THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO.

(CORAM: MANYINDO. D.C.J., ODOKI. J.S.C., ODER, J.S.C.)

(CIVIL APPEALL NO. 34 OF 1995

BETWEEN

G.M. COMBINED (U) LIMITED……APPELLANT

AND

A.K.DETERGENTS (U) LIMITED……RESPONDENT

(Appeal from the order of the High Court at Kampala

(Tsekooko, J.) dated 11/7/94 in High Court Civil Suit No.

348 of 1994)

JUDGMENT OF ODER,J.S.C.

This is an appeal against the order of the High Court requiring the appellant to furnish security for costs in a High Court Civil Suit in which the appellant was the plaintiff. Hereinafter security for costs is referred to as "s.f.c."

The background to the appeal is that the appellant filed High Court Civil Suit No. 348 of 1994 against the present respondent for recovery of certain immovable property situated in Kampala, on the ground that the respondent had acquired the suit property by fraud. Particulars of the alleged fraud were set out in the plaint. The plaint also prayed for an injuction to restrain the respondent from allegedly trespassing on, and from passing off as the owner of, the suit property.

The respondent resisted the suit, stating in its written statement of defence, inter alia, that it had lawfully purchased for value and in good faith all the moveable and immovable assets (including the suit property) of the appellant company (in receivership) from duly appointed Receivers thereof, and that the registered titles to the suit property were duly transferred to the respondent. After the close of pleadings and before the suit was set down for hearing the respondent applied by chamber summons to the High Court for an order that the appellant should give s.f.c. to be incurred by the respondent in the suit. The application was made

under Order 23, Rule 1, of the Civil Procedure Rules, and Section 404 of the Companies Act (Cap. 85). The ground of the application was that in view of the uncertainty of the appellant's continued existence and the doubt of its ability to meet the costs of the suit, which it was likely to lose, it was fit that the respondent gave such s.f.c.

The application was supported by two affidavits sworn by on Alykhan Karmali, a Managing Director of the respondent, which explained in detail the ground and circumstances of the application.

The appellant resisted the application, giving its reasons doing so in an affidavit in reply, sworn by one Zahid Mir, a member/Director of the appellant Company.

The application was heard by Tsekooko, J. (as he then was). He granted it and ordered that the appellant should furnish the sum Shs. 50,000,000/= as s.f.c. in the suit. He also ordered the proceedings in the suit by the appellant should be stayed until t s.f.c. ordered was paid. Hence this appeal.

Nine grounds of appeal were set out in the Memorandum of appeal, many of them sub-divided into numerous sub-grounds. I agree with the Counsel for respondent, Mr. Mulenga's classification of the issues raised by the grounds of appeal as essentially raising points which may be divided into four main categories.

The first issue was whether the trial Court erred in failing to take into consideration the merit of the appellant's case although it considered the defence (the respondent's) case.

The second issue was whether the trial Court erred by applying wrong principles or failing to apply correct principles, for instance whether the appellants inability to pay s.f.c. was cause by the respondent.

The third issue was whether the decision was erroneous by reason of bias and was prejudicial to the appellant.

The fourth issue was whether the trial Court erred on the mode, an quantity of the security it ordered.

At the hearing of the appeal Mr. Mohamed Mbabazi and Mr. Kavuma Kabenge represented the appellant, the former arguing most .Of t grounds. He took. many of them together.

Mr. Mbabazi criticised the learned trial Judge for relying on the affidavit of Aykhan for the decision he made. That affidavit, the learned Counsel said, indicated that the appellant company under a receivership; was the object of a winding up petition in the High Court; and was indebted to numerous other creditors. In the circumstances the learned trial Judge concluded that the appellant would be unable to pay costs in the suit and that this was a proper case for ordering s.f.c.

The Counsel criticised the learned trial Judge for making the order on that basis, because he declined to consider whether' the appellant had a prima facie case in the suit and its probability of success; he declined to consider that the present financial position of the appellant was caused by the respondents action, which was admitted, of buying the appellants movable and immovable assets and property; and he failed to consider that by ordering s.f.c., he was stifling the appellants suit.

The learned Counsel then referred to principles which guide Courts in consideration of applications for s.f.c. under 0.23 r.1 and Section 404 of the Companies Act. He referred to similar provisions in the English jurisdiction and authorities in which they have been discussed, including decided cases. These included Halsbury's Laws of England, its 4th Edn. Vol. 7 paragraph 779: The Supreme Court Practice Rules, 1985, Vol. 1, Sweet and Max Well, London, by Sir Jack I.A. Jacob, page 385: Procon (GB) Ltd V Provincial Building Co. Ltd (198A) 2 All E.R. 368 Sir Lindsay Parkinson & Co. Ltd V. Triplan (1973), 1 QB. 609. The learned Counsel also relied on certain local authorities, such as Anthony Namboro and Fabiano Waburo-lio V. Henry Kaala (1975) HCB. 315 an Uganda Commercial Bank V. Multi Constructions Ltd. Civil Appeal No 29 of 1994 (SCU) (unreported).

Mr. Kavuma Kabenge, for the appellant submitted in respect of the grounds of appeal concerning the claim that the poor state of U appellant was caused by the respondent and that the quantum of the s.f.c. ordered by the learned trial Judge had the effect stifling the appellant's suit. The learned Counsel said that the Receivers appointed were the agents of the appellant under t debentures by which they were appointed as such.

