

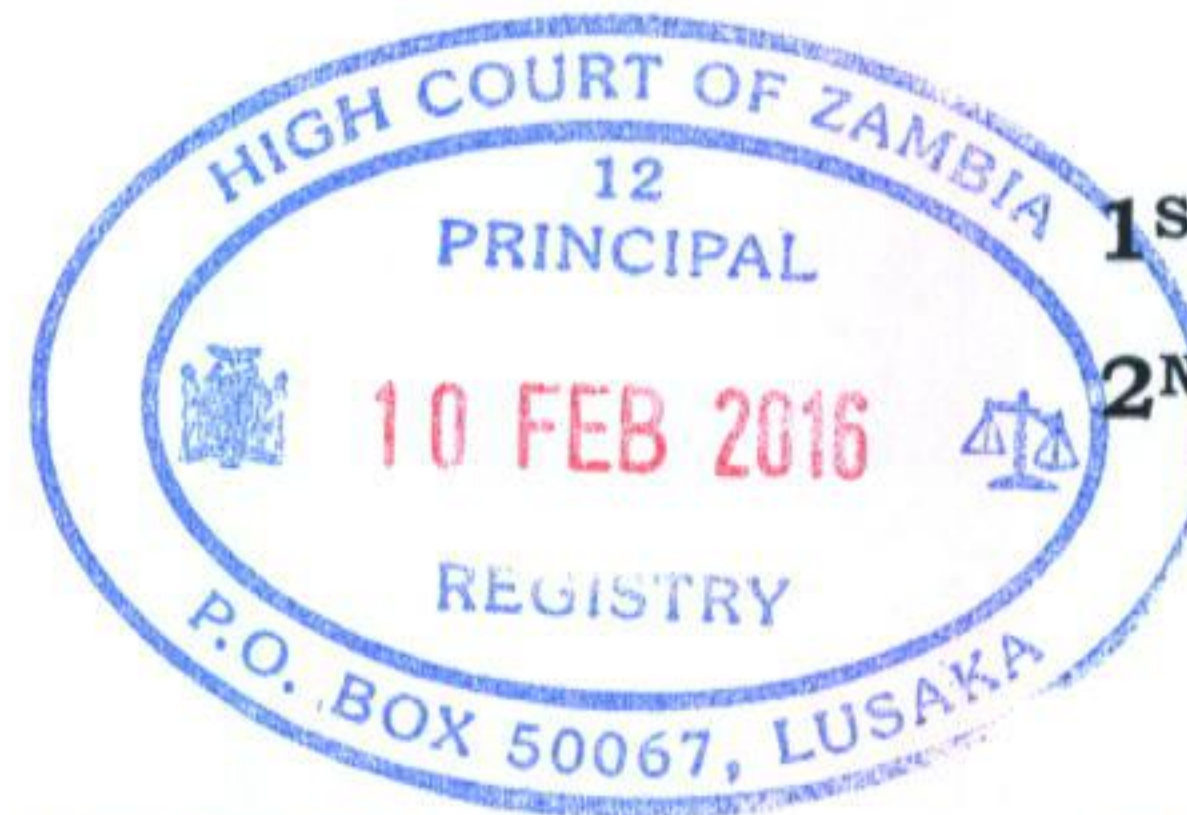
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IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2015/HP/2406

BETWEEN

AK TRANSPORT LIMITED
MOHAMMED NASSOR ALLY



1ST PLAINTIFF

2ND PLAINTIFF

AND

ADVANTAGE INSURANCE ZAMBIA LIMITED

DEFENDANT

Before the Honourable Mrs. Justice M.C. Kombe this 10th day of February 2016 in Chambers.

