

**IN THE SUPREME COURT FOR ZAMBIA**  
**SCZ/8/296/2011**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN**

**HENRY NSAMA AND 1341 OTHERS**

**APPELLANTS**

**AND**

**ZAMBIA TELECOMMUNICATIONS COMPANY  
LIMITED**

**RESPONDENT**

**Coram: CHIBOMBA, WANKI AND MUYOVWE, JJS**

**On 21<sup>st</sup> November, 2012 and 7<sup>th</sup> May, 2013**

For the Appellants: Mr. B. Gondwe, Messrs Buta Gondwe and Company

For the Respondent: Mr. N. Nchito, Messrs Nchito and Nchito and Mrs. S.  
Kateka

---

**J U D G M E N T**

---

**MUYOVWE, JS, delivered the Ruling of the Court.**

**Cases referred to:**

- 1. Lindsay Parkinson & Co. Ltd. (1973) QB 609**
- 2. Zulu vs. Avondale Housing Project Limited (1982) Z.R. 172**
- 3. Weldon v. Maples Teesdale and Co (1887) 20 Q.B.D 331**

**Works referred to:**

**A Practical Approach to Civil Procedure by Stuart Sime  
(1994) Blackstone Press**

This is a Notice of Motion pursuant to **Rule 48 (4) of the  
Supreme Court Rules Cap. 25 of the Laws of Zambia.**

The application is for an Order that the Order for security for costs granted on 13<sup>th</sup> March, 2012 be reversed, discharged and or varied on the grounds that the same was not justified as required by law and was excessive, oppressive and wrong in law and that the costs and incidental of this application be for the appellant.

In his affidavit in support of the Notice of Motion, Henry Nsama deposed, inter alia, that the Order for security for costs ordered by the single Judge was not appropriate as the only reason given by the respondent was that the appellants were many and resident all over the Republic of Zambia and that the respondents would have difficulties in executing their Order for costs. That the appellants' stand was that the said Order was excessive and meant to stifle their appeal.

There was no affidavit in opposition filed on behalf of the respondent.

At the hearing of the Notice of Motion, Mr. Gondwe submitted, inter alia, that his clients were seeking to vary the Order for security for costs. He relied on the affidavit in

support as well as the Heads of Argument appearing on pages 32-36 of the record of appeal.

In support of the sole ground advanced, it was submitted that when the matter came up on 28th February, 2012 the appellants' Counsel was in attendance while the respondent's Counsel was absent and that when the matter came up on the following hearing date, the Court ought to have adjourned the matter in the interest of justice especially that there was no inordinate delay on the part of both sides. That, however, the Court proceeded to hear the matter and made the decision based on the issues raised in the Affidavit in Support of the application. That the Court found that the appellants had not paid the costs in the Court below and that they were unlikely to pay the costs of the appeal in this Court. That the Affidavit in Support of the application for security for costs raised three issues namely: that the appellants had not paid the respondent the costs of the action in the Court below; that the appellants who are 1,342 are resident all over the Republic of Zambia and that in the event of the favourable judgment confirming the judgment of the Industrial Relations Court it will be an impossible task to recover costs from them. It was submitted

that the learned single Judge should have addressed her mind to **Rule 56 of the Supreme Court Rules** in exercising her discretion which discretion should have been exercised reasonably and in good faith and on correct grounds. He argued that where our own statute is not elaborate, the White Book is instructive. He referred us to **Order 23/1 of the White Book** which provides for the circumstances under which security for costs is ordered. It was submitted that the learned Judge glossed over the issues in that none of the issues provided for under **Order 23** formed the basis of the evidence upon which the Order was granted; that the security for costs were not determined in accordance with established practice. He referred us to the works of **Stuart Sime** titled "**A Practical Approach to Civil Procedure**" where at Paragraph 38:4 the learned author said:

**"The practice is that in fact a skeleton bill of costs should accompany the application or be exhibited."**

That this is the only way the Court can be assisted to know the anticipated costs. That the respondent had been initially represented by in-house Counsel and only engaged private Counsel in September, 2011 and that the security for costs

ordered were excessive and meant to stifle the appeal. We were also referred to the case of **Sir Lindsay Parkinson & Co. Ltd.**<sup>1</sup> where Lord Denning, MR, stated that the Court should take into account the fact that the plaintiff's claim is bona fide and not a sham and whether the claim has reasonable good prospects of success and whether the defendant has made any admissions on the pleadings or elsewhere. Counsel argued that the litigation was caused by the respondent who confused redundancy payments with long service gratuity. That the appellants cannot be penalised for a correction made after the litigation. Further, that the fact that the appellants did not file an affidavit in opposition did not automatically entitle the respondent to the order sought. That the respondent needed to advance good grounds for its application. Counsel relied on the case of **Zulu vs. Avondale Housing Project Limited**<sup>2</sup> and argued that the apprehension of none recovery of costs is ill founded.

