is a director, or appointed agent of the Plaintiff company.

IMPECUNIOUS LIMITED COMPANY

The Plaintiff is a limited company. The correspondence contained in the Bundle of Documents, as earlier noted, shows that the company is based in South Africa. The company has not indicated in the context of this application that it will be able to meet the costs order, in the event the order is made. The company's assets or liquidity has not been disclosed. I therefore find that there is no evidence presented to me to show that the company is in a position to meet the costs order, if it is so ordered.

DELAY IN MAKING THE APPLICATION

It is vital as earlier observed that applications for security of costs are made at an early stage in the proceedings. The pleadings in this matter have been exchanged and concluded. And the matter has been set down for trial. The trial has not commenced. Although the application has been made rather late, I am of the opinion that the application does not in any way work prejudice against the plaintiff. At any rate, Order 40, rule 7, of the High Court Rules provides that an application for security of costs may be made at the commencement of proceedings, or at any time during the progress of the action.

AMOUNT

The defendant has in the application indicated that it is requesting security for costs in the sum of K60 Million. The defendant has not provided any assistance, or adduced evidence as to how it arrived at the sum of K60 Million. I therefore consider the sum to be both arbitrary and excessive.

Be that as it may, in view of the fact that the Plaintiff is resident outside the jurisdiction; in the absence of evidence of the company's assets and liquidity; and also granted that Mr. Msiska is not a

director in the Plaintiff company, I have come to the conclusion that this is proper case to order security for costs. However, I consider the sum of K60 million to be arbitrary and excessive. Accordingly, I order security for costs in the sum of K20 million. Each party shall bear their respective legal costs of this application.

Leave to appeal is granted.