For the Plaintiffs: Mr. M. Nzonzo; Messrs M.C Mulenga & Nzonzo Advocates

For the Defendant: Mrs. M.K Ndhlovu; Messrs Sharpe & Howard Legal Practitioners

R U L I N G

Legislation referred to:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia.***
- 2. The Rules of the Supreme Court, 2999 Edition (White Book).***
- 3. Iain S. Goldrein, K.H.P. Wilkinson and M. Kershaw in their book Commercial Litigation: Pre-emptive Remedies, London, Sweet & Maxwell 1997.***

This is an application by the Plaintiffs for an order of interim preservation or release by the Defendant to the Plaintiffs of the vehicles which are the subject matter of this action. The application was made pursuant to Order 29 Rule 2 (1) of the Rules of the Supreme Court (White Book) 1999 Edition as read with Order 3 rule 2 of the High Court Rules.

The application was supported by an affidavit sworn by one, **EDWIN NGAKU**, who is the General Manager in the 1st Plaintiff Company.

The affidavit disclosed that on or about the 5th of November 2014, the Defendant took possession of the Plaintiffs vehicles and a container namely; a Scania Truck registration number T599AWF belonging to the 2nd Plaintiff; Trailer registration number T760CWH belonging to the 1st Plaintiff and a container registration number TCKU9477079; that the Defendant purported to hold on to these containers as security for payment of a demanded sum of K 90,000.00 allegedly paid to the Defendants insured Vijay Limited following a road traffic accident involving the said vehicles and another Toyota Dyna registration number ALT 7379; that the Plaintiffs disputed this claim of K 90,000.00 by the Defendant; that on 20th March 2015, the Plaintiffs through their Advocates issued a letter to the Defendant demanding the release of the said vehicles and the container together with certain costs for loss of business. The letter was exhibited as **'EN 1'** in the affidavit.

The affidavit further disclosed that the Defendant through its Advocates responded via a letter dated 1st April 2015 refusing to release the said vehicle and the container but maintained a claim of K 93,350.00 against the Plaintiff as a pre-condition for release of the vehicles. The said letter was exhibited as **'EN 2'** in the Affidavit; that the Plaintiffs were extremely worried of the state and condition of the vehicles that were likely to face damage on account of exposure and lack of maintenance whilst in the possession of the Defendant; that in order for the Plaintiffs to secure immediate release of the said vehicles,

the Plaintiffs had taken the liberty to pay the sum of K 100,000.00 into Court as security towards the disputed claim of K 93,350.00.

The Defendant opposed this application and filed in an affidavit in opposition on 24th December 2015. In an affidavit deposed to by **KAPILA KASAPATU**, the Assistant Manager, Claims in the Defendant Company, he disclosed that on 4th November 2014, motor vehicle registration No. ALT 7379 registered in favour of Vijay Limited and insured by the Defendant was extensively damaged following a motor vehicle accident along Buyantanshi Road in Lusaka; that the said accident was attributed to the driver of the Scania Truck and trailer (loaded with container) bearing registration No. T599AWF, T760CWH and TCKU9477079 registered in the names of the 2nd Plaintiff. He exhibited a copy of the Police Report and the same was marked as **'KK1'**.

The affidavit further disclosed that on account of the damage occasioned to the vehicle insured by the Defendant, the Defendant settled the insurance claim by Vijay Limited in the sum of K90, 000.00 and the vehicle belonging to Vijay Limited was declared a write-off.

Furthermore it was disclosed that in line with the general principle of subrogation, the Defendant immediately lodged a demand for the recovery of the said monies from the 2nd Plaintiff. He exhibited a demand letter marked **'KK 2'**; that contrary to the assertions contained in paragraph 3 of the Affidavit in support, the Defendant did not take mere possession of the vehicles itemized at paragraphs 3(i) to (iii) but the Defendant took possession of the said vehicles in order to recover the money paid to Vijay Limited; that in fact the Defendant's duly authorized representatives were informed by the Police that the driver of the Scania Truck belonging to the 2nd Plaintiff fled the scene of the accident abandoning the vehicles which were consequently impounded by the Police.