As a result of the Receivers action of selling off to the respondent the appellant's assets the appellant was not in a position to pay even Shs. 1m/= as s.f.c. Consequently, the learned Counsel prayed for a reversal of the order made by the learned trial Judge. instead, the Counsel suggested that the appellant should be ordered only to execute a security bond of the nature provided for in cases of stay of execution of decrees under Order 39, Rule 4, of the C.P.R. The form of such a security bond is annexed as form 2 to Appendix F of the C.P.R. For this, the learned counsel relied on the case of Siri Ram Kaura V. M.J.E. Morgan (1961) E.A 462.

With respect the case of Siri Ram (supra) does not assist the appellant on the point, because in that case an order by a single Judge for payment of security for costs pending an appeal against a judgment debtor who had confessed of being unable to pay costs o the suit he had lost was confirmed by the Court of Appeal. The case, in fact, goes against the present appellant in that the admission by that appellant that he was without assets and could not pay costs was a factor which justified the order of s.f.c.

In the alternative, Mr. Kabenge suggested that at worst to appellant should be ordered to pay Shs. 14m/= as s.f.c. in the instant case.

Mr. Mulenga, S.C., for the respondent, replied in greater detail the submissions of the Counsel for the appellant. He said that their statement of the background to the case the appellant learned Counsel had omitted certain details which appeared to unfavorable to their case. Mr. Mulenga also criticized the grounds of appeal as being argumentative, thus offending Rules 84(1) of the Rules of this Court.

I agree with these criticisms, but since they do not go to the substance of the appeal I think that I need not say anything more about them.

In his reply to the appellant's argument under what I have chosen to call the first issue in this appeal, Mr. Mulenga submitted that the sale and transfer of the appellants suit property, effected after a winding-up petition had been commenced in Court and after a suit challenging the appointment of the Receivers had been filed, did not render void the sale of the suit property under the Companies Act. The argument that the appellant's suit was destined to succeed had been adequately considered by the learned trial Judge in coming to the conclusion that, in the circumstances of the case, the respondent appeared to have a good

defence to the claim and the defence was likely to succeed. That is what Mr. Mulenga contended first. Secondly, Mr. Mulenga submitted that neither 0.23. r.l, not section 404 make merit of the case of the defendant or of the plaintiff a criterion for granting or refusing an order

for s.f.c. The law does not lay down criteria, except in Section 404 in which it is provided that the order is to be made where limited company is plaintiff it is shown that it is unable to pa the costs of the suit. It was contended that in the exercise C their discretion Linder the two statutes Courts have taken into consideration the merit of the cases but, only to a limited extent Generally, where a suit, on the face of it, is frivolous vexatious Courts have taken that into account in ordering s.f.c. Secondly, Courts have considered whether the defendant applying f s.f.c. has a reasonable defence likely to succeed in deciding whether to order for s.f.c. Conversely, Courts may take in consideration the bonafides of the claim i.e. whether the claim m succeed, or the helplessness of the defence.

This particular point, Mr. Mulenga said, has not yet been clearly decided but the learned Counsel thought that that is the essence o the decision in the case of Namboro (supra).

0.23, r. 1 of the C.P.R. provides:-

> "1. The Court may if it deems fit Order a plaintiff in any suit to give security for the payment of costs incurred by the defendant."

Section 404 of the Companies Act says:-

> "404 where a limited Company is plaintiff in any suit or other legal proceeding any Judge having jurisdiction in the matter may if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence require sufficient security to be given for those costs, and may stay all proceedings
>
> until the security is given."

The powers given to the Courts by these statutory provisions absolutely discretionary. The discretion under 0.23 r.l appears be wider in that it applies to any plaintiff, whether a company an individual. Secondly the Court may order for the payment of costs incurred by

the defendant “if it deems fit” to do so. No specific conditions or criteria are imposed before the Court can exercise the discretion.

The discretion under Section 404, on the other hand, is limited its application.

It applies only to plaintiffs which have limited liability. Secondly it is exercisable if the Judge believes by credible testimony that the plaintiff company will be unable to pay the costs of the defendant if successful in his defence. The Judge must first believe that the plaintiff company will be unable to pay the defendant’s cost before he may order security for costs, not before.

In considering the submissions made above by both sides on the issues in this appeal, I find, as a start, that useful assistance may be derived from discussions already made regarding the English equivalent of our 0.23 r.l and S. 404 of our Companies Act (Cap. 85). In Supreme Court Practice Rules 1985 (supra) the learned author says that English Order 23, which provides for payment of security for costs by a plaintiff if the Court thinks it just to do so, must be read subject to the powers of the Court to order security for costs under other enactments for example S.447 of the English Companies Act. 1948, (which is couched in identical term as our S.404). Secondly, a major matter for consideration is the likelihood of the plaintiff’s case succeeding, If there is strong prima facie presumption that the defendant will fail in his defence to the action, the Court may refuse him security for costs It may be a denial of justice to order a plaintiff to give security for the costs of a defendant who has no defence to the claim. Again, if a defendant admits so much of the claim as would be equal to the amount which security would have been ordered the Court m refuse him security for he can secure himself by paying t admitted amount in Court. Further, where the defendant admits his liability, the plaintiff will not be ordered to give security.

Dealing specifically with the Court’s discretion under 5.447 (the equivalent of our S.404) the learned author referred to Sir Lindsay Parkinson (supra) and said that among the circumstances which the Court might take into account are: (1) whether the plaintiff’s claim is bonafide and not a sham; (2) whether the plaintiff has a reasonably good prospect of success; (3) whether there is an admission by the defendant on the pleadings or elsewhere that money is due; (4) where there is a substantial payment into Court or an “open offers of a substantial amount; (5) whether the application for security was being used oppressively, e.g., so as to stifle a genuine claim; (6) whether the plaintiff’s want of means has been brought

about by any conduct by the defendant, such as delay in payment, or in doing their part of the work; (7) whether the application for security is made at a late stage of proceedings.

