

**IN THE HIGH COURT FOR ZAMBIA**

**2012/HP/1483**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

AGRICON ZAMBIA LIMITED  
RAMNIKLAL GORDHANDAS KOTECHA  
KIRAMBALA KOTECHA  
MITT ASHOK BORIA  
KOTECHA STEEL FORGE PVT LIMITED

**1<sup>ST</sup> PLAINTIFF**  
**2<sup>ND</sup> PLAINTIFF**  
**3<sup>RD</sup> PLAINTIFF**  
**4<sup>TH</sup> PLAINTIFF**  
**5<sup>TH</sup> PLAINTIFF**

**AND**

SHYAMDAS GOPALDAS VASANT  
GROWMORE EQUIPMENT LIMITED

**1<sup>ST</sup> DEFENDANT**  
**2<sup>ND</sup> DEFENDANT**

**BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO**

**ON 7<sup>TH</sup> MARCH, 2018.**

*For the Plaintiffs: Mrs. S. Chisanga-Miti – Messrs. KMG Chisanga  
Advocates*

*For the Defendants: Mr. M. J. Katolo – Messrs. Milner & Paul Legal  
Practitioners*

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## **RULING**

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**CASE AUTHORITIES REFERRED TO:**

1. *Keen Exchange (Holding) Company v Ingrid Andrew Loiten and Investment Bank Plc (2009) ZR 343;*
2. *Glocom Marketing Limited vs. Contract Haulage Limited (2010) ZLR 482;*
3. *Isaac Lungu vs. Mbewe Kalikeka - Appeal No. 114/2013; and*
4. *Aquila Design (GRB) Products Limited v Cornhill Insurance Plc (1988) BCLC 134.*

**LEGISLATION AND OTHER WORKS:**

1. *The High Court Act Chapter 27 of the Laws of Zambia; and*
2. *The Rules of the Supreme Court, White Book 1999 Edition.*

The delay in delivering this Ruling is deeply regretted. It is due to the amount of cases in backlog re-allocated to this Court.

This is an application by the Defendants against the Plaintiffs for Security for costs. The application is made pursuant to **Order XL Rule 7 of The High Court Rules**<sup>1</sup> and **Order 23 Rule 1 of The Supreme Court Practice**<sup>2</sup>. The application is supported by an Affidavit deposed to by the 1<sup>st</sup> Defendant Shyamdas Gopaldas Vasant, a Director in the 2<sup>nd</sup> Defendant company.

According to the aforestated Affidavit, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs reside in India, as shown in the Affidavit in Opposition to Affidavit in Support of Summons to dismiss action for Want of Prosecution deposed to by one Mitt Ashok Boria, the 4<sup>th</sup> Plaintiff herein and dated 18<sup>th</sup> November 2016, particularly paragraph 16, while the 5<sup>th</sup> Plaintiff herein is a company registered in India, which is out of the jurisdiction of this Court. It has been averred in the aforestated Affidavit that in the event that the Plaintiffs' action is dismissed, it will be very difficult if not impossible to follow costs to a company that is registered and operating in India. Further that it will be difficult to follow costs against the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as well, as they are Indian nationals residing in India. It has also been averred that the 5<sup>th</sup> Plaintiff company has no property or assets in Zambia to enable it satisfy the costs in this action in the event that the Plaintiffs' action is dismissed as the 5<sup>th</sup> Plaintiff is a foreign company registered and operating in India with no clear indication whether the same company is solvent. That it is therefore

necessary for the Plaintiffs to give security for the Defendant's costs, which the deponent has estimated the costs at K500,000.00.

