

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

2014/HPC/0428

BETWEEN:

DAVID KEATING
CONNIE KEATING

1ST PLAINTIFF
2ND PLAINTIFF

AND

PRINCE SIAME

1ST DEFENDANT

CHARITY CHANDA SIAME

2ND DEFENDANT

MISSION TOUCH MINISTRIES LIMITED

3RD DEFENDANT

DISCIPLESHIP SKILLS TRAINING
CENTRE LIMITED

4TH DEFENDANT

***Before the Hon. Mr. Justice Justin Chashi in Chambers on
the 10th day of June, 2015***

For the 1st and 2nd Plaintiffs:

*G. Chisanga, Messrs KMG Chisanga
Advocates*

*For the 1st, 2nd, 3rd and 4th Defendants: M.K Kamwengo (Ms), Messrs Chilupe
and Permanent Chambers*

RULING

Cases referred to:

1. *Porzelack KG v. Porzelack (UK) Ltd [1987] 1 All ER 1074*
2. *R v. Barnet London Borough Council, ex parte Shah [1982] 1 All ER 698*
3. *Glocom Marketing Limited v. Contract Haulage Limited 1998/HP/787
(Unreported)*
4. *John Mumba, Danny Museteka, Dr. W. Amisi, Dennis S. Simuyuni v. Zambia
Red Cross Society (2006) Z.R. 137*

Legislation referred to:

5. *The High Court Act, Chapter 27 of the Laws of Zambia*
6. *The Supreme Court Practice (White Book), 1999*
7. *The Immigration and Deportation Act, Chapter 123 of the Laws of Zambia*

The 1st and 2nd Plaintiffs, namely **David Keating** and **Connie Keating** respectively commenced this action on the 15th day of October, 2014 by way of Writ of Summons accompanied by a Statement of Claim. In turn, on the 4th day of December, 2014 **Prince Siame, Charity Chanda Siame, Mission Touch Ministries Limited** and **Discipleship Skills Training Centre**, the **1st, 2nd, 3rd, and 4th Defendants** respectively entered conditional appearance to the Writ of Summons. They later filed a defence and counter-claim on the 19th day of December, 2014.

On the 23rd day of January, 2015, the Court gave an Order for Directions. This order has not yet been fully complied with by the parties.

Meanwhile, there is what appears to be a composite application before me. It appears to be a composite application in that the Defendants are seeking, from this Court, two orders, namely an order for security for costs and an order for stay of proceedings pending payment of costs as security. The application is made by way of interlocutory summons dated the 10th day of April, 2015, pursuant to **Order 40, Rules 7 and 8 of the High Court Rules**⁵ as read together with **Order 23 of the Rules of the Supreme Court**⁶.

In support of the application is an affidavit of even date sworn by the 1st Defendant in his capacity as such and as a member and Director of the 3rd and 4th Defendants.

The deponent avers in his affidavit that the Plaintiffs are missionaries from the United States of America (USA). According to him, the Plaintiffs are holders of Zambian employment permits and have, on that basis, been residing in Zambia. The Court's attention is drawn to exhibits "PS1", "PS2" and "PS3" in this regard.

It is the deponent's assertion that the Plaintiffs used to serve and assist in the operations of the 3rd and 4th Defendants as missionaries but their employment was terminated following the passing of a resolution for their removal as employees of the 3rd and 4th Defendants. The deponent refers the Court to exhibits "PS4" and "PS5" which he describes as "copies of the said resolution" to support his assertion.

He goes on to assert that, as a representative of the 3rd and 4th Defendants, there is an obligation on his part, arising from the termination of the Plaintiffs' employment, to surrender the Plaintiffs' employment permits to the Department of Immigration which may in turn revoke the permits. The deponent does not, however, state whether he has performed this obligation.

According to him, the Plaintiff's employment permits **were "expected to expire in or about May 2015"**.

It is thus his assertion that the Plaintiffs are expected to return to their home country, the USA.

Based on this 'expectation', the deponent expresses apprehension that the Defendants would face difficulties in enforcing any order for costs which may be made in their favour. In his endeavour to justify this apprehension, the deponent informs the Court that the Plaintiffs previously expressed an intention not to return to Zambia when they had gone to the USA for a vacation. The Court's attention in this regard is drawn to a copy of an email which the 1st Plaintiff wrote to the 1st Defendant exhibited as "**PS6**".

On the whole, these are the contents of the affidavit in support of the Defendants' application.

On the 15th day of May, 2015, in opposing the application, the Plaintiffs filed an affidavit wherein, whilst acknowledging that he is a national of the USA, the 1st Plaintiff deposes that he and the 2nd Plaintiff are currently ordinarily resident in Zambia at Plot Number 78, Simon Mwansa Kapwepwe Road, Avondale, Lusaka.

The deponent disputes the 1st Defendant's suggestion that he and the 2nd Plaintiff were only assisting in the operations of the 3rd Defendant. Instead, his evidence is that he and the 2nd Plaintiff were the ones running and sourcing finances for the 3rd Defendant before their removal as afore-stated.