It is also said in the learned authors discussion of the Supreme Court Practice Rules 1985 (supra) that the Court may order plaintiff company in liquidation to give security for costs, ever though it is one of two or more plaintiffs, especially where there is a comparatively small over lap between its own claims and those of the other plaintiffs. It is said further that while the Court must not allow S.477 to be used as an instrument of oppression it must equally not allow an impecunious company to put unfair pressure on a prosperous company.

The case of Bilcon Ltd. V. Fegmay Investments Ltd (1966) 2 All E.R (Q.B.D) P. 513 is also an authority to the effect that where it appears by credible testimony that there is reason to believe the claimant (or plaintiff) company is insolvent it would be just to order the company under S.447 to give security for the costs the defendant. Security for costs was also ordered in Pure Sprit Co. V. Fowler (1980) QB., where the plaintiff company was in liquidation.

In Halsbury's Laws of England (supra), it is also said the fact of a company being in liquidation is prima facie evidence that it will, if unsuccessful, be unable to pay the defendants costs even if the liquidation occurs while the action is pending. See, for instance, John Bishop (Caterers) Ltd and Anor V. National Union Bank Ltd & Others (1973) 1, All E.R. 707;

In the case of Sir Lindsay Panknison (supra). The claimants had carried out sub-contract work for the main contractors. They sought arbitration on their claim for outstanding balances of £25,300 said to be due. When the contractors failed to take the necessary steps in the arbitration the claimant in June, 1971 sued for the sum. The contractors thereupon applied for a stay pending arbitration. The claimants delivered their, points of claim. In January, 1972 the contractors wrote an open letter offering the claimants £ x sum and reasonable costs in full satisfaction of the claim, stating that that offer was intended to be the equivalent of payment into Court in High Court proceedings. The claimants did not accept the offer. The arbitrator fixed July 3 as the date for the hearing and allowed eight days for it: shortly before the fixed date the contractors, having found out that the claimant company was in financial difficulties, issued a High Court summons for security of the costs of arbitration. On June 26 Master Lubbock on affidavit evidence that there was reason to believe that if the contractors were

successful in the arbitration, the claimants would be unable to pay their costs, accepted the submission that by terms of Section 447 of the Companies Act, 1948 he was bound to order security for costs; and he ordered the arbitration to be stayed unless and until the claimants paid $1,500 into Court as security.

On the claimant's "appeal against the order and the contractor" cross-appeal against its quantum High Court Judge allowed the appeal and dismissed the cross-appeal, holding that under S.477, he had unfettered discretion whether or not to order security for costs even though there was credible testimony of the claimants inability to pay the costs of successful defendants, and that he would exercise that discretion in favour of the claimants by quashing the masters order, taking into account the circumstances that the claimants had a bonafide claim which they should not be forced to abandon for lack of means; that they had already paid £300 in arbitration; and that the amount of the contractors open offer of £ x was an indication that the contractors already had security in excess of £ 1,500. On appeal by the contractors to the Court of Appeal it was held, dismissing the appeal: (1) that even where there was credible evidence that a limited liability would be unable to pay the costs of a successful defendant, Section 447 was not mandatory but gave the Court a discretion whether or not to order security for costs against the company having regard (per Lord Denning M.R. and Lawton L.J) to all the circumstances of the particular case; (per Cairns L.J.) where there were special circumstances; (2) that the circumstances of that case, and in particular the lateness of the application for security for costs the fact that an order might prevent the claimants from proceeding with an admittedly bonafide claim in arbitration and the amount of the contractors open offer of £ x, the equivalent of a payment into Court, which was prima facie evidence that the claimants we likely to recover more than £1,500 so that the contractors had hand security of not less that £ 1,500 justified the Court, exercise of its discretion under S.447, in making no order.

I think that the other circumstances of the Sir Lindsay Parkinson case 1 (supra) far out weighed the credible evidence that the claimants were unable to pay the contractors? (defendants) costs if the defendants were successful in the arbitration.

This case shows that even if a plaintiff or an appellant is in financial problem and, therefore, may be unable to pay for the costs of the suit or appeal if the suit or appeal fails the Court may still refuse to order for s.f.c. considering other circumstances of the case. But I think that

the decision in that case must be viewed in the light of its special circumstances. It is an exception to the general rule.

Another English case which I find very useful in consideration of whether the discretion under Section 404 of the Companies Act (cap 85) in case of Company plaintiffs should be exercised by ordering s.f.c. is that of Pearson and Another V. Naydler and others (1977) 3 All ER, 531. The case applies to cases of first instance, and not to appeals. In that sense it is very relevant to the instant case. There, Megarry V-C, discussed the matter with hi characteristic clarity. The first and second plaintiffs brought action against the defendants. The second plaintiff was a limited company of which at all material times the first plaintiff and h wife were sole directors. The plaintiff company was in such financial straits that it would be unlikely to be able to pay the defendants costs if the action failed. On an application by the defendants for an order for security against the plaintiff company under S.447 of the Companies Act, 1948 the plaintiffs contend that the court had no power to make an order under S.447 where one of the plaintiffs was a natural person and resident within the jurisdiction. It was held that a limited Company whether suing solely or jointly was liable to give security at the discretion the Court.

Where the Company was suing jointly the fact that the co-plaintiff was a natural person who would not be ordered to give security for costs did not deprive the Court to order the Company to give security for costs, but instead was simply a matter to be taken into account by the Court in exercising its discretion. On the facts, it was appropriate that an order for s.f.c, should be made.

