

IN THE COURT OF APPEAL OF ZAMBIA

Appeal No. 004 of 2024

HOLDEN AT KABWE

(Civil Jurisdiction)



BETWEEN:

FOOTBALL ASSOCIATION OF ZAMBIA (FAZ)

APPELLANT

AND

AUGUSTINE MUKOKA

RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA & PATEL, JJA

On 14th October & 7th November 2024

For the Appellant:

Mr. S. M. Chipompela

Messrs. Joseph Chirwa & Company

For the Respondent:

Mr. B. Mulunda of Messrs. Mulunga & Co

(holding a brief for Messrs. Apton & Partners)

JUDGMENT

Patel, JA, delivered the Judgment of the Court.

Cases Referred to:

1. Glocom Marketing Limited v Contract Haulage 1998/HP/787
2. Rosemol General Suppliers Limited & Rosemary Bwalya v West Star Properties Limited, Lamasat International Limited & Kobil Zambia Limited-SCZ/8/282/2015
3. Sir Lindsay Parkinson and Company Limited v Triplan Limited 1973 QB 609
4. Solomon v Solomon & Sons (1897) AC 22
5. Nkhata and Four Others v The Attorney General of Zambia (1966) Z.R. 124 (C.A.)
6. Wilson Masuso Zulu v Avondale Housing Project Limited (1982) Z.R. 172 (S.C.)
7. Isaac Lungu v Mbewe Kalikeka -SCZ Appeal No. 144/2013 (unreported) at page J18
8. Keary Development v Tarmac Construction Limited and Another (1995) 3 ALL E R 534
9. Haroon Muhomed Hussein v Ebenzer Prem Chellepa T/A Knight High School) ZMSC 153 (2020)
10. Access Bank (Zambia) Limited v Group Five/ZCon Business Park Joint Venture (suing as a Firm) SCZ/08/52/2014
11. Indeni petroleum Refinery company v Kafco Oil Limited and 3 Others -SCZ Selected Judgment No. 29 of 2017

Legislation & Rules referred to:

1. The High Court Act and Rules Volume 3, Chapter 27 of the Laws of Zambia.
2. The Rules of the Supreme Court of England 1965, (White Book) (1999) Edition. (RSC)
3. The Companies Act No. 10 of 2017.

Other Texts and Materials referred to:

1. Halsbury's Laws of England 4th Edition Vol.16.

1.0 INTRODUCTION

- 1.1 This is an appeal by the Appellant, (the Defendant in the Court below) against the Ruling of **S. Kaunda Newa J**, delivered on 16th August 2023, rendered on an application made by the Appellant in the lower Court.
- 1.2 This Appeal arises out of an interlocutory Ruling which interrogates the law and procedure on an application for security for costs and the resultant decision arrived at in the exercise of discretionary power of the lower Court.
- 1.3 The Appellant's application was anchored on **Order XL rule 7¹** of the High Court Rules as read with **Order XXIII rule 1²** of the Rules of the Supreme Court.
- 1.4 Needless to say, being an interlocutory appeal, we will not comment on the merits of the claim, the subject of the action.

2.0 BACKGROUND

- 2.1 For the purposes of this section, and the next, we will refer to the Appellant and Respondent, as Defendant and Plaintiff respectively, as they were in the Court below.
- 2.2 On 27th March 2023, the Plaintiff, Augustine Mukoko, instituted proceedings against the Defendant, Football Association of Zambia, under cause number 2023/HP/504, seeking the following reliefs:

- i. Damages for libel defamation;
 - ii. A mandatory injunction that the defendant renders an apology to the Plaintiff herein for allegations levelled against him and the ground upon which the Plaintiff was allegedly banned by the defendant herein on 13th March 2019 through a print media of wide circulation and the defendant's online platform;
 - iii. Aggravated damages;
 - iv. interest;
 - ii. Any other relief that the Court may deem fit;
 - iii. Costs.
- 2.3 The intervening applications are not of concern in the appeal before us, save the Defendant's application apparently filed on 2nd June 2023. We have combed the Record and cannot find a copy of the Summons under which the lower Court was moved, and which is the subject of the appeal before the Court.
- 2.4 What we have seen at **page 74** of the Record of Appeal, is an Affidavit entitled: "*Affidavit in support of ex parte Summons for an Order to Stay proceedings pending payment for security for costs.*" The Affidavit is sworn by one Reuben Kamanga in his capacity as the General Secretary of the defendant Association. The Affidavit makes reference to two exhibits supposedly marked 'RK1' and 'RK2', both not exhibited to the said Affidavit.
- 2.5 The Defendant also filed its list of authorities and skeleton arguments on the said date and this is seen at **page 77** of the Record of Appeal.

- 2.6 The Plaintiff filed its opposing affidavit on 6th July 2023 coupled with its supporting list of authorities and skeleton arguments of the same date. These are seen from **pages 81 to 109** of the Record of Appeal.
- 2.7 The Defendant filed its Affidavit in Reply and supporting skeleton arguments on 17th July 2023 which are seen at **page 147 to 153** of the Record of Appeal.
- 2.8 The lower Court heard the Defendant's application for security for costs on 20th July 2023 and delivered its now assailed Ruling on 16th August 2023.

3.0 DECISION OF THE COURT BELOW

- 3.1 For the purposes of this section, we shall refer to the parties as they were in the court below.
- 3.2 The Ruling is noted from **pages 9 to 24** of the Record of Appeal.
- 3.3 The learned Judge in the lower Court under the section *Introduction* noted that the Defendant's application was anchored on **Order XL rule 7¹** of the High Court Rules as read with **Order XXIII rule 1²** of the Rules of the Supreme Court.
- 3.4 In considering the application before her, the learned Judge considered the Affidavit evidence, the submissions of the Parties and referred to the authorities which were canvassed by the Parties. She examined the principles on applications for security for costs as laid down by the case of **Glocom Marketing Limited v Contract Haulage¹**. She also considered the guidelines for a Court's consideration as set out by the Supreme Court in the case of **Rosemol General Suppliers Limited & Rosemary Bwalya v West Star Properties Limited, Lamasat International Limited & Kobil Zambia Limited²**.

She further relied on factors that a Court may consider when granting Orders for the payment of security for costs as settled by the case of **Sir Lindsay Parkinson and Company Limited v Triplan Limited**³.

- 3.5 She noted that the relief sought by the Defendant, is discretionary in nature and calls for the Court to exercise its discretion with circumspect and judiciously.
- 3.6 Ultimately, the learned Judge exercised her discretion and declined the Defendant's application with leave to appeal.

4.0 THE APPEAL

4.1 Aggrieved with the Ruling of the lower Court, the Appellant filed a Notice of Appeal and Memorandum of Appeal on 28th August 2023, advancing four (4) grounds of appeal:

- i. *The Court below erred in fact and law when it held that the Plaintiff should not pay security for cost as he had sufficient business in Zambia, without taking into consideration that the PACRA printouts presented by the Plaintiff indicated that the business entities relied upon were limited liability companies, of which the Defendant is precluded from enforcing any judgment in its favor against such company;*
- ii. *The Court below erred in fact and law when it held that the Plaintiff should not pay security for costs because he was in possession of a tenancy agreement to show that he resides in Zambia, without taking into consideration that the said tenancy agreement relied upon to prove*

- residency in Zambia had expired and that no proof was produced of actual residency or extension and/or renewal of such agreement;*
- iii. The Court below erred in fact and law when it applied the wrong test in determining the legal question relating to payment for security for costs, as the provisions of Order 23 rule 1 (a) of the Rules of the Supreme 1965 Edition, as the Plaintiff who resides outside jurisdiction cannot be exempted from paying security for costs on the basis that he owns a business entity and is in possession of a tenancy agreement; and*
- iv. The Court below erred in fact and law when it relied on the fact that the Plaintiff was a mere shareholder of a limited company.*

5.0 APPELLANTS' ARGUMENTS IN SUPPORT OF THE APPEAL

- 5.1 We have duly considered and appreciated the Appellants' Heads of Argument filed on 9th January 2024.
- 5.2 The Appellant argued grounds 1 and 4 together and then ground 2 and 3. With respect to grounds 1 and 4, the Appellant canvassed the argument based on corporate personality and its separate existence from its shareholders. It relied on the provisions of **section 22** of the Companies Act³ and the celebrated case of **Solomon v Solomon & Sons**⁴ in support of its argument that the learned Judge erred on account of her finding that the Respondent had assets and business interests in Zambia, which interests were held through limited liability companies.