He also disputes the 1st Defendant's deposition to the effect that the Plaintiffs' employment permits were due to expire in May. According to the deponent, the correct position is that the permits remain valid until the 28th day of July, 2015. Copies of the 1st and 2nd Plaintiffs' employment permits are in this respect exhibited as "DK1" and "DK2" respectively.

The deponent adds that the Plaintiffs are beneficial owners of the aforementioned property whose market value is pegged at US\$ 200, 000.00. It is his assertion that the Plaintiffs purchased this property using their own funds. A document described as a 'Housing Agreement' is exhibited as "DK3" to support this assertion.

Further, the deponent disputes the 1st Defendant's assertion that he expressed any intention not to return to Zambia while on vacation in the USA. He explains that he only wrote the email whose copy is exhibited as "PS6", because the 1st Defendant had falsely advised the Plaintiffs that their employment permits had been withdrawn.

In countering the 1st Plaintiff's evidence, the 1st Defendant filed an affidavit in reply on the 27th day of May, 2015 in which he asserts that the Plaintiffs cannot be regarded to be ordinarily resident in Zambia. This assertion is, however, at variance with the deponent's prior deposition to the effect that the Plaintiffs would only be considered not to be ordinarily resident in Zambia upon the expiration of their employment permits. He ingeniously

evades conceding that the Plaintiff's employment permits will only expire towards the end of July, 2015, contrary to his assertion that they were due to expire in May.

The deponent goes on to suggest that the validity of the employment permits is dependent upon the Plaintiffs being in employment. Thus, in his view, the asserted termination of the Plaintiffs' employment rendered their employment permits invalid although they have not yet expired.

Further, according to the deponent, the property aforementioned is solely owned by the 3rd Defendant. He thus disputes the Plaintiffs' evidence that they have beneficial interest in the said property. A copy of the Certificate of Title relating thereto is produced and marked as exhibit "PS1"(sic) though erroneously so as there is another document on record marked as such. It should have therefore been marked as exhibit "PS7".

The 1st Defendant also disputes that he made any false representation to the Plaintiff that their work permits had been revoked.

Insofar as it is relevant to this application, the foregoing is the evidence before Court.

In furtherance of this evidence, Counsel filed skeleton arguments and lists of authorities on behalf of the parties. Counsel for the Defendants filed her skeleton arguments and an accompanying list of authorities together with the affidavit in support of the

application on the 10th day of April, 2015, while Counsel for the Plaintiff filed his together with the affidavit in opposition to the application on the 15th day of May, 2015.

When the application came up for hearing on the 29th day of May, 2015, Counsel for the parties augmented their skeleton arguments with oral submissions which submissions were largely in tandem with their respective skeleton arguments. Counsel's respective submissions and skeleton arguments are discussed hereunder.

In supporting the application, Counsel for the Defendants referred the Court to **Sections 18 and 21 of the Immigration and Deportation Act**⁷. This was done in an endeavour to demonstrate that the law requires the 3rd and 4th Defendants to surrender the Plaintiffs' employment permits to the Department of Immigration and that the Chief Immigration Officer would in turn revoke the permits as asserted in the affidavit in support of the application.

It was Counsel's submission that the Plaintiffs' employment permits would only be renewed upon a recommendation being made by the 3rd Defendant to the Immigration Department for such renewal. However, according to Counsel, the 3rd Defendant is not in a position to make such recommendation. Exhibit "PS3" was relied upon in this regard.

Counsel added that, when their employment permits expire, the Plaintiffs' would no longer be regarded as ordinarily resident in

Zambia hence may leave the country. Paradoxically, Counsel went on to argue in her oral submissions that the Plaintiffs were not ordinarily resident in Zambia and that their stay in the country was illegal because their employment was terminated. As earlier stated, this argument is at variance with the foregoing contention to the effect that the Defendants' would be regarded not to be ordinarily resident in Zambia after the expiration of their employment permits.

All in all, these were the arguments by Counsel for the Defendant.

In rebutting these arguments, Counsel for the Plaintiffs argued that the circumstances of this case do not support the Defendants' application for security for costs. According to him, this is so because the Plaintiffs have demonstrated that they are legally resident, and have real property, within the jurisdiction. Counsel added that the Defendants' application is unsustainable because the Plaintiffs have high prospects of succeeding in the main action. He cited the cases of **Porzelack KG v. Porzelack (UK) Ltd¹**, **R v. Barnet London Borough Council, ex parte Shah²** and **Glocom Marketing Limited v. Contract Haulage Limited³** to reinforce his arguments.

Further, Counsel argued that the provisions of the **Immigration and Deportation Act⁷** which have been cited on behalf of the Defendants are inapplicable to this case. According to him, the said provisions would only apply if the termination of the Plaintiffs' employment was done in accordance with the law.

