

UGANDA / JUDGMENT

Noble Builders (U) Limited and Anor v Jabal Singh Sandhu (Civil Application 15 of 2002) [2004] UGSC 12 (3 March 2004)

[2004] UGSC 12

COURT

Supreme Court of Uganda

CASE / FILE NUMBER

Civil Application 15 of 2002

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{\f278\froman\fcharset177\fprq2 Times New Roman (Hebrew);}{\f279\froman\fcharset178\fprq2 Times New Roman (Arabic);}{\f280\froman\fcharset186\fprq2 Times New Roman Baltic;}

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SANDHU::::::::::::::::::::}{\cs35\b\insrsid7030012 }{\cs35\b\expnd2\expndtw10\insrsid7030012 -.
APPLICANTS

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SANDHU::::::::::::::::::::RESPONDENT

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{\cs35\b\ul\expnd2\expndtw10\insrsid7030012 RULING.

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 Motion dated 26}{\cs37\super\insrsid7030012 th}{\cs37\insrsid7030012

September 2002, brought under r.100 (3) of the Supreme Court Rules, 1996, the above named
 applicants apply for orders that -

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The respondent furnishes further security for costs, past}{\cs37\insrsid7030012 }
 {\cs37\insrsid7030012 costs and costs of civil appeal No.41 of 2002 within a}{\cs37\insrsid7030012 }
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period determined by the court, failing which the appeal be}{\cs37\insrsid7030012 }
 {\cs37\insrsid7030012 dismissed with costs.

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Costs of and incidental to this application, be provided for.}{\cs37\insrsid7030012 }
 {\cs37\insrsid7030012 The application is supported by the Affidavit of Raghbir Singh Sandhu, the}
 {\cs37\insrsid7030012 }{\cs37\insrsid7030012 2}{

\cs37\super\insrsid7030012 nd}{\cs37\insrsid7030012 applicant, sworn on 27 September 2002, and
 his several Supplementary Affidavits sworn on subsequent dates.

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 {\cs37\insrsid7030012 The background to the application is very brief. On 19}
 {\cs37\super\insrsid7030012 th}{\cs37\insrsid7030012

September 2000, in Companies Cause No.16 of 2000, the respondent petitioned the High Court for
 orders to wind up the 1}{\cs37\super\insrsid7030012 st}{\cs37\insrsid7030012 applicant and
 declare the 2}{\cs37\super\insrsid7030012 nd}{\cs37\insrsid7030012

applicant a delinquent director. The High Court entered judgment for the respondent, granting
 the orders for which he had applied. The applicants successfully appealed to the Court of Appeal,
 which on 20}{\cs37\super\insrsid7030012 th}{

\cs37\insrsid7030012 May 2002, set aside the judgment of the High Court and awarded to the applicants, costs of the appeal and of proceedings in the High Court. T

he respondent appealed to this Court in Civil Appeal No. 13 of 2002, which has not yet come up for hearing.

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{\cs37\insrsid7030012 In the meantime, the applicants filed bills of costs in the two lower courts. At the time of hearing this application, the applicants' bill of cos

ts in the High Court had been taxed and allowed at shs.28,079,000/=; and on reference to a single judge of the Court of Appeal, their costs in that court, had been reduced to shs.6,085,400/=. The applicants contend that the total costs so far owing from t

he respondent is shs.34,164,400/=:, and that they will incur further costs in respect of the appeal pending in this Court.

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Apart from asserting that the costs so far incurred in the lower courts are quite substantial, the applicants base this application on the grounds that -

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\fs24\lang1033\langfe1033\cgrid\langnp1033\langfenp1033 {\cs37\insrsid7030012 The respondent is a foreigner currently resident in Canada, without any property or investments in Uganda.

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\cs37\insrsid7030012 The respondent's appeal has no likelihood of success.

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It is in the interest of justice, to order for further security for costs. In his Affidavit in Reply, Jaspal Singh Sandhu, the respondent, avers that he has not refused or failed to pay the costs, and

that there is no ground for suspecting that he will be unable to pay if he loses the pending appeal as he is not impecunious. He also avers that his appeal to this Court is not devoid of merit; and that the applicants have not shown special circumstances

to justify the need for further security for costs.

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At the hearing of the application, Mr. Byenkya, learned counsel for the applicants submitted that the purpose for security for costs pending disposal of an appeal, is to ensure that a party who has been

successful in the lower courts is not left without recourse for his costs, in the event of repeated success in the further appeal. He maintained that in the instant case the applicants had already incurred substantial costs in the sum of over shs.34m/=,

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hich was likely to increase by about another shs.10m/=, in respect of the pending appeal. Counsel argued that because the respondent does not reside, and has no assets or investments, within the court's jurisdiction, the applicants would be left without r

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course in the event of their likely success in the pending appeal. According to learned counsel, the statutory sum of shs.400,000/= deposited in court as security for costs is utterly inadequate. He stressed that a successful party should not be left to t

he vagaries of having to pursue costs through proceedings in foreign jurisdictions. He relied on the decision in {\cs37\ul\insrsid7030012 A}{\cs35\b\ul\expnd2\expndtw10\insrsid7030012 tul}
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Application No.9/89. While conceding that security for costs should not be used

to stifle further appeals, he proposed that having regard to the circumstances of the instant case, the sum of shs.50m/= would be a reasonable amount for further security.}}\cs37\insrsid7030012 }\cs37\insrsid7030012