The affidavit further disclosed that in seeking to resolve this matter amicably and on account of the 1st and 2nd Plaintiff's failure to respond to the letter of demand, the Defendant was informed by the Police that since their investigations had been concluded, they had no objection to the release of the 2nd Plaintiff's vehicle but that the said release could only be made to the driver of the vehicle namely Nickson Felix Mkonge and the 1st and 2nd Plaintiff's agents namely Micky Sombe and a Mr. Muulu; that once the vehicles were released to the said Nickson Felix Mkonge, Micky Sombe and Mr. Muulu, the Defendant informed the trio that it was pursuing the recovery of K 90,000.00 from the 2nd Plaintiff being money paid to Vijay Limited and that since the 2nd Plaintiff was resident out of jurisdiction at an unknown physical address, the Defendant requested that the said vehicles be handed over to it to be held until the said K 90,000.00 was recovered in full at which point the keys to the said vehicle were handed over to the Defendant.

It was further deposed that since the vehicles were being held at the Police Station, the Defendant, with help of the Plaintiffs driver being Nickson Felix Mkonge arranged for the removal of the vehicle from the Police Station to a safe parking place which removal had led to the accrual of storage charges which fact had been brought to the attention of the 1st and 2nd Plaintiff. He exhibited a copy of the letter to the Plaintiffs Advocates advising them of the storage charges, the letter was marked as '**KK3**'; that contrary to the assertions contained in the affidavit in support, the Defendant had held on to the vehicles due to the failure and/or neglect by the 1st and 2nd Plaintiff to settle the Defendant's claim and also due to the fact that the 1st and 2nd Plaintiffs were domiciled out of the jurisdiction exposing the Defendant to a possibility of not recovering the sums due to it. That at the 1st and 2nd Plaintiffs' instance, the Scania Truck, Trailer and Container were inspected by the 1st and 2nd Plaintiffs' duly authorized representatives on the 12th June 2015 in his presence and another officer of the Defendant company namely Abraham Ngoma at which

the Plaintiffs were assured that the said vehicle, trailer and container were in safe custody.

The deponent deposed further that he verily believed that the 1st and 2nd Plaintiffs' application was misconceived as the vehicle, trailer and container, which were subject of this application were being kept safely therefore requiring no order for their preservation. He further deposed that he verily believed that the Plaintiffs' application for an alternative order of release of the vehicle, trailer and container was gravely misconceived as the release of the said vehicles would defeat the Defendant's claim for payment of the K 90,000.00 together with storage charges and exercise of its right of subrogation notwithstanding the payment of the K 100,000.00 by the 1st and 2nd Plaintiff into Court.

Lastly, the deponent deposed that the payment of K 100,000.00 by the 1st and 2nd Plaintiff into Court was to be ideally construed as payment of security for costs in view of the fact that the 1st and 2nd Plaintiffs were both domiciled outside Zambia.

At the hearing of the matter on the 30th December 2015, learned counsel for the Plaintiffs Mr. Nzonzo stated that the Plaintiffs application for an order of preservation or the release by the Defendant to the Plaintiffs of the vehicles subject of this application was made pursuant to Order 29 Rule 2(1) of the Rules of the Supreme Court as read together with Order 3 rule 2 of the High Court Rules.

Mr. Nzonzo submitted that he was relying on the affidavit in support filed on 15th December 2015. He argued further that under Order 29 of the White Book, this Court had powers to order for the detention, custody or preservation of any property which was subject of the matter or cause. He submitted that there were three properties subject of this action as listed in the affidavit in support

as well as the affidavit in opposition, which affidavits were unanimous that the properties belonged to the Plaintiffs.

He contended that the Defendant currently had custody of the vehicles and their interest arose from a money claim of K93, 350.00 which the Defendant paid to its insured following an alleged accident between the Plaintiffs' vehicles and a third party insured by the Defendant. Counsel submitted further that the Defendant had exercised a disputed lien over the vehicles as security for payment of K93, 350.00. However, as an act of good faith in this matter and in order to secure the safe custody of these assets by way of preservation, counsel submitted that the Plaintiffs' being owners of the vehicles had paid K 100,000.00 into Court as security for the Defendant's claim. He submitted that should the Defendant prove to this Court at trial that it was entitled to the disputed claim of K 93,350.00; the K 100,000.00 paid into Court would be available to the Defendant in satisfaction of its claim.