At page 535, Megarry V-C said this:-

> “In the case of a limited company, there is no basic rule conferring immunity from any liability to give security for costs. The basic rule is opposite. S.447 applies to limited companies and subjects then all to the liability to give security for costs. The whole concept of the section is contrary to the rules developed by the cases that poverty is not to be made a bar to bringing an action. There’s nothing in the statutory language (the substance of which goes back at least as far as the Companies Act, 1862, s. 69) to indicate that there are any exceptions to what is laid down as a broad and general rule.

> A man may bring into being as many limited companies as he wishes, with the privilege of limited liability; and Section 447 provides some protection for the community against litigious abuses by artificial persons manipulated by natural persons. One should be as slow to whittle away this protection as one should be to whittle a natural person's right to litigate despite poverty……
> It is clear law that the jurisdiction under the Section is discretionary."

About merits and prospects of success, the learned Judge there said that apart from pleadings, he had very little material before him to judge. He then related the issue of merit of the litigation to the case of Sir Lindsay Parkinson & Co. Ltd (supra), where no order for security was made, an important factor plainly being the substantial sum offered by the defendants to the plaintiffs with an effect equivalent to payment into Court. The trial Judge there took the view that no security for costs over and above that sum should be ordered and the Court of Appeal held that he was quite right.

Deciding to order for payment of security by the limited company plaintiff, Megarry V-C in Pearson and Another (supra) made the following point in his conclusion on pages 536 and 537.

> "Doing the best that I can to assess the relevant factors and considering in particular the matters mentioned in Parkinson case, I come back to the words of S.447. It seems plain enough the inability of the plaintiff company to pay the defendants cost is a matter which not only opens the jurisdiction but also provides a substantial factor in the decision whether to exercise it. It is inherent in the whole concept of the section that the Court has power to do what the company is likely to find difficulty in doing, namely, to order the company to provide security for costs which ex-hypothesis it is likely to be made to pay. At the same time the Court must not allow the section to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a large company. For this reason Mars-Jones, 3., was not prepared in the Parkinson case to make an order for security for costs for more than the £1,500 that the master had ordered. As against that the Court must not show such a reluctance to order security for costs that this becomes a weapon whereby the impecunious, company can use its inability to pay costs as a means of putting unfair pressure on a more prosperous company. Litigation in which the defendant will be seriously out-of pocket even if the action fails is not to be encouraged. While I fully

> accept that there is no burden of proof one may or the other, I think that the Court ought not to he unduly reluctant to exercise its power to order security for costs in cases that fall squarely within the section. In the end, looking at the matter as a whole, I have reached the conclusion that on balance, I ought to make an order for security for costs."

Turning to the local scene, the majority of the decisions appear to deal mainly with further security for costs or past costs relating to matters in question on appeals under rule 104(3) of the Supreme Court Rules or its predecessor, the section 404 of our Companies Act. Some are relevant to the issues we are dealing with in t instant case, some are not.

Lalgi Gangi V. Nathoo Vassanjee (1960) EA 315, one of the early such cases, is important on the point that under rule 60 (the predecessor of rule 104 (3) of the Supreme Court Rules) the burden lay on the applicant for further security for costs or for past costs to show cause why that relief should be granted. He could not merely by averring that the security already deposited for costs was inadequate or because the costs in the Court below, ordered in his favour, had not yet been paid impose any obligation upon the Court or judge to grant his application.

In Siri Ram Kaur vs. Morgan (1961) 462, we have already noted that the fact of an admission by the appellant that he was without assets and could not pay costs was sufficient to justify an order for s.f.c, under rule 60 of the Court of Appeal Rules them in force.

In Moor Mohamed Abdullah V. Ranchhobhai J. Patel And Another (1962) EA 447 one of the arguments on behalf of the appellant advanced against the application under rule 60 for security for payment of past costs relating to matters in question on appeal was that the appellant's impecunious circumstances arose from alleged wrongful act of the respondent. The alleged wrongful act was the distraint the legality of which was in issue in the action. On that argument the Court said this on page 452:

> "We think that a mere assertion in such a matter is inadequate and that a certain amount of supporting detail should have been given. The allegation has not been denied, however, and, as far as it goes, the argument provides some support for the appellant's case. We are not inclined to attach much weight to it in the circumstances."

In that case the application for security for past costs was refused mainly because there had been an inordinate delay in making the application.

The decision in the case of Premchard Raichand Ltd and Another V. Quarry Services of East Africa Ltd and others (1) (1971) EA 172 turned on the same issue of delay. It was held that where there had been delay in applying for security the applicant must show Chat the delay has not been prejudicial to the appellant. In that case the delay had been prejudicial to the appellant. The application for security was, therefore, refused.

A Ugandan case which bears some similarities to, and appears to support the respondents application in the instant case, is that of Mawogola Farmers and Growers Ltd V. Kayanja and Others (1971) EA 108. In the original suit twenty respondents successfully sued the appellant for shares in the company to be allotted to them the total value of Shs. 8,800/=. The decree was dated 28/4/1970. The appellant's application for stay of execution pending appeal was dismissed by the High Court of Uganda, which ordered that the appellant should deposit the taxed costs of suit within ten days of the taxation order and costs of the application in the appeal. The respondents applied under rule 60 of the East African Court of Appeal Rules and Section 404 of the Companies Act: (Cap 85) for an order that the appellant should give security for the respondent's costs in the High Court including the cost of the application for stay of execution and of the appeal in such sum a the Court may direct, failing to give such security the appeal should stand dismissed without further order. The grounds of the application for security were that a receiver and manager had bee appointed over all the assets of the appellant and consequently if the appeal was unsuccessful the respondents would be unable to recover any of the costs except the sum of Shs. 1500/=, deposited in the Court as security for costs of the appeal. Secondly the appellant had not deposited in Court the taxed costs of the suit and the other costs ordered by the High Court.

