

**IN THE HIGH COURT FOR ZAMBIA**

**2017/HPC/0422**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

**SAMSUNG GULF ELECTRONICS FZE**

**PLAINTIFF**

**AND**

**NYIOMBO INVESTMENTS LIMITED**

**DEFENDANT**

**Before the Hon. Lady Justice Irene Zeko Mbewe**

*For the Plaintiff:*

*Mr. C Ngaba of Messrs Corpus Legal Practitioners*

*For the Defendant:*

*Mr. P Muyatwa of Messrs Muyatwa Legal Practitioners*

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## **RULING**

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### **Cases Referred To;**

1. *Keen Exchange (Holding) Company v Ingrid Andrea Loiten and Investment Bank Plc*
2. *Mohamed Enterprises T Limited v Hamrah Enterprises*
3. *Aeronova SPA and Another v Westland Charters Limited and Others*
4. *Sir Lindsay Parkinson*

5. *Investrust Bank Plc and Borniface K Mwale v Zambia Airways Corporation Limited (In Liquidation)*
6. *Porzelack KG v Porzelack (UK) Ltd*6, [1978] 1 ALL E R 1074
7. *Corfu Navigation Company, Bain Clarkson Limited v Mobil Shipping Company Limited, Zaine S.E.P, Petroca S.A.*[1991] 2 Lloyds Rep. 52
8. *Aquila Design (GRB) Products Limited v Cornhill Insurance Plc*

**Legislation Referred To:**

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

**Works Referred To:**

1. *Odgers on Civil Court Actions: Practice and Precedents' 24<sup>th</sup> Edition, London, Sweet and Maxwell*

This is a Ruling on the Defendant's application for an order for security for cost. The summons is supported by an affidavit deposed to by Kwazi Adam Dlamini the Managing Director in the Defendant Company. The salient facts are that court process was issued on 18<sup>th</sup> September, 2017 by way of a writ of summons and statement of claim containing various claims against the Defendant. That after a perusal of the writ of summons it showed that the Plaintiff is a foreign company incorporated in the United Arab

Emirates having its registered office in Dubai, United Arab Emirates, and as such is unlikely that the Plaintiff owns movable or immovable property within Zambia. It is deposed that where a Plaintiff does not own property within Zambia against which the Defendant's costs can be secured in the event of the Defendant's being successful in the action, it is a fit and proper case to order the Plaintiff to furnish sufficient security for the Defendant's costs herein. According to the deponent, a sum of ZMW600,000.00 would be sufficient security for costs in this matter and that the proceedings be stayed until such security as shall be determined by the Court is duly paid into Court by the Plaintiff.

The Plaintiff opposed the application in an affidavit deposed to by Jeong Hyun Park a Senior Professional in the Plaintiff Company. It is deposed that the Plaintiff was served with an affidavit and skeleton arguments in support of the summons for an order for security for costs on the ground that the Plaintiff resides out of jurisdiction and has no assets in Zambia. That there is an admission by the Defendant in the 14.01 A/R balance letter dated 7<sup>th</sup> April, 2014 which said admission has not been resiled in its

defence dated 28<sup>th</sup> September, 2017. That an order for security for costs is unlikely to be granted where the Defendant has admitted being indebted to the Plaintiff and the Defendant has expressly admitted its indebtedness to the Plaintiff. That there is no basis whatsoever for the Defendant's estimates that their legal costs would amount to ZMW600,000.00. That the Defendant's estimate of the quantum for security for costs in this matter is excessive, unreasonable and meant to stifle the Plaintiff's genuine claim taking into account the fact that the case is in the Commercial Court where matters are disposed of expeditiously. That the Plaintiff is part of the Samsung Group which is a multinational group of companies that is solvent in every respect. It is deposed that it is not correct for the Defendant to merely show apprehensions regarding the recovery of costs as a ground for granting the Order for security for costs when it has not shown good prospects of success in its defence. That in view of the foregoing, it is desirable and in the interest of justice that this application should not be granted.



In the Defendant's affidavit in reply, it is deposed that the Plaintiff has confirmed that it is resident out of jurisdiction and has no movable assets in this country. That the Defendant has not admitted any of the Plaintiff's claims nor has it ever written or executed any letter admitting liability. It is deposed that the Defendant has already filed a defence into Court and that the sum of ZMW600,000.00 is based upon precedents of previous orders made by the Courts in this jurisdiction based on the old fee scale under the **Legal Practitioners (Costs) Order 2001** and taking into account the new fee scale which increased the legal practitioners fees by more than 50%.