Mr. Mubiru-Kabenge, learned counsel for the respondent, submitted that the order for

security for costs is discretionary, and the courts use it sparingly. According to him, the order for security for costs is appropriate only where there is evidence to show inability to pay. Non-payment of past costs, residence outside of the court's jur

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sdition and lack of assets or investments therein, are not evidence of inability to pay. He conceded that residence outside jurisdiction is a factor the court may take into consideration, but argued that it is not sufficient ground alone. He pointed out

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hat Canada is within the Commonwealth, so that, pursuant to the Judgment Extension Act (Cap. 12) and the Reciprocal Enforcement of Judgments Act (Cap.21), if the applicants succeed in the pending appeal, they would not find it difficult to recover their c

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sts in Canada. Counsel also stressed that the court should not allow an order for security for costs to have the effect of fettering the appeal process. He contended that in the instant case, an order for further security for costs could drive the respond

ent from the seat of justice. He submitted that though the respondent was able to pay, he would find it imprudent to tie so much money in court instead of putting it to profitable use. In support of his submissions, counsel cited }}

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Bank}}\cs35\b\ul\insrsid7030012 }}\cs35\b\ul\expnd2\expndtw10\insrsid7030012 of}

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 {\cs37\insrsid7030012 Rule 100 of the Supreme Court Rules, 1996 provides as follows -
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 Subject to rule 108, there shall be lodged in Court on the institution of a civil appeal as security
 for the costs of the appeal}\cs36\i\insrsid7030012 }\cs36\i\insrsid7030012 the sum of shs.400, 000.
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 (2) Where an appeal has been withdrawn\tab the Court may,....direct}\cs36\i\insrsid7030012 }
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the cross-appellant to lodge in the Court as security for costs, the sum of shs. 400, 000 or ... less....

(3) The Court may, at any time, if the Court thinks fit,

direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the appeal.

Under r.108 the Court may, on application, exempt an appellant from depositing security for costs if it is satisfied that the appellant lacks the means to pay, and that the appeal has a reasonable possibility of success.

I deduce from those two rules that the general principle is that an appellant should provide security for costs of the appeal, unless the Court exempts him due to inability. It is noteworthy

that even a party who files a cross-appeal with no obligation to deposit any security for costs, may subsequently be required to do so if the main appeal is withdrawn. In addition, the Court may direct the appellant, in appropriate circumstances, to incre

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se the security for costs of the appeal; and/or to deposit security for past or earlier costs. All this tends to portray security for costs in civil appeals as the norm rather than the exception. Nevertheless, it is well settled that the burden lies on th

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applicant to show sufficient cause why the appellant should furnish further security for costs, over and above the amount fixed by the rules. What amounts to sufficient cause, is a matter for the Court's discretion, depending on the circumstances of the

case before it.

One of the grounds of this application is that the respondent's appeal has no reasonable chance of success. I am inclined to the view that demonstrable lack of reasonable chance of success for an appeal is sufficient cause for the court to

order an appellant to furnish, not only further security for costs of the appeal, but also security for past costs. In the instant case, however, the applicant's contention that the appeal has no reasonable chance of success is countered by the responden

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's contention that his appeal is not devoid of merit. Neither party has advanced its contention, by evidence or argument, beyond the mere claim, albeit by affidavit, that it hopes to succeed. I cannot place reliance on either contention. Secondly, althoug

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Mr. Mubiru-Kabenge sought to make his client's ability to pay the costs an issue, the application is not based on any allegation that the respondent is unable to pay. Perhaps what is nearer to the point is the respondent's willingness to pay the costs, s

ince he has not paid the costs so far incurred. What is more, I do not accept that inability to pay }
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is the only ground for ordering security for costs. I therefore do not need to consider whether the respondent is able to pay the costs in the event of losing the pending appeal.

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The significant ground in support of the application is the assertion that the respondent is a foreigner who resides in Canada, and who has no property or investments in Uganda. The respondent does not expressly admit or deny

the assertion. He merely contends in paragraph 7 of his affidavit in reply, that, }

{\cs36\i\insrsid7030012 "the assertion is not supported by any evidence and is no proof of inability to pay". }{\cs37\insrsid7030012 The 2}{\cs37\super\insrsid7030012 nd}{

\cs37\insrsid7030012 applicant retorts in his supplementary affidavit of 14 Nov. '04 -}

{\cs41\i\fs39\fs26\insrsid7030012 "4. }{\cs36\i\insrsid7030012 In reply t

o paragraph 7 of the respondent's affidavit in reply.... I personally know the respondent and he has lived in Canada with his family since the early 1990's and I know of no assets that belong to him in Uganda against which execution can issue should}{

\cs36\i\insrsid7030012 }{\cs36\i\insrsid7030012 we be successful in the appeal. 5.1 verily believe that his lack of property in Uganda is the reason why he does not name any assets that belong to him in his affidavit in reply."