The respondents application for further security to the extent of the costs in the High Court was granted, Sir Sheridan, C.J, said this on page 110:-

> "I think that in the exceptional circumstances of this case a right balance be struck if I order the appellant to give security for the respondents cots of the Court below including the costs of the application for stay of execution within 21 days, failing which the appeal is dismissed with costs without further orders."

In the most recent case in this line, Uganda Commercial Bank vs. Multi Constructors Ltd (supra), an application was made by the respondent Uganda Commercial Bank on appeal under Rule 104(3) and Section 404 of the Companies Act for orders for security for past costs and costs of the appeal which had been lodged by Multi- Constructors Ltd. The ground of the application appears to be that the appellant had been unable to pay the taxed costs of he suit it had lost in the High Court. Piatt, J.SC., rejected the application. His decision appears to have been influenced by cases such as Premchand (supra) Lalgi Gangi (supra) and Noor Mohamed Abdulla (supra), and based on the reasons that the Court's power to order security in respect of the payment of past costs should be sparingly used, because the appeal process should not be unduly fettered and that the appellant's inability to pay the taxed costs had not been sufficiently proved in that case. What was needed was failure of execution or some other steps to show that the appellant could not pay or an admission on its part.

On the allegation that it was the Banks wrongful action which led to the appellant's financial down fall, the learned Judge said that that was a matter of open debate and one which should be left for decision in the appeal.

Lastly, the case of Anthony Namboro (supra) the decision in which, on the face of it, appear to be in favour of the appellant in the instant case.

It was an application under 0.23 r.1 of the C.P,R. for an order requiring the respondents to pay security for the applicants costs. The respondents had instituted a suit against the applicant for damages for professional misconduct in that he had failed to appear on their behalf in a Civil Suit at Mengo Court when he was briefed and as a result an ex-parte judgment was entered against the respondents and they were ordered to pay damages whereas they had a good defence to the case. The applicant did not deny having been briefed by the respondents, but justified non-appearance at the hearing by stating that the respondents had not paid his instruction fees.

In support of his application the applicant stated that the respondents had shown themselves to be in the habit of not paying their debts and, therefore, if he successfully defended the suit the respondents would again neglect to pay the applicant's costs. The respondents applied to have the suit dismissed, firstly because it was wrongly brought by notice of motion instead of chamber summons and, secondly, because the applicant had failed to show that he had a good defence to the action.

Ssekandi Ag. J. (as he then was) who heard the application held that:-

> "The main consideration to be taken into account in an application for s.f.c. are (a) whether the applicant is being put to undue expenses by defending a frivolous and vexatious suit;(b)that he has a good defence to the suit;(c) and that he is likely to succeed. Only after these factors have been considered would factors like inability to pay come into account;
>
> (2) mere poverty of a plaintiff is not by itself a ground for ordering security for costs; if this were so, poor litigants would be deterred from enforcing their legitimate rights through the legal process.
>
> (3) In the instant case the respondent has a triable cause of action against the applicant and there is a likelihood him succeeding. Wherefore the application would be dismissed.

That case, in my view, really turned on the issue that the defendant had no defence to the suit. He did not deny having been briefed by the respondents, not that he did not appear for them in Court. But he tried to justify his non-appearance in Court by alleging that the respondents had not paid his fees. This, apparently, was hardly a defence at all to the cause of action.

From the many authorities I have considered above, the summary of the position the merit of the plaintiff's case or that of the defendant as a factor n exercising the Courts discretion under 0.23 r.l and section 404 of the Companies Act. in favour or against an application by a defendant for s.f.c., may be stated as follows:-

1. A major consideration is the likelihood of success of the plaintiff's case; put differently, whether the plaintiff has a reasonably good prospect of success; or whether the plaintiff's claim is bona fide and not a sham;

2. If there's a strong prima facie presumption that the defendant will in his defence to the action the Court may refuse him s.f.c.; it may be a denial of justice to order a plaintiff to give s.f.c. of a defendant who has no defence to the claim;

3. Whether there's an admission by the defendant on the pleadings or elsewhere that money is due;

4. If the defendant admits so much of the claim as would be equal to the amount for which security would have been ordered the Court may refuse him security for he can secure himself by paying the admitted amount into Court.

5. Where the defendant admits his liability the plaintiff will not be ordered to give s.f.c.;

6. Where there is a substantial payment into Court or an "Open offer" of a substantial amount, an order s.f.c. will not be made.

In a nut-shell, in my view, the Court must consider the prima facie case of both the plaintiff and the defendant. Since a trial will not yet have taken place at that stage, an assessment of the merit of the respective cases of the parties can only be based on the pleadings, on the affidavits filed in support of or in opposition to the application for s.f.c. and any other material available at that stage.