In opposing the application, the Plaintiffs filed an Affidavit in Opposition deposed to by Mitt Ashok Boria, the 4<sup>th</sup> Plaintiff and Managing Director in the employ of the 1<sup>st</sup> Plaintiff. The deponent is also an Attorney of the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs duly appointed by way of a Power of Attorney. It is in the said Affidavit deposed that the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs were joined to the proceedings as third Parties at the instance of the 1<sup>st</sup> Defendant and that at the discretion of the Court and by subsequent consent of the parties, the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs were cited as Plaintiffs only for purposes of proper citation of the parties to the action given the action commenced by the 1<sup>st</sup> Plaintiff. It is further deposed in the said Affidavit in Opposition, that the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs are effectively merely nominal parties to the action and do not have a direct benefit or interest in the outcome of the claim that the 1<sup>st</sup> Plaintiff has against the Defendants. It has been averred that the joinder of the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs was intended to allow the parties to defend the counter-claim, which the 1<sup>st</sup> Defendant raised against the Plaintiffs. That the 1<sup>st</sup> Plaintiff is a company incorporated in Zambia and has sufficient assets to meet the costs in this action in the event that the Plaintiffs' action is dismissed or that judgment is in favour of the Defendants. It is also averred that the prospects of the Plaintiffs' case succeeding against the Defendants in this matter are very high in comparison to the claim of the Defendants against the Plaintiffs and that the amount

claimed by the Defendants does not represent the quantum of costs claimable by a successful litigant on completion of trial on a party and party basis.

At the hearing of the application, the Defendants relied on their Affidavit evidence and made *viva voce* submissions. The Court's attention was drawn to exhibit "SGV 1" attached to the Defendant's Affidavit in Support filed herein on 17<sup>th</sup> March 2017, where the 4<sup>th</sup> Plaintiff made a confirmation on oath that the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs are resident in the Republic of India and that it was difficult to obtain instructions from them. The Defendants submits that if it was difficult for the Plaintiffs' Advocates to obtain instructions from their own clients, it would be practically impossible for the Defendants to enforce any order for costs that would be made in this matter against these Plaintiffs. It was also submitted that there is nothing placed before the Court to show that the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs have any property whether movable or immovable in Zambia against which an order for costs can be enforced.

In opposing the application, the Plaintiffs also relied on their Affidavit in Opposition filed herein on 28<sup>th</sup> April, 2017 and drew the Court's attention to the case of ***Keen Exchange (Holding) Company v Ingrid Andrew Loiten and Investment Bank Plc***<sup>1</sup>, where the Court highlighted the fact that a Court has a complete discretion in considering an application for security for costs, whether or not to order such and further gave factors which a Court should consider. That one of the factors raised was to consider the

probable success of the Plaintiff's action against the Defendants and in that vein, learned counsel for the Plaintiffs, Mrs. Chisanga-Miti submitted that the Plaintiffs' action has high prospects of success in that it is a mere action requesting the Defendants to render an account or give a refund for the value of stock that was moved from the company. In her submissions, Mrs. Chisanga-Miti emphasised that the amount being claimed by the Defendants as security for costs is excessive and does not represent the quantum of costs that would be claimable by a successful litigant upon completion of trial on a party and party basis. She further submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are shareholders in the 1<sup>st</sup> Plaintiff company, regardless of the fact that they are both resident in the Republic of India. She prayed that the application be dismissed with costs as it is misconceived.

In reply, the Defendant's learned counsel Mr. Katolo drew the Court's attention to the case of ***Glocom Marketing Limited vs. Contract Haulage***<sup>2</sup> and emphasised that if a Plaintiff is resident outside jurisdiction, in the absence of the company's assets and liquidity, the Court would come to the conclusion that the case is prone to order for security for costs. He reiterated his argument that there is no evidence placed before this Court with regard to the value of the assets or liquidity of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs. He submitted that there is no evidence before the Court to support the Plaintiffs' assertion that 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are shareholders in the 1<sup>st</sup> Plaintiff company and that the principle of law is that shareholders are separate and distinct from the company. On the

Plaintiffs' argument that the Plaintiffs' action has prospects of success, Mr. Katolo submitted that the mere fact that the claim seeks an order to render an account does not automatically follow that the claim has prospects of success. It was also his submission that the pleadings as they stand show that the 2nd , 3rd and 5th Plaintiffs are just Plaintiffs as described and that if they had no interest in the matter as alleged, they should have applied to be disjoined from the proceedings. That they consented to be placed as Plaintiffs and therefore they are bound by the law that requires Plaintiffs resident outside jurisdiction to furnish security for costs. It was the Defendants' prayer that the application be allowed as the sum of K500,000.00 being demanded as security for costs was very modest.

