



**IN THE HIGH COURT OF MALAWI
(COMMERCIAL DIVISION)
LILONGWE REGISTRY
COMMERCIAL CASE NO. 188 OF 2018**

BETWEEN:

AFRICA PRIME INVESTMENT LIMITED.....CLAIMANT

AND

**RAB PROCESSORS.....DEFENDANT
NBS BANK PLC.....1ST THIRD PARTY
MARTIN SCHEEPERS.....2ND THIRD PARTY
SKIPCO LIMITED3RD THIRD PARTY**

Coram: HON. JUSTICE GLORIA ALINAFE NAMONDE

Mumba, of Counsel for the Claimant
Gondwe, of Counsel for the Defendant
1st Third Party - Absent
2nd Third Party – Absent
3rd Third Party – Absent
Ms. Makalani, Court Clerk.

RULING

1. On 29th April, 2024, the Defendant made an application with notice for security of costs for the sum of MK 70, 000, 000.00 (being an estimate for costs) or any other amount as shall be determined by the Court as being adequate and reasonable against the Claimant

and that the within proceedings be stayed till an order for security of costs is made and satisfied. The Defendant filed both sworn statement and skeleton arguments in support of its application. One basis for the application is that the central command of the Claimant's company is outside the jurisdiction and that most of its key decisions are made outside the jurisdiction. Reference was made to a Board resolution that authorized the Claimant to pledge property No CL 37/39 as security for a bond totaling MK 85 million. The resolution also empowered Mr. Scheepers, (being the 2nd Third Party in these proceedings) in his capacity as Chairman of the 3rd Third Party to negotiate all the terms and conditions relating to the application.

2. Further that in Commercial Case No. 9 of 2015, one of the Directors swore her sworn statement from RSA. The only shareholder within Malawi is the 2nd Third Party. There is no other know property other than the property on title no. Chichiri 38 which is the one in dispute in the present proceedings
3. The Claimant is not operational other than being registered at the Registrar of Companies. It is only a company on paper and that its whereabouts are also unknown after they moved out of the premises with the 2nd Third Party residing in Mzuzu. He has not even disclosed what kind of business he is doing.
4. In its response the Claimant averred that there are only two shareholders of the company namely the 2nd Third Party and Mrs. AE Kluxen. Mr. Venter, whom the Defendant refers to as another shareholder is only the secretary. Therefore, it cannot lie to argue that the majority of the shareholders are outside the jurisdiction when the ratio is 50-50. Thus, the application cannot even come under Order 32 rule 1 of the CPR as the one who is driving the proceedings is the shareholder who is within the jurisdiction.
5. It is also not correct to argue that the Claimant does not have assets in Malawi as there is a title document signifying proof of ownership of title no Chichiri 36 and that the Claimant is still registered as such in the Ministry of Lands. (see **exhibit SM 2**). There are also documents pertaining to a lease agreement between the Claimant and the Defendant showing that the Defendant had leased some of the Claimant's property. Further that the Defendant cannot begin to query as to the financial means of the shareholder as the application is being made against the Claimant herein. The Claimant is very capable of paying costs as it would be observed that there was another matter

under cause number 9 of 2015, as well as the scenario where the Defendant had wrongfully entered a caution against the Claimant. Even the present proceedings, the Claimant is able to seek the services of Counsel and are able to pay for Counsel's fees.

6. The Claimant's address is also clear from the registration certificate and that the Board resolution had been signed outside the jurisdiction as the 2nd Third Party was in the RSA at the time.
7. The Defendant also pointed out that the Defendant has delayed in making this application seeing that all the facts that have been raised have been existent from the time the proceedings herein were commenced. This delay has not been explained.
8. At this point, I have to mention that it would be seen from the quorum that Counsel for the other parties were absent as the application herein concerned the Claimant and Defendant only.
9. The issue before me is whether the application for an order of security of costs should be granted.
10. Order 32 (1) provides the guiding law for the applications for security of costs. It is in the following words:

1) Where, on an application of a defendant to a proceeding, it appears to the Court—

- (a) that the claimant is ordinarily resident out of the jurisdiction;*
- (b) that the claimant, not being a claimant suing in a representative capacity, is a nominal claimant 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 defendant's costs if ordered to do so;*
- (c) the claimant may be unable to pay the defendant's costs if ordered to do so;*
- (d) subject to sub rule (2), that the claimant's address is not stated in the claim, or is incorrectly stated;*
- (e) that the claimant has changed address since the proceeding started and there is reason to believe this was done to avoid the consequences of the proceeding; or*
- (f) that the claimant is about to leave the jurisdiction and there is reason to believe that he has insufficient property available within the jurisdiction for enforcement to pay the defendant's costs, then where, having regard to all circumstances of the case, the Court considers it is in the interests of justice to do so, order the claimant to give such security for the defendant's costs of the proceeding.*

(2) The Court shall not require a claimant to give security by reason only of sub rule (1) (d) if he satisfies the Court that the failure to state his address was an innocent misstatement and was not made with the intention to deceive.