Counsel concluded his submissions by urging the Court to dismiss the Defendant's application. He also prayed that the costs of the application should be borne by the Defendants' lawyers as they ought to have known that the Defendants' application is untenable.

In the light of the above evidence and arguments by Counsel, I have carefully analysed the application before me. Indeed, this Court wields discretionary powers to make orders for security for costs, and to stay proceedings pending payment of costs or furnishing of security for costs, in appropriate cases.

In this vein, **Rules 7 and 8 of Order 40 of the High Court Rules**⁵ reads 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 the costs of any particular proceeding undertaken in his interest.

8. Where the Court or a Judge orders costs to be paid, or security to be given for costs by any party,

the Court or a Judge may, if it or he thinks fit, order all proceedings by or on behalf of that party in the same suit or proceeding, or connected therewith, to be 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.”

Similarly, **Order 23, Rule 1 of the Rules of the Supreme Court**⁶ provides that:

“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, or

(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 proceeding as it thinks just."

Although, there are various grounds upon which an order for security for costs may be made, in making this application, the Defendants appear to have placed reliance on **Order 23, Rule 1 (1) (a)** respecting cases where the plaintiff is ordinarily resident out of the jurisdiction. I will therefore determine the application on that basis.

As the affidavit and skeleton arguments in support of the application will show, the Defendants' argument is that the Plaintiffs' employment permits were to expire in May, 2015 and that upon such expiration, the Plaintiffs were expected to leave Zambia. It has been asserted on behalf of the Defendants that the Plaintiffs would not be considered to be ordinarily resident in Zambia after the expiration of their employment permits. Thus, at the time they filed the application, the Defendants did in fact acknowledged that the Plaintiffs were ordinarily resident in Zambia. At that time, the application was merely based on their apprehension that the Plaintiffs would leave the country. As such, even at the time it was filed, the Court would not have granted the Defendants' application on the ground that the Plaintiffs were ordinarily resident out of the jurisdiction.

In the view that I take, the Defendants' apprehension that the Plaintiffs would leave the country would not also form a basis for ordering the Plaintiffs to provide security for costs. I take this view because I find the Defendants' apprehension in this regard to be unfounded. From the evidence before me, I see no reason why the Plaintiffs would want to leave the country before the conclusion of the dispute herein.

The email (exhibit "PS1")(sic) which the Defendants relied on to show that the Plaintiffs wanted to leave the country has no relevance to this case. I say so because, in that email, the 1st Plaintiff merely expressed doubt about returning to Zambia when he and the 2nd Plaintiff were in the USA. They did not state that they would not return to Zambia. In fact, they did return and at present, they are within the jurisdiction and have a fixed abode. The evidence by the 1st Plaintiff that he and the 2nd Plaintiff ordinarily reside at Plot Number 78, Simon Mwansa Kapwepwe Road, Avondale, Lusaka has not been disputed. Thus, it is immaterial that the 1st Plaintiff's reason for writing the said email is in dispute.

If anything, by commencing this action, the Plaintiffs have demonstrated their desire to continue with their missionary work in Zambia. I note from the pleadings that the Plaintiffs are seeking, among other reliefs, to be restored as members and directors of the 3rd and 4th Defendants. If they had any intention of leaving the country they would not seek this relief. They are challenging their removal as members and directors of the 3rd and

4th Defendants because they want to continue their work hence residing in the Country.

Also, at this interlocutory stage, the Court cannot delve into the question of whether the Plaintiffs are legally in Zambia or not. The suggestion that the Plaintiffs are illegally in Zambia emanates from the very removal of the Plaintiffs as members and directors of the 3rd and 4th Defendants which is being challenged in this case. There is no suggestion that the Plaintiffs obtained their employment permits by any unlawful or illegal means. Thus, to say that the Plaintiffs are illegally in Zambia would be tantamount to partially determining the matter before trial. However, this Court cannot pronounce itself on the merits of the matter at this interlocutory stage (vide the case **John Mumba, Danny Museteka, Dr. W. Amisi, Dennis S. Simuyuni v. Zambia Red Cross Society**⁴). I accordingly decline to pronounce myself on this issue.

In any event, the issue of the Plaintiffs being illegally in the country was not pleaded. It only came up as a mere afterthought after the Defendants realised that their assertion that the Plaintiffs employment permits were to expire in May could not be sustained. It was only after the Plaintiffs exhibited copies of their employment permits that the Defendants turned around to suggest that the Plaintiffs were illegally in Zambia because their employment with the 3rd Defendants was terminated.

I therefore need not go any further in determining this application as the same is hopeless. The frivolity of the Defendants' reasons for seeking an order for security for costs and attendant stay proceedings cannot be over emphasised.

Accordingly, the Defendants' application is hereby dismissed in its entirety. Costs of the application shall be borne by the 1st and 2nd Defendants. Same shall be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 10th day of June, 2015

Justin Chashi
HIGH COURT JUDGE