

IN THE HIGH COURT FOR ZAMBIA

2018/HPC/0437

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

WANG QINGHAI

1ST PLAINTIFF

WANG HUIMIN

2ND PLAINTIFF

AND

KINGPHAR COMPANY (ZAMBIA) LIMITED

1ST DEFENDANT

WANG SHUNXUE

2ND DEFENDANT

Before Hon. Madam Mrs. Justice Irene Zeko Mbewe

Appearances

For the Plaintiffs:

*Ms. M. Mwiinga and Mr. G. Phiri of Messrs PNP
Advocates*

For the Defendants:

Mr. A. Kasolo of Messrs AKM Legal Practitioners

RULING

Cases referred to:

1. *GDC Logistics v Kanyanta and 13 Others Selected Judgment No 17 of 2017*
2. *Standard Bank Limited v Brocks [1972] ZR 306*

Legislation referred to:

1. *High Court Rules, Chapter 27 of the Laws of Zambia.*

This is the Plaintiffs application for an order for security filed into Court on 21st March 2019 pursuant to *Order 26 Rule 1 High Court Rules, Cap 27 of the Laws of Zambia*.

The Plaintiffs seek an Order for such security to be paid into Court in the sum of US\$1,705,000.00 or as the Court may deem fit.

In the supporting affidavit deposed to by the 1st Plaintiff filed into Court on 21st March 2019, the Plaintiff disclosed that a suit was commenced against the Defendants to recover inter alia the sum of US\$1,700,000.00 and USD5,000.00 owed to him which he alleges was fraudulently obtained from the Plaintiffs' herein but was used for the benefit of the 2nd Defendant (Exhibit "WQ1a-b").

According to the 1st Plaintiff's affidavit, he paid money to the 2nd Defendant through a bank account of Shijiazhuang Yidian Trade Company Limited whose account the 2nd Defendant had requested to have the money deposited into as an investment in the 1st Defendant company. This was for purposes of securing 5% shareholding in the 1st Defendant Company (Exhibit "WQ2").

The 1st Plaintiff averred that the 2nd Defendant intimated that he was setting up a pharmaceutical company and induced the 1st Plaintiff to invest money. Further, that the money invested by the 1st Plaintiff was used to purchase pharmaceutical equipment which the Defendants' have been attempting to sell.

Further, it was agreed that the deponent would jointly supervise an account set up for the special purpose company called Shijiazhuang Yidian Trade Company Limited which he alleges is controlled by the 2nd Defendant's sister.

According to the deponent, he later discovered that the 2nd Defendant had not set up a pharmaceutical company and the equipment purchased using his money had arrived in Zambia but was not operational and was instead gathering dust.

It is disclosed that the deponent later learnt that the 2nd Defendant through Shijiazhaung Yidian Trade Company Limited had opened a secret account with Handan Bank in Shijiazhang China whose account number was 876040100100005176 where kickbacks from the manufacturers of medical equipment were secretly paid. This was allegedly done through the overpricing of the equipment on over-inflated invoices (Exhibits “WQ3a-b”).

According to the deponent, the 2nd Defendant a Chinese national is attempting to dispose of the factory together with the equipment (Exhibit “WQ4”). It is on that premise that the Plaintiffs seek an Order that the Defendants furnish security in the sum of USD1,705,000.00 to ensure that any Judgment in the Plaintiffs favour is not rendered an academic exercise.

In the alternative, it is averred that if the Defendants fail to provide security, the Court can order an attachment of the factory and machinery.

The 1st Plaintiff stated that the 1st Defendant had since borrowed from Brilliant Concept Trading Limited in the sum of ZMW500,000.00 and that the financial instability of the Defendants and continued borrowings shall negatively affect the present action and Judgment if passed in the Plaintiffs’ favour (Exhibit “WQ6”). It is further disclosed that the Defendants were called upon to provide security but failed to oblige (Exhibit “QW5”).

It is the deponent’s belief that the Defendants will suffer no prejudice should the application be granted.

On 11th June 2019, the 1st Plaintiff filed an affidavit verifying to affidavit in support of the application for security without leave of Court. I shall therefore not consider its content in the determination of this matter.

On record is a further affidavit in support of summons for an order for security filed into Court on 9th August 2019 with similar averments as those of the supporting affidavit dated 31st March 2019. This Court did not grant leave to the 1st Plaintiff to file this further affidavit and it suffers the same fate as the earlier one.

The 2nd Defendant filed an opposing affidavit dated 1st August 2019 where it seeks to oppose the summons for an order for security for costs instead of an order for security pursuant to *Order 26 Rule 1 High Court Rules, Cap 27 of the Laws of Zambia*.

The affidavit evidence discloses that the 1st Plaintiff is currently not ordinarily resident in Zambia and is facing criminal charges (Exhibit “WS1”). Further, that the 1st Plaintiff had not shown any authority from the 2nd Plaintiff to commence proceedings against the Defendants herein nor did he supply any pharmaceutical equipment to the Defendants as demanded (Exhibit “WS2”).

The 2nd Defendant denied he fraudulently obtained any funds from the Plaintiffs and asserted that according to the shareholders agreement those funds were to have been paid into Hebei Bixue Water Purification Equipment Co Limited and not Shijiazhang Yidian Trade Company Limited.

The affidavit evidence revealed that the bank transfers exhibited were not authenticated and could not be used as evidence in this jurisdiction. Further, that article 1.1 of the shareholders agreement obliged the Plaintiffs to pay their capital contribution of 30 million RMB by 30th November 2016 into an account of Hebei Bixue Water Purification Equipment Company a shareholder in the 1st Defendant Company (Exhibit “WS3”). It is disclosed that the Plaintiffs did not meet the condition precedent under the shareholders agreement.