- 5.3 With respect to ground 2, the Appellant has urged us to reverse the finding of place of residence of the Respondent as established by the lower Court and placed reliance on the cases of **Nkhata and Four Others v The Attorney General of Zambia**⁵ and **Wilson Masuso Zulu v Avondale Housing Project Limited**⁶ which speak to the limited circumstances in which decisions of the lower Court may be set aside or reversed.
- 5.4 It was the Appellant's argument that the lower Court fell into error in its finding that the fact that the Respondent had exhibited a tenancy agreement, he had satisfied the test of domicile within the jurisdiction.
- 5.5 With respect to ground 3, it was the Appellant's argument that the lower Court fell into grave error by not heeding to the applicable tests set out under **Order 23** of the Rules of the Supreme Court ² and by not considering all the relevant circumstances of the case. It was their ultimate argument that the Respondent, not being a resident of Zambia, ought to have been compelled to pay security for costs in accordance with **Order 23 rule 1 (a)** of the Rules of the Supreme Court².

6.0 RESPONDENT'S HEADS OF ARGUMENT

- 6.1 We have equally considered and appreciated the Respondent's Heads of Argument filed on 26th January 2024.
- 6.2 In opposing the argument of the Appellant, the Respondent has maintained that the lower Court was on firm ground in finding that the Respondent had demonstrated that he had assets within the jurisdiction, was in possession of a Zambian National Registration Card and a valid tenancy agreement.

6.3 With respect to ground 3, the Respondent has urged us to find that the lower Court's decision was correct in the circumstances, and he urged us to ignore arguments that were not raised in the lower Court and which were now mounted for the first time. He ultimately prayed that the appeal be dismissed with costs.

7.0 THE HEARING

7.1 At the hearing, Counsel relied on the Record of Appeal and Heads of Argument respectively.

8.0 DECISION OF THE COURT

8.1 We have carefully considered the grounds of appeal reproduced in *paragraph 4* above, the impugned Ruling, and the arguments and submissions of the Parties.

8.2 Although the Appellant has mounted four grounds of appeal and argued them in clusters, we are of the considered view that there is a single issue raised in this appeal: namely, *whether the Appellant has discharged the requirements for an Order for security for costs against the Respondent.*

8.3 As a starting point, the application for security for costs was made pursuant to **Order XL rule 7¹** which rule provides 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 the costs of any particular proceedings undertaken in his interest.”

8.4 We have considered an unreported decision of the Apex Court in the case of **Isaac Lungu v Mbewe Kalikeka**⁷ in which case, the Supreme Court in relation to **Order XL rule 7**¹ stated as follows:

“...it is clear that the Court has complete or real discretion whether to order security, and it will act in light of all the relevant circumstances of the case. In other words, the court must carefully consider the effect of making such order, and in the light thereof to determine to what extent or for what amount a plaintiff (or defendant as the case may be) may be ordered to provide security for costs...”

8.5 We are also mindful of the provisions of **Order 23 rule 1 RSC**² which lists factors for consideration, and which have been used in this jurisdiction to apply for security for costs under **XL rule 7**¹. We have also considered the guidance provided by the English case of **Sir Lindsay Parkinson and Company Limited v Triplan Limited**³, in which decision, Lord Denning MR, highlighted salient factors that are relevant in the exercise of a court’s discretion when faced with an application to order security for costs. Of the factors highlighted in the decision above, prospects of success, the time of applying, and the stifling of genuine claims are some of the major factors that a court must take into consideration.