I have carefully taken into consideration the Affidavit evidence and the submissions and the relevant authorities.

The Defendants' application is made pursuant to **Order XL Rule 7** of **The High Court Rules**<sup>1</sup>, which states as follows: -

*"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."*

The Defendants' application is further premised on **Order 23 Rule 1** of **The Supreme Court Practice**<sup>2</sup>, which is couched in the following terms: -

**"Security for costs of action, etc.**

- (1) 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."**

Under **Order 23/0/2**<sup>2</sup>, the editorial introduction states, *inter alia*, 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 where the Plaintiff is Ordinarily resident out of jurisdiction.

The application before this Court falls under a situation where the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs ordinarily reside out of the jurisdiction of this Court.

According to **Order 23/3/4**<sup>2</sup> 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.

I further refer to the case of **Keen Exchange (Holding) Company v Ingrid Andrea Loiten and Another**<sup>1</sup>, which the Plaintiffs drew my attention to and where Imasiku J, held *inter alia*, as follows: -

***"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..."***

*In casu*, it is not in dispute that the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs are resident in the Republic of India, which is outside this Court's jurisdiction. The Defendants have therefore discharged that onus.



Relying on the provisions of **Order 23/3/4** of **The Supreme Court Practice**<sup>2</sup>, I lean towards exercising 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 because it is ordinarily just to do so.

The other consideration in applications of this nature is whether the Plaintiff has goods and/or chattels of his in the jurisdiction of this Court which are sufficient to answer the possible claim of the other litigant, and which would be available to execution when the Court will order him to give Security for Costs. *In casu*, I have taken into consideration that there is nothing in the Plaintiffs' Affidavit in Opposition to pin-point their property in Zambia, if any. Nor is there any value of any property they may own here in Zambia. Accordingly, I find no proof before this Court from the Plaintiffs that they have substantial immovable property within jurisdiction which would satisfy the costs of the Defendants, in the event that the case is decided in their favour.

On the other hand, I have taken into consideration the argument by the Plaintiffs that the Defendants have estimated the costs of the proceedings at K500,000.00 which they view as being excessive and does not represent the quantum of costs that would be claimable by a successful litigant upon completion of trial on a party and party basis. No source has been provided or furnished to this Court for such an estimate by the Defendants. It is my considered view that the estimated amount is not only high but is also overstated, 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 ***Isaac Lungu vs. Mbewe Kalikeka***<sup>3</sup>, the Supreme Court guided as follows: -

***"We want to make it very clear that the Court award only such sum of money as will provide a 'sufficient security', which must be reasonable, in all the circumstances of the case. In fact such a high amount of security undermines access to justice and the Appellant's ability to seek and obtain a remedy through the court. We emphasise that there is not access to justice where the justice system is financially inaccessible to litigants."***

In the case of ***Aquila Design (GRB) Products Limited vs. Cornhill Insurance Plc***<sup>4</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 aforesaid and applying my discretionary powers under the applicable rule, I find that the sum of K100,000.00 will in the circumstances be reasonable as Security for Costs.

***Order XL Rule 8*** of ***The High Court Rules***<sup>1</sup> states as follows: -

***"Stay of proceedings pending payment or security for costs***

***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."***

Accordingly, I Order as follows: -

1. The Plaintiffs are to pay into Court the sum of K100,000.00 as Security for costs;
2. The said amount is to be paid within ninety (90) days from the date hereof and all proceedings by or on behalf of the Plaintiffs are hereby stayed until the said costs are paid; and
3. In the event of the Plaintiffs failing to pay the Security for Costs, the Plaintiffs' claim herein shall stand dismissed.

I make no order as to costs of this application.

Leave to appeal is hereby granted.

**Delivered at Lusaka this 7<sup>th</sup> day of March 2018.**



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**P. K. YANGAILO  
HIGH COURT JUDGE**