

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

**2014/HPC/0535**

(Civil Jurisdiction)

**BETWEEN:**

MOHAMMED ENTERPRISES (T) LIMITED

**PLAINTIFF**

**AND**

HAMRAH ENTERPRISES OF **PLOT NO. 9469,**  
**DEFENDANT**  
OFF KAFUE ROAD, MAKENI, LUSAKA

**BEFORE THE HON. MR JUSTICE JUSTIN CHASHI IN  
CHAMBERS ON THE 19<sup>TH</sup> DAY OF MARCH, 2015**

*For the Plaintiff: N L Okware, Messrs Okware and Associates*

*For the Defendant: M. Ndhlovu standing in for Messrs Mutemwa Chambers.*

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**R U L I N G**

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**Cases referred to:**

1. Keen Exchange (Holding) Company v Ingrid Andrew Loiten and Investment Bank Plc (2009) ZR 343
2. Aquila Design (GRB) Products Limited v Cornhill Insurance Plc (1988) BCLC 134

**Legislation referred to:**

3. The Supreme Court Practice (White Book) 1999
4. The High Court Act, Chapter 27 of The laws of Zambia.

This is an application by the **Defendant, Hamrah Enterprises against the Plaintiff Mohammed Enterprises (T) Limited** for Security for costs. The application is made pursuant to **Order 23 Rule 1 of The Supreme Court Practice<sup>3</sup>** and **Order 40 Rules 7 and 8 of The High Court Rules<sup>4</sup>** and is supported by an affidavit deposed to by **Muhammad Bilal**, an **Operations Manager** in the Defendant employ.

According to the aforesaid affidavit, the Plaintiff as shown on the Writ of Summons carries on business in Dar es Salam, Tanzania which is out of the jurisdiction of this Court and that it is therefore necessary for the Plaintiff to give security for the Defendant's costs.

The deponent has estimated the costs at US\$100,000.

In the Skeleton arguments accompanying the application, reliance has been placed on the case of **Keen Exchange (Holding) Company v Ingrid Andrea loiten and Another<sup>1</sup>** where Imasiku J, held inter alia:

- (1) *A Plaintiff who is abroad is prima facie bound to give security for costs. If a Plaintiff desires to escape from doing so he is bound to show that he has substantial property in the Country not of a floating but of a fixed and permanent nature, which would be available in the event the Defendant being entitled to costs of the action.*

(2) *Another fact taken into consideration is exercising the discretion to Order security for costs is the Plaintiffs prospect of success in an action. If the Plaintiff has prospects of success it is the Plaintiff and not the Defendant who would be entitled to costs.*

According to the Defendant, the Defendant has shown by its Defence and Counter Claim that it does not owe the monies being claimed by the Plaintiff and that therefore the prospect of the Plaintiff succeeding are highly unlikely and no property of a fixed nature is available to meet the Defendant's costs if Ordered to be paid by the Plaintiff.

It is the Defendant's prayer that the proceedings herein be stayed pending the full payment by the Plaintiff of Security for costs.

In opposing the application, the Plaintiff filed an affidavit in opposition deposed to by **Cosmas Mtesigwa**, the **Country Manager** for the Plaintiff. It is in the said affidavit deposed that the Defendant has in its custody goods supplied to it by the Plaintiff whose value is **US\$ 218,976** which the Defendant would have recourse to if the Plaintiff lost its case and the Defendant was awarded costs.

It is also asserted that the sum of **US\$ 100,000** being demanded by the Defendant is highly prohibitive and designed to stifle the Plaintiffs legitimate right to pursue its claim.

It is the Plaintiff's prayer that the application for security for costs be dismissed with costs.

At the hearing of the application, both parties relied on their respective affidavit evidence.

I have carefully taken into consideration the affidavit evidence and the Defendants Skeleton arguments and the relevant authorities.