Mr. Nzonzo submitted that he filed a Notice of Payment into Court on the 15th December 2015 under government receipt number C 2576986 which demonstrated that K 100, 00.00 had been paid into Court. It was therefore his contention that in view of the foregoing, there was no basis upon which the Defendant could continue to hold custody of the vehicles more so that the Defendant's interest was not in the vehicles but a specified sum of money which had hitherto been paid into Court.

Mr. Nzonzo further submitted that the properties in issue would best be preserved in the custody of the Plaintiffs who were the owners of the vehicles. He submitted further that the Defendant had expressed fear in their affidavit in view of the fact the Plaintiffs were domiciled out of the jurisdiction of this Court. However, this fear had been overtaken in view of the fact that the disputed sum had been paid into Court and that it would be available to the Defendant should it prove its claim.

In conclusion, counsel submitted that the Defendant's contention in its affidavit in opposition that the payment into Court should be deemed as security for costs was not tenable as the Defendant should have made a specific application for security for costs upon demonstrating that they had a defence to the Plaintiffs' claims. In the event that an order for security for costs was made, the Defendant would have an option to request a stay of these proceedings until security for costs were paid. In the premises, Counsel submitted that this was a proper case and prayed for an order seeking preservation and release of vehicles to the Plaintiff, further that costs be in the cause.

In opposing the application, learned counsel for the Defendant Mrs. Ndhlovu informed the Court that the Defendant would entirely rely on the affidavit in opposition filed on the 24th December 2015.

In answer to the question from the court regarding the Plaintiffs contention on security for costs, Mrs. Ndhlovu submitted that she opposed the Plaintiffs submission because they were aware that the Plaintiffs were not domiciled in Zambia and that the Defendant was not sure that it would be able to pursue the Plaintiffs should judgment be in its favour.

In answer to another question from the court on the Defendant's position regarding the Plaintiffs contention that the vehicles should be preserved by the Plaintiffs who were the owners of the vehicles, Mrs. Ndhlovu submitted that they were of the view that the Defendant was currently preserving the vehicles at a secure destination and there was no risk of damage to the vehicles.

In reply, Mr. Nzonzo submitted that in his view, it was speculative that the vehicles were not at risk of damage. Counsel submitted that the Defendant had not provided any proof to demonstrate that the vehicles had been kept safe and

secure. He submitted further that the critical point was that the money that the Defendant sought had been secured having been paid into court. Therefore, there would be no prejudice occasioned to the Defendant.

Mr. Nzonzo further reiterated his earlier submission on the issue of security for costs. He submitted that the Defendant should have made a specific application to that effect and in the event that the Defendant demonstrated that it would be a proper case for an order for security for costs, the Defendant had recourse to having this matter stayed pending payment for security for costs.

Those were the submissions by the parties which I have carefully considered.

By this application, I am being called upon to determine whether or not the Plaintiffs are entitled to an Order of interim preservation and/or release of the vehicles subject of this action.

The application for preservation of the vehicles has been made pursuant to Order 29 rule 2(1) of the Rules of the Supreme Court. The said Order provides that:

'On the application of any party to a cause or matter, the Court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter or to which any question may arise therein or for the inspection of any such property in the possession of a party to the cause or matter.'

The attractive feature of this Rule is what is provided for under Order 29/8A/9 which reads as follows:

'The protective measure extends to every case in which the court sees that as between the Plaintiff and defendant there is something which ought to be done for the security of the property.'

In relation to the property to be preserved, the authors of Commercial Litigation: Pre-emptive Remedies state at page 293 that:

'The property which can be made the subject of the order under Order 29 is property which is either the subject-matter of the action or as to which a question may arise in the action. The property normally sought to be protected or inspected is the physical subject-matter of the action such as a car or jewellery.'