In the instant case, in answer to the respondents w.s.d. it was pleaded in the reply to the w.s.d. that the alleged sale of the appeiiant1s property by the Receivers was null and void, because a petition for winding up the appellant company had already been instituted when the sale took place, The sale was therefore done in contravention of sections 227, 228 and 229 of the Companies Act (Cap, 85). Apart from the allegations of fraud made in the plaint, this appears to have been the main basis for the appellants contention that the respondent had no defence to the suit. The suit, therefore, had a reasonable prospect of success. It has been contended before us that that is what the learned trial Judge failed to consider. With respect, I think that that criticism is not justified. The learned trial Judge considered at length whether the respondents purchase of the appellant's assets were void as the following passage of his judgment shows:

> "The respondent and its Counsel, Mr. Kabenge, don't really deny the existence of his winding up proceedings. Rather Mr. Kabenge as one of his arguments against the present application, takes advantage of winding up proceedings and has submitted that since winding up proceedings were instituted on 9/2/1994 prior to the sale of the respondents property by the receivers on 21/3/1994, such sale by the receivers is null

and void by virtue of sections 277, 288 and 299 of the Companies Act. That in that regard the respondent's suit is likely to succeed and therefore there should be no order for security for costs. He cited the case of Highlands Commercial Union Ltd V Abdul Mapek (1957) EA, 641 in support of his view.

I better consider this point at this stage.

Mr. Mulenga in response to this point submitted that the rights of the respondent under S.227 is an issue to be determined in the main suit but not in this application. In other circumstances, I could have taken Mr. Kabenge's view and would have had to take S.227 into account that the Section affects the present application. But on the facts of this case I agree with Mr. Mulenga. The receivers and managers were appointed under the two debentures, copies of which have been annexed to the respondents reply to the written statement of defence as annextures XW and VW. I don't want to go in further details at this stage of the suit than to say that the two receivers exercised power of sale derived from the two debentures which powers the respondent company can't apparently revoke. See Saw man & others V. David Daniel Trust Ltd and another (1978) 1, All. ER at page 621, the case cited by Mr. Mulenga. In that case Goulding, J, reviewed a number of decided cases on the powers of a receiver appointed by debenture holders as in the present case, and from the facts set out in that case, the debenture in Saw man's case contained clause on appointment of receivers and the power of receivers similar to those contained in the two debentures in the present case. Goulding, J. held, with regard to sale inter alia,

that winding up did not affect the receivers power to hold and dispose of the company's property comprised in the debenture including the power to use the companies name for that purpose. These are matters which are really to be decided after the trial, hut I have had to refer to them because of submissions of Mr. Kabenge which provoked the response from Mr. Mulenga…….

The Highlands' case upon which Mr. Kabenge relies is distinguishable in that the disposition there was by a director of the Company (see pages 646 to 647) during winding up. besides, the Court is given powers under Section 227 to make other orders in case of avoiding dispositions. In other words my understanding of the provisions of S.227 is that a Court need not declare void any disposition of property

> pending winding up proceedings depending on the circumstances of each case. The fact that UDB and DFCU are public institutions is such a circumstance. In that case, I hold that the defendant/applicant who purchased property from receivers in exercise of their powers to sell prima fade has defence in this case where receivers sold properties under their powers contained in debentures for the reasons given. As regards S. 228, its wording is very clear. There is not evidence that the receivers were exercising powers or attachment, distress, or execution authorised by the Court. I need not say much on it really as I am satisfied that it doesn't apply to this application."

I am unable to say that the learned trial Judge was wrong in making the conclusion stated in this passage of his judgment.

The appellant's suit was also founded on fraud, the main allegation being that the respondent fraudulently transferred the suit property in its name. That having been the case I find it puzzling that the plaint never mentioned the Receivers at all or said that the alleged purchase of the suit property by the respondents from the Receivers was fraudulent. it was not until after the respondents w.s.d, had been filed, averring that the respondents had purchased from duly appointed Receivers, that the appellant averred in its reply to the defence that the alleged sale was void under the Companies Act.

In the reply to the w.s.d. a new particular of the alleged fraud was added. It was that the respondent was not a bidder for the suit property, hence the sale was fraudulent and at an under value.

The learned trial Judge did not expressly consider the fraud allegations; but I think that the passage of the judgment I have set out above indicates that he did so by implication. In my view, it means that he also considered the issue of fraud and concluded that the appellant had no prima facie case of fraud with a reasonably good prospect of success. That, in my view, is the effect of the holding of the learned trial Judge that the defendant/applicant who purchased from Receivers in the exercise of their powers to sell prima facie had a defence in this case, where Receivers sold properties under their powers contained in the debentures. Thus the claim that the sale was void and, therefore, that the appellant still had right of title to the property was not tenable.

On the basis of the pleadings and the other materials available, the learned trial Judge was, in my view right to say that on the face of it the appellant's allegations of fraud had no merit. I do hold accordingly.

It was also contended on behalf of the appellant that the respondent had made admissions over the claim relating to the sale of the appellant's assets arid properties during winding up proceedings and the pendency of HCCS 151 of 1994 and HCCS. 705/1994 the capacity of the alleged sellers (Receivers).

As I see, it the admission by the respondent that the receivers sold and the respondent bought the suit property was far from admission of liability. This is to be contrasted with the admission in the case of Sir Lindsay pankinson (supra), There, the defendant was admitting substantially the amount due. It meant that the plaintiff had a bona fide. Another aspect of such an admission is that a person owing money should not be allowed to say that he should not be taken to Court without paying s.f.c.

In the instant case, however, the admission by the respondent does not go to liability as far as the law stands. The respondent admitted that it had bought the suit property from duly appointed Receivers and that there was a suit in Court by the appellant challenging the appointment of the Receivers. But such admission does not in any way affect the validity of the sale, Nor does it mean, in my view, that the respondent admitted the appellant's claim in the suit.

The next issue is whether the learned trial Judge considered or did not consider certain principles to such an application. The learned trial Judge was critised for not taking into account that the appellant had a bona fide claim which was likely to succeed.