According to the deponent, the 2nd Defendant was incorporated in Zambia on 3rd March 2014 (Exhibit “WS4”). The deponent further asserted he was never a signatory on the alleged secret account with Handan Bank held by Shijiazhuang Yidian Trade Company Limited and did not request the Plaintiffs to pay the said company. He disclosed he never colluded with any manufacturer to overprice any equipment purchased by the 1st Defendant company in China and that the 1st Defendant had other shareholders (Exhibit “WS5”). Further, that the 1st Defendant had borrowed monies but is not in financial distress.

Both parties filed skeleton arguments which I have considered in the determination of this matter.

At the hearing on 10th December 2019, Counsel for the Plaintiff relied on the affidavit in support, skeleton arguments and list of authorities. Counsel also made oral submissions.

The Defendants were not present at the hearing nor was there any explanation for their non-attendance. I proceeded to determine the matter in their absence of the Defendants as there was an affidavit of service showing that the Defendants were aware of the date of hearing.

I have carefully considered the affidavit evidence, skeleton arguments and list of authorities.

The Plaintiffs application is anchored on *Order 26 Rule 1 High Court Rules, Cap 27 of the Laws of Zambia* which provides as follows:

“1. If the defendant, in any suit for an amount or value of fifty thousand kwacha or upward, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property or any party thereof, or to remove any such property from the

jurisdiction, the plaintiff may apply to the Court or a Judge, either at the time of the institution of the suit, or at any time thereafter until final judgment, to call upon the defendant to furnish sufficient security to fulfill any decree that may be made against him in the suit, and, on his failing to give such security, to direct that any property, movable or immovable, belonging to the defendant shall be attached until the further order of the Court of a Judge."(underlining for emphasis purposes)

From the cited Order, my understanding is that before an interim order for attachment of property can be made, the Plaintiff ought to make an application to Court for the Defendant to furnish sufficient security. The Plaintiffs ought to show that the Defendants with intent to obstruct or delay execution of any decree that may be passed against them is about to dispose of or remove any such property from the jurisdiction of the Court.

The Supreme Court has guided in the case of *GDC Logistics v Kanyanta and 13 Others Selected Judgment No 17 of 2017*⁽¹⁾ that an interim attachment of property is a provisional or temporary relief which allows the Plaintiff to attach the Defendant's property whilst a court action progresses. It effectively restricts a Defendant's ability to deal with the attached property in their possession pending the outcome of the action.

In the case of *Standard Bank Limited v Brocks* [1972] ZR 306⁽²⁾ it was held as follows:

"The remedy which a Plaintiff has to protect his future chances of payment lies under Order XXVI of the Rules, namely, an interim attachment. Such attachment can of course be issued where a Defendant is about to remove or

dispose of the property with intent to obstruct or delay execution of any decree that may be passed against him”

According to the writ of summons, the Plaintiffs’ are claiming for payment of the invested amount of US\$1,705,000.00, US\$5000.00 being money lent to the 2nd Defendant, an order for interim attachment of property, damages for fraudulent misrepresentation, general damages and punitive damages for mental distress and anguish. The suit is pending determination.

A perusal of the record shows that in a letter dated 8th October 2018 the Plaintiffs requested the Defendants to provide sufficient security (Exhibit “WQ 5”). Counsel for the Defendants argued that this letter was only generated after this Court’s earlier Ruling and should not be relied on.

My understanding of *Order 26 Rule 1 High Court Rules* as highlighted in the preceding paragraphs is that the Plaintiff is required to make an application to Court calling upon the Defendant to furnish security and not that the Plaintiff should directly request for security from the Defendant. I therefore find that the letter being referred to falls outside the scope of the said Order.

Secondly, the basis of the application is that the 2nd Defendant is attempting to sell the equipment whilst the substantive matter is subsisting. In paragraph 4 of the supporting affidavit, the Plaintiffs assert that the 2nd Defendant is trying to sell the factory together with equipment acquired using his invested funds and that prospective buyers have been frequenting the 1st Defendant’s company premises (Exhibit “WQ4”).

A perusal of the said exhibit merely shows the product name, type and number of some equipment and names of companies. The record further shows a contract for the purchase and sale of equipment dated 22nd October 2016 with the buyer as a

company called Shijiazhuang Yidai Trade Company Limited and the seller as Shandong Xinhua Medical Equipment. (Exhibit "WQ-3b").

I concur with Counsel for the Defendant's submission that the Plaintiffs assertions are hearsay and at best speculative as no evidence has been adduced to prove the alleged state of affairs.

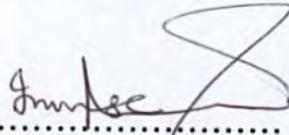
From the affidavit evidence, I find no imminent threat or any proof led by the Plaintiffs to substantiate the allegation that the 1st Defendant intends to remove or dispose of the equipment or delay or delay execution of any decree or Judgment that this Court may render as envisaged under *Order 26 Rule 1 High Court Rules, Cap 27 of the Laws of Zambia*.

For the foregoing reasons it is not appropriate to grant an order for the Defendant to furnish sufficient security and there is therefore no basis to grant an order for interim attachment of property.

Costs to the Defendants to be taxed in default of agreement.

Leave to appeal granted.

Delivered at Lusaka this 6th day of February 2020.



.....
IRENE ZEKO MBEWE
HIGH COURT JUDGE