11. Upon listening to both Counsel, and keeping in mind the law stipulated above, this Court notes that the Claimant has ably responded to all the grounds that the Defendant raised as their basis in making this application. The Claimant has explained how the shareholding of the Company belongs to two individuals, one based in RSA and another who has lived in Malawi since 1987. (see **exhibit SM 1**) Further, and this Court confirms that Mr. SM Venter was just a secretary as would be seen in **exhibit CTG 1**. Upon a further scrutiny on **exhibit SM 1**, (being the memorandum of association it is clear that the said Mr. Venter signed as a witness. With these facts, it cannot be said that the majority of shareholders are without the jurisdiction.
12. It has been noted that the Defendant also argued that the resolution to obtain a loan by way of mortgage was made outside the jurisdiction, and that 'the directors were filing sworn statements prepared outside the jurisdiction,' the Defendant presented as if this was the usual practice by the Claimant. The Claimant averred that the resolution was made outside the jurisdiction as he had been in RSA at the material time. On the facts, only these two incidences have been flagged out where transactions pertaining to the Claimant's company were done outside of the jurisdiction. In the absence of evidence establishing a trend that this was the *modus operandi* of the Claimant's company, this Court finds it to be a hasty generalization to conclude that due to these two incidences, the Company's central management is outside the jurisdiction. It has already been seen that out of the two directors, one was based in Malawi and the other in RSA.
13. Coming to the issue of assets, again it has been demonstrated by the Claimant that contrary to the Defendant's assertions, it owns property titled Chichiri 36 by arguing that Defendant was leasing a car park belonging to the Claimant on Chichiri 36. The Defendant did not dispute this evidence meaning that the Defendant is indeed aware that the Claimant owns the said property. With respect to the question of address, the Claimant stated that it has maintained the address from the time of registration.

14. Rule 2 of Order 32 of the CPR, speaks of considerations the Court is to take into account in deciding whether to make the order for security of costs or not. The rule is in the following words:

2. *In deciding whether to make an order for security for costs, the Court may have regard to any of the following matters—*

- (a) *the prospects of success of the proceeding;*
- (b) *whether the claimant's lack of means is because of the defendant's conduct;*
- (c) *whether the order would be oppressive or would stifle the proceeding;*
- (d) *whether the proceeding involves a matter of public interest;*
- (e) *whether the claimant's delay in commencing the proceeding has prejudiced the defendant;*
- (f) *the costs of the proceeding.*

15. This Court agrees with the views expressed by Judge Manda in **Steering Timber International v Malawi Savings Bank & Anor**, Commercial Case Number 30 of 2017, '*Looking at the facts of this case and considering the time it has taken the defendants to file the application for costs, I do not think I can make an order for security for costs. Not at this point in time since if I were to do that, I will have to consider the case on the merits. Indeed, with the wording of Order 32, I do foresee many a situation where the court will be drawn to consider cases on merits in an application for security of costs... .*'

16. Looking at some of the factors to be considered such as the '*prospects of success of the proceeding*,' this would require a demonstration of some sorts by the Defendant otherwise the Court would be speculating. This could be the reason why the application needs to be made at the earliest opportunity and not when the matter is already in the final adjudication stages as in the present instance. Moreover, the Defendant did not explain the delay in making this application. This is a matter that was commenced in 2018. The Defendant only decided to make the present application when the matter was ripe for trial. In fact, Counsel alluded to the fact that he was going to make the present application when Court convened for trial and there were other preliminary issues that had been raised.

17. It is a wonder that the Defendant being fully aware of all the grounds from the inception of these proceedings only thought of bringing them up at this point. Noting that the Defendant was also seeking a stay of proceedings till an Order for security for costs is made and satisfied by the Claimant, this application is a good example of a case where if such Order is granted, it would be oppressive or stifle the proceeding.
18. I therefore dismiss the application with costs. The dates for trial remain the same as were given through the order of this Court dated 24th April, 2024.

Made this 19th day of June, 2024


Gloria A. Namonde
JUDGE