Alternatively, it was submitted that the Court should sanction the hearing of the appeal without security being paid. He relied on **Rule 56 of the Supreme Court Rules** and argued that the single Judge did not deem it fit to make the

payment of costs a condition precedent to the entertainment of the appeal. That the learned Judge was within the confines of the law in exercising her discretion in such manner.

On behalf of the respondent, Mr. Nchito submitted, inter alia, that the Ruling for security for costs was given pursuant to **Rule 56 of the Supreme Court Rules** which gives discretion to the Court to order security for costs where it deems fit. It was submitted that in exercising its discretion, the Court did so judiciously and that this is clear in the Ruling appealed against. Counsel relied on **Order 59/10/32 of the White Book** which states that security for costs on appeal may be ordered where there are special circumstances which in the opinion of the court render it just to order security (**See Weldon v. Maples Teesdale and Company**<sup>3</sup>). The said Order also states that the categories of 'special circumstances' are not closed.

According to Counsel, in as much as the appellants want justice; the respondent also wants justice. That the appellants are a large group of people who qualify under special circumstances as alluded to in the White Book and that they pose a serious challenge to the respondent because they are riding on the belief that they will succeed in their claim at all

costs. Counsel submitted that it is an acceptable legal practice in litigation that the losing party inevitably bears the substantial part of the winning party's legal costs. It was pointed out that in this case, the appellants have not paid any of the costs awarded against them and they do not seem to be in a position to do so. And that the respondent is simply safeguarding itself against the risk of losing the fruits of litigation. That the respondent has got good cause for reasonable apprehension because the appellants have not shown any cohesion or ability to pay security for costs or any costs at all. Counsel submitted that in as much as the appellants feel the order for security for costs will stifle their claim, the respondent is equally entitled to justice especially that the appellants have on two occasions, as shown above, failed to pay costs ordered by the Court. Counsel contended that the discretion of the Judge in awarding the security for costs was exercised judiciously and was on firm ground. Further, it was submitted, by appealing the Order for security for costs, the appellants are the ones stifling their case instead of proceeding with the main matter and that it appears that the appellants are proceeding on a dangerous premise that they

will succeed at all cost and do not foresee themselves having to pay the costs and that this is the reason why they are opposing the security for costs very vigorously. That on the other hand, the respondent has a reasonable apprehension that the task of collecting costs from all the appellants will be costly and may cost more than the costs themselves. It was contended that the law is very clear on security for costs on appeal and that the Notice of Motion should be dismissed with costs.

We have considered the Affidavit in Support of the Notice of Motion and the submission by both learned Counsel.

It is not in dispute that the respondent applied for security for costs before a single Judge and the same was granted. Indeed, as submitted by Mr. Nchito, it is obvious that at the end of the day, both parties want justice in this case. The sole ground of appeal in this case is that the learned Judge did not exercise her discretion in a judicious manner when she ordered security for costs.

In our view, Mr. Gondwe's submission that the single Judge should have had recourse to **Order 23** is misplaced. We note that the application by the respondent before the single Judge



was brought under **Rule 56**. We take the view that it was not necessary for the single Judge to also consider **Order 23** in arriving at the decision to grant security for costs in favour of the respondent. Mr. Gondwe's contention is that none of the grounds listed in **Order 23** formed the basis of the evidence upon which the order for security for costs was granted. Certainly, we are aware, as the single Judge was, of the provisions of **Order 23**. In our view, **Order 23** comes into play when the matter involves for example, a foreign company or an individual outside jurisdiction. The respondent was in order to bring the application under **Rule 56**. It is up to the applicant to choose the law which suits his case. However, we do agree with Counsel for the appellants that the Court was not assisted in determining the anticipated costs.

We have taken into account the submissions by both learned Counsel on this matter. In exercising our discretion, we take the view that the appellants being a group of people who are unemployed can be regarded as indigent persons and for this reason we believe that ordering security for costs will be tantamount to blocking them from prosecuting their appeal. At the same time, these are Zambians who are unlikely to go out

of jurisdiction and the respondents can easily trace them as they have a group leader and Counsel. Also, we bear in mind that this case was commenced in the Industrial Relations Court which is mandated to deliver substantial justice to litigants. We must emphasize that in matters of this nature and indeed, in any other matter, each case must be dealt with on its own merit.

In the circumstances, we find merit in the application and set aside the Order for security for costs.

We order that each party bears its own costs.

.....  
**H. CHIBOMBA**  
**SUPREME COURT JUDGE**

.....  
**M.E. WANKI**  
**SUPREME COURT JUDGE**

.....  
**E.N.C. MUYOVWE**  
**SUPREME COURT JUDGE**