It is clear from the foregoing that the court has powers to grant interim preservation orders in cases where as between parties, the court sees that something ought to be done for the security of the property in question.

In this regard, the deponent of the Plaintiffs affidavit in support has deposed in paragraph 7 that he is extremely worried of the state and condition of the vehicles that are likely to face damage on account of exposure and lack of maintenance whilst in the possession of the Defendant.

On the other hand, the Defendant has argued that the vehicles are being preserved at a secure destination and there is no risk of damage to the vehicles. Therefore in paragraph 17 of the affidavit in opposition, the deponent has deposed that on 2nd June, 2015 the Trailer and Container were inspected by the 1st and 2nd Plaintiffs duly authorized representatives at which inspection the representative was assured of the safe custody of the vehicles.

I have carefully considered this application for preservation. Although counsel for the Defendant has argued that the vehicles are currently being preserved by the Defendant at a secure destination and there is no risk of damage, there is no proof that the vehicles are stored at a secure place. Since vehicles are assets which are at risk of damage or theft on account of exposure, lack of use and maintenance they are supposed to be safely secured. In the present case, I am not wholly satisfied that the vehicles in the possession of the Defendant are not

exposed to these risks as the Defendant has not mentioned the place where the vehicles are stored. In this regard, I am of the view that in order to guarantee the security of the vehicles, the vehicles should be preserved by the owners of the vehicles.

In relation to the argument by the Plaintiff for the release of the vehicles, I have also considered the argument by the Defendant that they have held on to the vehicles due to the failure and neglect by the 1st and 2nd Plaintiffs to settle the Defendant's claims and also due to the fact that the 1st and 2nd Plaintiffs are domiciled out of the jurisdiction. That in this regard, the Defendant has been exposed to the possibility of not recovering the sums due to it.

Although there seems to be strength in that argument, however, there is evidence on record that the Plaintiffs have taken the liberty to pay a sum of K100, 000.00 into court as security towards the disputed claim by the Defendant. I am of the considered view that since the Plaintiffs have paid into court this amount, the Defendant will not be prejudiced in the event that it succeeds in its demand. In short, the Defendant's demand of K93,350.00 has been secured by the payment into court of the amount of K 100,000.00.

Furthermore, I have considered the contention by the Defendant that the payment of K100, 000.00 should be construed as payment of security for costs in view of the fact that the Plaintiffs are both domiciled outside the country.

It is trite law that the court may in its discretion order security for costs if it has the jurisdiction to do so. Under our Rules of the Court, this jurisdiction is derived from Order 40 rule 7 of the High Court Rules as read together with Order 23 of the Rules of the Supreme Court. However, before an order for security for costs is made, the court should have regard to all the circumstances of the case whether it would be just to make such an order.

A reading of Order 40 rule 7 reveals that there should be a specific application for security for costs to enable the court make a determination whether an order should be so granted. In the present case, no application has been made by the Defendant although I take cognizant of the fact that the Defendant entered conditional memorandum of appearance. However, the nature of the application the Defendant intends to make is unknown to this court. There being no application for security for costs, I find that there is no basis upon which this court can construe the payment of K100, 000.00 as payment for security for costs. Consequently, I decline to hypothesize and make such an order as contended by the Defendant.

On the facts of this case and for the foregoing reasons, I find that this is a proper case in which to exercise my discretion under Order 29 Rule 2 of the Rules of the Supreme Court and my inherent jurisdiction under Order 3 Rule 2 of the High Court Rules and order preservation and the release of the subject vehicles to the Plaintiffs. For the avoidance of doubt the vehicles to be released are: Scania Truck registration number T599AWF belonging to the 2nd Plaintiff; Trailer registration number T760CWH belonging to the 1st Plaintiff and a container registration number TCKU9477079. Considering the nature of the application, I make no order as to costs.

Leave to appeal is granted.

DELIVERED at Lusaka this 10th day of February, 2016



**M. C. KOMBE
JUDGE**