The Defendant filed skeleton arguments in which it argues that security for costs is found in **Order 40 Rules 7 and 8 High Court Rules, Cap 27 of the Laws of Zambia**, and that the Court has discretionary power to make an order for security for costs. That the Plaintiff is a company registered in the United Arab Emirates with its registered office in Dubai and does not have any assets in Zambia which can be applied to any Judgment for costs or damages that may be awarded against it. The Court's attention was drawn to

**Order 23 Rule 1 (1) (a) Rules of the Supreme Court, 1999 Edition** on security for costs. The case of **Keen Exchange Holding Company v Ingrid Andrea Loiten and Investment Bank Plc**<sup>1</sup> was cited in support of the proposition on security for costs. Counsel for the Defendant argues that the onus is on the Plaintiff to satisfy the Court that it has substantial assets in Zambia in order to avoid an order for security for costs and relied on the case of **Mohamed Enterprises T Limited v Hamrah Enterprises**<sup>2</sup> and **Aeronova SPA and Another v Westland Charters Limited and Others**<sup>3</sup>. Counsel for the Defendant urges the Court to grant the order for security for costs and that the Plaintiff will in no way be prejudiced.

The Plaintiff filed skeleton arguments dated 23<sup>rd</sup> November, 2017 in which they contend that the summons for security for costs is made on the ground that the Plaintiff is resident out of jurisdiction and has no business or assets in Zambia. Counsel submits that pursuant to **Order 40 Rule 7 High Court Rules, Cap 27 of the Laws of Zambia**, the Court has power to order a Plaintiff to pay security for costs in deserving cases. Counsel for the Plaintiff submits that the Court is guided by set principles from decided

cases and my attention was drawn to the case of **Sir Lindsay Parkinson and Company Limited v Triplan**<sup>4</sup>. In the course of argument, the case of **Keen Exchange (Holding) Company v Ingrid Andrea Loiten**<sup>1</sup>, **Investrust Bank Plc and Borniface K Mwale v Zambia Airways Corporation Limited (In Liquidation)**<sup>6</sup> was cited in support of the proposition that the Defendant should demonstrate that their case has prospects of success. Counsel for the Plaintiff contends that the Court ought not to grant an order for security for costs unless good reason is shown to justify the granting of such an Order. That in the present case, the Defendant has not shown any evidence that suggests that the Plaintiff cannot or would not pay costs in the event that the Defendant succeeded in its defence of the claim herein. Counsel for the Plaintiff submits that the Plaintiff is an international company with sufficient capacity to pay costs when ordered to do so and thus the Order for security for costs ought not to be granted, that **Order 23 Rule 1 Rules of the Supreme Court, 1999 Edition** states that it is no longer for example, an inflexible or rigid rule that a Plaintiff resident abroad should provide security for costs, and that it is not sufficient to merely allege. Further, that there is no justification for a claim



for security for costs in the sum of ZMW600,000.00 for a matter that will be disposed of expeditiously in the Commercial Court. In conclusion, Counsel for the Plaintiff submits that an application for security for costs is discretionary taking into account all the circumstances of the case and argues that the Defendant has failed to satisfy the principles required for the grant of such an Order, and therefore the application ought to be dismissed.

At the hearing, the parties relied on their rival affidavits, list of authorities and skeleton arguments, and made oral submissions which mirrored their rival skeleton arguments.

I have considered the affidavit evidence, skeleton arguments and relevant authorities. The singular issue for determination is whether to grant an order for security for costs.

The application is made pursuant to **Order 40 Rule 7 and 8 High Court Rules Cap 27 of the Laws of Zambia** which reads as follows:

*"7. The Court or a Judge may, on the application of any defendant, if any, or he sees fit, require any plaintiff in such 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 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".*

Similarly, **Order 23 Rule 1 (1) Rules of the Supreme Court, 1999**

**Edition** reads as follows:

*"(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.*
- (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 this action or other proceedings as it thinks fit."*

*(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 above Rules gives this Court discretion having regard to all the circumstances of the case to order the Plaintiff to give such security for the Defendant's costs of the action.