**Order 40 Rule 7 and 8 of The High Court Rules<sup>4</sup>** states as follows:

- “ (7) The Court or a Judge may on the application of any defendant, if it or he sees 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 a Judge by deposit or otherwise or to give further or better security and may require any defendant to give security or further or better security for costs of any particular proceeding undertaken in his interest.**
- (8) Where a Court or a Judge Orders costs to be paid or security to be paid given for costs of any party, the Court or a Judge may if it thinks fit, Order all proceeding by or on behalf of that party in the same suit or proceedings or connected therewith to be so stayed until the costs are paid or security given accordingly but such Order shall**

**not supersede the use of any other lawful method of enforcing payment”.**

The Defendant’s application is further premised on **Order 23 Rule 1 of the Supreme Court Practice. Order 23/0/2** the editorial notes state that the Court must take into consideration all the circumstances of the case and after having done that, if the Court thinks it just to do so it may order security for costs in any of the following circumstances:

- 1. The first mentioned (and from a practical point of view, the most important) is that the Plaintiff is Ordinarily resident out of jurisdiction,**
- 2. The Companies Act gives the Court power to Order Security where there is reason to believe that a Plaintiff Limited Company may be unable to pay the Defendants costs in the event of his being successful in the action,**
- 3. Where there is misinformation either by misdescription of Plaintiffs address or change of Plaintiffs address,**
- 4. Where there is an appeal to the Court of Appeal either on final or Interlocutory Orders and**
- 5. 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.**

The application before this Court falls under the first situation of the Plaintiff ordinarily residing out of the jurisdiction of this Court.

According to **Order 23/3/4** the onus is on the Defendant to prove that the Plaintiff ordinarily resides out of jurisdiction. It goes further to state that there is no longer any inflexible rule or practice that a Plaintiff resident abroad will be ordered to give security for costs. The power to make such an Order is entirely discretionary.

The Order goes on to state that as a matter of discretion, it is the usual, ordinary or general practice of the Court to require the foreign Plaintiff to give security for costs, because it is ordinarily just to do so.

In the **case in casu**, it is not in dispute that the Plaintiff Company conducts its business in Dar es Salam Tanzania, which is outside this Court's jurisdiction. That fact is also not disputed by the Plaintiff. The Defendant has therefore discharged that onus.

Relying on the provisions of **Order 23/3/4 of The Supreme Court Practice**<sup>3</sup>, I am inclined to exercise my discretion in favour of granting the application as it is the usual ordinary general practice of the Court to require a foreign Plaintiff to give security for costs as it is ordinarily just to do so.

I have also taken into consideration that there is no indication from the Plaintiff that he has substantial property in the Country of a fixed and permanent nature.

However, I note that the Defendant has estimated the costs of the proceedings at **US\$ 100,000**. No basis has been provided or furnished to this Court for such an estimate. In my view, the estimated amount is not only high but is also exaggerated, so much that to Order the Security for costs in that amount will not serve any other purpose apart from stifling the Plaintiffs claim.

In the case of **Aquila Design (GRB) Products Limited v Cornhill Insurance Plc**<sup>2</sup> it was stated that:

*“Where an Order for security for costs against the claimant company might result in oppression in that the Claimant Company would be forced to abandon a claim which has a reasonable prospect of success, the Court is entitled to refuse to make the Order notwithstanding that the Claimant Company if unsuccessful, will be unable to pay the Defendants costs”.*

In Order to avoid the aforestated and in the view that I have taken and looking at the nature of the case from the pleadings the sum of K100,000 will in the circumstances be reasonable as Security for costs.

In that respect, **the following Orders are hereby made.**

- 1. The Plaintiff is to pay into Court the sum of K100,000 as Security for costs and request for Orders for Directions, once the payment is done.**
- 2. The said amount is to be paid within ninety (90) days from the date hereof,**

- 3. In the event of the Plaintiff failing to pay the Security for costs, the cause herein shall stand dismissed,**
- 4. The proceedings herein are forthwith stayed pending payment of Security for costs.**
- 5. There shall be no Order as to costs in respect of this application.**

**Leave to appeal is hereby granted.**

**Dated at Lusaka this 19<sup>th</sup> day of March 2015.**

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Justin Chashi  
**HIGH COURT JUDGE**