I have just dealt with that criticism at great length and came to the conclusion that it was not justified.

The next one was that the learned trial Judge failed to consider that the appellant's present dire financial difficulties was brought about by the respondent by buying the appellant's assets from the alleged receivers. In Mr. Mulenga's reply in this regard, he pointed out that this point was not raised by the appellant before the learned trial judge. This complaint by Mr. Mulenga is valid as it is borne out by the record.

Be that as it may I shall consider the point raised by the appellant. It appears that one of the circumstances which a Court may take into account whether or not to order s.f.c. under Section 404 our Companies Act is whether the company's want of means has been brought by any conduct by the defendants, such as delay in payment or delay in doing part of the work. This is what Lord Denning M.R. said at page 626 in Parkinson & Co. (supra). I do not think that this can be extended to include what happened in the instant case. The appellant's precarious financial condition cannot be blamed on the respondents. What happened was chat the respondents as debtors failed to pay under the debentures securing payment of such debts and the debenture holders called for payment which the respondent failed to do. The creditors then appointed Receivers under the debentures and the respondent bought the appellant's assets from the Receivers. Until the validity of the appointment of the Receivers or of sale they made to the respondents is nullified by the Court in the pending suit, the purchase remain valid.

In the circumstances, I do not think than the respondents had anything to do with the precarious financial position of the appellant..

Further, even if the issue was raised before, and it was considered by the learned trial Judge, I have no doubt that he would have come to the same conclusion.

It was also contended for the appellant that this appeal involves important points of law, and great general public importance and thus merits serious judicial consideration. Regarding this I will only say briefly that although such an issue was not brought before the learned trial Judge for his consideration, we have regarded the appeal with all the seriousness it deserves, and I have attempted to do the best I can in applying the law applicable to the facts of the case. I find that such a contention has no merit.

One thread that seems to run through all the authorities which *I* have considered above, is that a plaintiff's impecunious position and, being under liquidation, inter alia, are justifiable reasons to order for s.f.c., unless special circumstances exist for instance, that the defendant admits liability; has made an open offer to settle the suit; has paid money into Court; the plaintiffs suit is frivolous, or vexatious or has no reasonably good prospect of such success, or is not bonafide; or that such inability to pay has been due to the defendant company's action, etc.

In the instant case there is ample evidence, and the appellant admits, that the appellant is under a receivership because it could not pay its debenture holders; is under liquidation proceedings because it was unable to pay a judgment creditor; is indebted to many creditors and is involved in a multiplicity of suits. None of these was brought about by the respondent's conduct. In the circumstances, there can be no doubt that the learned trial Judge acted properly to order s.f.c. Nor was such an order intended to stifle the appellant's claim in the suit. In my view, the order s.f.c, was entirely justified.

The next complaint arising from the grounds of appeal was that the decision of the learned trial Judge was erroneous by being bias or prejudicial to the appellant. This criticism was not canvassed at the hearing of the appeal. In this connection, Mr. Mulenga J.S.C., or the respondent, submitted that there was a contradiction in that complaint, in that the respondent was complaining in other grounds of appeal that the merit of its case had not been examined and yet it was complaining in ground 8 that the learned judge's finding had concluded the case. Mr. Mulenga contended that the learned trial Judge had done no such thing, He only considered whether there was a prima facie case.

The respondents submission must be correct because the learned trial Judge did not finally decide the case. All that he did was to order that because the appellant had no prima facie case, and in view of all the other circumstances of the case the appellant should furnish s.f.c. On compliance with the order, the suit would proceed. As that decision, in my view, was justified, there is no basis for saying that the learned trial Judge was bias against the appellant.

The next and final issue I have to consider regards the quantum of the s.f.c. ordered by the learned trial Judge, In this regard Mr. Mohamed Mbabazi said that in the lower Court the respondent had suggested the sum of Shs, 60m/=, but the appellant offered Skis. 21,387,500/= as s.f.c. They also suggested Shs. 14m/. He contended that the sum of Shs. 50m/= ordered by the learned trial Judge was not computed in accordance with the Advocates (Remuneration and Taxation of Costs) Rules, 1982. Secondly the learned Counsel contended that security which should be ordered should be the costs actually incurred. For this he relied on the case of Procon (GB) Ltd. (supra) and Pearson and another (supra).

He further contended that the sum of Shs. 50m/= was excessive. Applying the relevant scale, it should have been Shs. 21m/=. As there was evidence that the Receivers had Shs. 404m/= in their hands, part of that money should have been deposited as s.f.c.; or the directors of the respondent company should deposit title deeds to land as s.f.c, All such suggestions said the learned Counsel, had been rejected by the learned trial Judge.

I have already referred to Mr. Kabenge's submission in this regard.

Mr. Mulenga replied that the suggestion that the Receivers should deposit what they had collected as proceeds of sale of the appellants assets had no merit, because the Receivers, as codefendants in the suit could not be ordered to pay s.f.c. With regard to the suggestion of execution of a security bond, he discounted the idea, because as the appellant company had been unable to pay under the debentures it would be a mockery to ask the company or. its directors to execute a bond. Moreover, the receivers, having been joined as co-defendants, could not be ordered to furnish s.f.c.

I find no merit in the contention that the appellant or its directors should execute a security bond instead of making payment of s.f.c. Nor in the contention that the receivers (who are codefendants) should pay money in the possession as s.f.c.