8.6 In the case of **Keary Development v Tarmac Construction Limited and Another**⁸, Peter Gibson L J stated as follows:

“The Court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as stifling a genuine claim”.

8.7 We are also mindful that in an attempt to balance the considerations and general principles applicable, in any application for security for costs, there is the need to protect the defendant from unwarranted costs which has to yield to the claimants right of access to the courts. The discharge of this responsibility lies in the discretion of the trial Court, which discretion we will not lightly interfere with save for an obvious error made by the lower Court.

8.8 We are also alive to the principle that in exercising such discretion, the court ought to consider the full circumstances of the case. According to the learned authors of **Halsbury’s Laws of England Volume 37 Fourth Edition paragraph 304**¹, they state as follows:

“The Court may order security for costs, in the cases in which power to do so exists, only if, having regard to all circumstances of the case, it thinks it just to do so. The Court thus has a discretion whether or not to order the security for costs to be given, both under the Rules of the Supreme Court and under its statutory power...”

8.9 It is trite that on the application for security for costs, often, three matters arise, namely:

(a) whether there are grounds for ordering security for costs;

(b) if so, whether the court's discretion should be exercised in favour of making the orders; and

(c) if so, how much security should be provided.

8.10 We are minded that this exercise rests in the discretion of the court and as an appellate court, we are limited to the extent of interference in the exercise of judicial discretion, unless we are of the considered opinion that the exercise of discretion was not judicious or used wrong principles of law. On this settled principle of law, we place reliance on the case of **Haroon Muhomed Hussein v Ebenzer Prem Chellepa T/A Knight High School**⁹ where the Supreme Court stated as follows:

"The exercise of discretionary power by a court is indeed appealable. The onus lies on the appellant to show that the exercise of discretion by the lower court was injudicious or otherwise improper."

8.11 Remarks of Malila JS (as he then was), in the case of **Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture (suing as a Firm)**¹⁰ are instructive on the issue of judicial discretion.

"Since facts of two cases are never always the same, a court cannot be bound by a previous decision in a regimented way because that would be, as it were, putting an end to discretion."

8.12 We note that the learned Judge considered the fact that the Respondent was resident out of jurisdiction. She went on to note that he had provided sufficient proof of assets within the jurisdiction and which in her opinion,

were satisfactory to defeat the application for an order for security for costs. This is in accordance with **Order 23 rule 3 (7)**² of the Rules of the Supreme Court. We have also noted that in its Affidavit in Reply and skeleton arguments in reply, the Appellant did not canvass the issue of the inadequacy of the assets exhibited by the Respondent, nor did they raise any issues of separate corporate personality which they seek now to do.

8.13 We therefore agree with the Respondent's argument that matters not canvassed in the lower Court would not be allowed to be raised on appeal. We take the point that issues to do with the assets being held by limited liability companies and or the expiry of the tenancy agreement, were not raised in the lower court. The decision of the Supreme Court in the case of **Indeni petroleum Refinery company v Kafco Oil Limited and 3 Others** ¹¹ refers.

8.14 We have interrogated the Ruling, and the judicial reasoning exercised by the lower Court, and we note that the lower Court properly interrogated the provisions of **Order XL rule 7**¹ and **Order 23 rule 1 RSC**² along with authorities submitted by Counsel respectively, in arriving at the conclusion that an application for security for costs may be made at any time during the progression of a matter. The lower Court also recognized the need to do justice after considering all the circumstances of the case.

8.15 Ultimately, we find no merit in the appeal and dismiss all the grounds of appeal.

9.0 **CONCLUSION**

9.1 The appeal being bereft of merit, it is dismissed in its entirety.

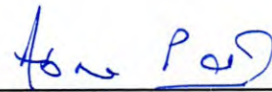
9.2 We award costs to the Respondent, to be agreed or taxed in default.



M. J. SIAVWAPA
JUDGE PRESIDENT



F.M. CHISHIMBA
COURT OF APPEAL JUDGE



A.N. PATEL S.C.
COURT OF APPEAL JUDGE