Therefore this Court has the jurisdiction to deal with the application at hand. What then is the rationale for security for costs? In the case of **Porzelack KG v Porzelack (UK) Ltd<sup>7</sup>**, [1978] 1 ALL E R 1074 Sir Nicolas Browne-Wilkinson, Vice Chancellor, in his judgment stated at pages 1076 and 1077 that:

**“The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case**

**brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction”.**

An order for security for costs seeks to protect the party in whose favour it is made against being unable to enforce any costs order he may later obtain. This means that where the Order is complied with, it will provide the party in whose favour it is made with funds normally held in Court which is made available for the payment of any costs the Court may later award. In **Odgers on Civil Court Actions: Practice and Precedents' 24<sup>th</sup> Edition, (London, Sweet and Maxwell**, at page 337, the learned authors warn 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.

In **Corfu Navigation Company, Bain Clarkson Limited v Mobil Shipping Company Limited, Zaine S.E.P, Petroca S.A. [1991] 2 Lloyds Rep. 52<sup>s</sup>**, the Court when considering an application for security of costs stated as follows:



**“The basic principle underlying orders for security for costs is that, it is prima facie unjust that a foreign plaintiff, who by virtue of his foreign residence is more or less immune to the consequences of an order for costs against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order can be executed.”**

A significant factor in an application for security for costs is whether the Plaintiff ordinarily resides out of the jurisdiction of this Court, and the Defendant herein relies on that factor. According to **Order 23/3/4, Rules of the Supreme Court, 1999 Edition** 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. In the present case, it is not in dispute that the Plaintiff Company is registered in Dubai, United Arab Emirates which is outside this Court’s jurisdiction. I find that the Defendant has therefore discharged that onus. I further find that the Plaintiff has made no indication as to whether

it owns substantial property in the jurisdiction of a fixed and permanent nature, except to state that it is an international renowned company. I am fortified in my finding by the case of **Keen Exchange (Holding) Company v Ingrid Andrea Loiten and Investment Bank Plc**<sup>1</sup> where it was held that a Plaintiff who is abroad is prima facie bound to give security for costs.

The next factor that I should take into consideration is whether or not the claim that is before the Court is a sham. I have taken note of the affidavit evidence presented to the Court. I am not making a finding as to whether or not the Plaintiff has a strong case to be litigated as that is not the function of this

Application. I note however that the issue to be decided by the Court as pleaded is whether or not the Defendant is indebted to the Plaintiff in the sum of US\$3,128,863.50. I opine that this does not appear to be a sham claim.

The Plaintiff argues that the Defendant's application is meant to stifle and delay the proceedings in the Commercial Court where matters are disposed of expeditiously. Counsel for the Plaintiff cites

the case of **Aquila Design (GRB) Products Limited v Cornhill Insurance Plc** <sup>10</sup> where it was held 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.”*

I concur with the principles cited in the above case. I am of the settled mind that the Defendant's apprehension is based on the fact that the Plaintiff is out of jurisdiction, and in my considered view is not in any way meant to stifle the Plaintiff's claim.

In terms of the amount to be imposed as security for costs, this should be such as the Court thinks just in all the circumstances of the case. In the case of **Procon (Great Britain) Ltd v Provincial Building Company Limited**<sup>9</sup>, the Court pointed out that it needs assistance on the amounts of costs the Defendant is likely to incur in the action. In the present case, the Defendant has estimated the

costs of the proceedings at ZMW600,000.00 on the basis that the Legal Practitioners scale costs have been adjusted upward by almost 50%. Counsel for the Plaintiff argues that the estimated costs are astronomical and meant to stifle the Plaintiff's claim. I find the proposed amount of ZMW600,000.00 to be excessive. Arising from my findings and as guided by the provisions of **Order 23/3/4 Rules of the Supreme Court Rules, 1999 Edition**, I am inclined to exercise my discretion in favour of granting the application for security for costs.

The upshot is that the following Orders are hereby made:

1. The Plaintiff is to pay into Court the sum of ZMW150,000.00 as security for costs within forty five (45) days from the date hereof.
2. The proceedings herein are forthwith stayed pending payment of security for costs.
3. In the event of the Plaintiff's failure to pay the security for costs, the cause herein shall stand dismissed.
4. I make no Order as to costs in respect of this application.



Leave to appeal is hereby granted.

Dated at Lusaka this 25<sup>th</sup> day of January, 2018.



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**HON JUSTICE IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**