With respect, the case of Procon (G.B) td. (supra) is far from being an authority for the contention by the learned Counsel for the appellant, Mr. Mbabazi that s.f.c. under 0.23 r.l and Section 404 should be costs actually incurred. The case is, in fact an authority for the reverse. For the sake of brevity, I think that a reference to the head note only shall suffice. It says:-

> "The Courts discretion under RSC Ord. 23 r.l. to order a plaintiff to give security for the defendants costs of the action or other proceedings in the High Court as the Court thinks just is on the plain language of the rule, un-restricted, and there is no justification for any conventional approach of fixing a sum of two-thirds of the estimated party and party costs rather than ordering security on a full indemnity basis. Nor should any distinctions be made between actions in the commercial list and other proceedings in the Queens Bench Division. The correct principle is that any security ordered should be such as the Court thinks just in all the circumstances of the case. Normally a discount will be made to take account of the Courts expectation of any reduction by the taxing officer of the fees particularised, but after making that

> discount the Court should, if satisfied that the defendant has made an honest action estimate of his costs and disbursements, order that amount to be incorporated in the order for security. Where security is sought at a very early stage in the proceedings it is relevant to cake into account the possibility that the action may be settled, perhaps quite soon, in which case it may be appropriate to make an arbitrary discount of the estimated probable future costs, the amount of the discount (if any) depending on the Court's view of all the circumstances Where there is an appeal against the judge's decision the Court of Appeal will normally accept the Judges exercise of his discretion unless it is satisfied that he went wrong."

The case of Pearson (supra) does not support the learned Counsel's contention, either. In that case, there was no skeleton bill of costs before the Judge concerned, though in affidavit filed 'on behalf of the defendants gave some broad figures. They pointed to some £ 4.000 as having been incurred already, another £ 4.000 as being incurred on the remaining interlocutory stages, and another £4.000, pr a bit more, getting the case into Court including the brief fees. The two latter figures were mere global estimates, whereas the first was based on hours already spent, though these had yet to encounter the taxing master.

In reaching the figure he estimated and ordered as s.f.c. Megarry V-C, said:-

> "I feel no doubt that some discount must be made on these figures to reflect the absence of supporting detail and the uncertainties of all litigation including, in relation to costs not yet incurred, the possibility of some compromise being reached. I find it impossible to give a reasoned explanation of the precise figure at which I arrive in the end. To a considerable extent as in the assessment of general damages in many cases, one is forced to rely on the feel of the case after considering the relevant factors. Doing the best I can, I order the plaintiff company to give security for the defendants costs in the sum of £ 7000, the security being in respect of those costs up to and including the first day of the trial"

These two decisions on the quantum of s.f.c. appear to have been influenced by what was summarised in a note to the R.S.C. Order 23, in The Supreme Court Practice, Vol. 1 page 440. para 23/1-3/22**.** which read:-

> "Amount of security The amount of security awarded is the discretion of the Court, which will fix such sum as it thinks just, having regard to all the circumstances of the case. It is not the practice to order security on a full indemnity basis. The more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up to the stage of the proceedings for which security is ordered, but there is no hard and fast rule, It is a great convenience to the Court to be informed what are the estimated costs, and for this purpose a skeleton of costs usually affords a ready guide."

According to Halsburys laws of England (supra) the amount of security required should equal the probable amount of costs payable, but: the Court has an absolute discretion as to the amount of the security and as to when, in what manner, and on what terms it is to be given.

I think that in our jurisdiction the provision of the Advocates (Taxation of Costs and Remuneration) Rules, 1982 are some of the factors which a Court ought to take into account in estimating the quantum of s.f.c. to be ordered.

In the instant case the sum of Shs, 60m/= was suggested to the learned trial Judge with reference to the Rules in question. The learned trial Judge had the provisions of those Rules in mind in arriving at the sum of Shs, 50rn/=. This sum was based on all the circumstances of the case as he saw them, including what the learned trial Judge considered was likely to be a vast litigation and the value of the suit property as very large. At the hearing of the application the respondent's Counsel put the value of the suit property at Shs. 2 billion though the respondent itself said it was Shs. 7 billion.

In all the circumstances of this case, and doing the best I can, I think that the amount of security for costs which the appellant should furnish should be Shs. 30 million.

In the result, I would partly allow this appeal and order that the appellant should furnish security for costs in the sum of Shs. 30m/= and that the appellants should not proceed with suit in the High Court until the security for costs so ordered is paid into Court. I would also order that the respondent should have four-fifths of the costs here and in the Court below. The security for costs so ordered should be paid into Court within thirty (30) days from the date hereof.

Before leaving the case, I would recommend to future applicants such as in the instant case to make what was called in Pearson's case (supra) a "skeleton bill of costs", to guide the Courts in deciding what to order as s.f.c.

Dated at Mengo, this 17th day of May 1996.

A.H.O ODER,

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL

MASALU MUSENE
REGISTRAR SUPREME COURT.

JUDGMENT OF ODOKI. J.S.C.

I have had the advantage of reading in draft the judgment of Oder, J.S.C., and I agree with it and the orders proposed by him.

Dated at Mengo this 17th day of May , 1996.

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL

MASALU MUSENE
REGISTRAR SUPREME COURT.

I had the benefit of reading the judgment of Oder, J.S.C. in draft. I agree with it and as Odoki, J.S.C.., also agrees the appeal is allowed to the extent that the sum of Shs. 50 million ordered as security for costs by the High Court Judge is set aside and a sum of Shs. 30 million substituted therefor.

There will be an order for costs in terms proposed by Oder, J.S.C.

Dated at Mengo this 7th day of May, 1996.

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL

MASALU MUSENE
REGISTRAR SUPREME COURT.