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All this is affidavit evidence, which the respondent does not contradict. In my view, it is sufficient proof that the respondent is a foreigner, who is ordinarily resident outside the court's jurisdiction, and who has no assets in this country. This facto

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is significant because it lends weight to the applicants' fear that if they succeed in the pending appeal, they might not readily recover the costs awarded to them. In default of voluntary payment of the costs, neither the person nor the assets of the re

spondent would be available within the court's jurisdiction for attachment.

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The respondent's principal response is that in case of such default, the applicants would be able to enforce the orders for costs through execution proceedings in a Canadian court

, by virtue of provisions of the Judgments Extension Act, (Cap. 12) and the Reciprocal Enforcement of Judgments Act, (Cap.21). Cap.12 makes provision for the execution, in Uganda through Uganda courts, of decrees and warrants issued by the courts of Kenya

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Malawi and Tanzania. Cap.21 makes similar provision for judgments of superior courts in the United Kingdom and the Republic of Ireland. Each of the two Acts empowers the Minister, by statutory order, to extend the application of the Act to judgments of c

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urts in any other Commonwealth country. In the view of the respondent's counsel, a Ugandan court order would be enforceable in Canada - a Commonwealth country, without difficulty. It is in this context, that learned counsel invited me to follow the two En

glish decisions in {\cs37\ul\insrsid7030012 Porzelack KG vs. Porzelack (UK) Ltd} {\cs37\insrsid7030012 (supra) and {\cs35\b\ul\expnd2\expndtw10\insrsid7030012 De} {\cs35\b\ul\insrsid7030012 }{\cs35\b\ul\expnd2\expndtw10\insrsid7030012 Bry}{

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(supra), in each of which the defendant's application for security for costs on the ground that the plaintiff was a foreigner resident outside the court's jurisdiction, was rejected. In rejecting the application, the court took into account {}

\cs36\i\insrsid7030012 inter alia {} \cs37\insrsid7030012 the Civil Jurisdiction and Judgments Act 1982 of the U. K., which gave effect to a convention on enforcement of judgments within EEC countries. Under that conven

tion, enforcement of judgments of courts of one EEC member country in other member countries is relatively easy.

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erations, which are not applicable to the instant case. In the }

{\cs35\b\ul\expnd2\expndtw10\insrsid7030012 Porzelack's}{\cs35\b\ul\insrsid7030012 }

{\cs35\b\ul\expnd2\expndtw10\insrsid7030012 case}{\cs35\b\expnd2\expndtw10\insrsid7030012 },{

\cs35\b\insrsid7030012 }{\cs37\insrsid7030012 the court noted that under the convention the defendant was availed {} \cs36\i\insrsid7030012 "substantial and improved rights" }

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to enforce an order for costs in West Germany and considered that to be {} \cs36\i\insrsid7030012 "an important but not decisive" }{\cs37\insrsid7030012

factor. One of the other factors it took into consideration was that if it ordered the security for costs on the scale requested, the plaintiffs action would be stifled. In }

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\cs35\b\ul\expnd2\expndtw10\insrsid7030012 Bry's case}

{\cs35\b\expnd2\expndtw10\insrsid7030012 },{\cs35\b\insrsid7030012 }{\cs37\insrsid7030012 the Court of Appeal set aside an orde

r for security for costs made by the lower court. It criticised the judge of first instance for failing to appreciate that by virtue of the said convention, enforcement of an English judgment within the EEC was prima facie relatively cheap and effective.

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n addition to that, however, the court took into account the fact that the plaintiff had, within the court's jurisdiction, a considerable fund, albeit of yet unascertained value, which could be used to satisfy any order for costs made against him. The cir

cumstances of the two cases are distinguishable.

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 {\cs37\insrsid7030012 My second reason is that the respondent has not laid any foundation for his}
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submission on this aspect. While it is not disputable that Canada is a Commonwealth country, the respondent do

es not show, by affidavit or otherwise, that the Minister ever extended application of either Cap. 12 or Cap.21 to judgments of Canadian Courts. More importantly, the respondent does not show that judgments of Ugandan courts are enforceable in Canada with

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ut difficulty. It is noteworthy that before making a statutory order under Cap.21, the Minister must be satisfied that the legislature of such other Commonwealth country has made reciprocal provisions. Unlike the courts in the two English cases, I am unab

le to say that enforcement of a Ugandan court order for costs in Canada, is prima facie easy, let alone cheap.

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(supra), Lord Donaldson M. R., referred to Order 23 of the English RSC, which provides for security for costs, and at p.565 g-i, said that its rationale is that -

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" a defendant should be entitled to security if there is reason to believe that, in the event

of his succeeding and being awarded costs of the action, he will have real difficulty in enforcing that order. If the difficulty would arise from the impecuniosity of the plaintiff the court will of course have to take an account of the likelihood of his

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ucceeding in his claim, for it would be a total denial of justice that poverty should bar him from putting forward what is prima facie a good claim. If, on the other hand, the problem is not that the plaintiff is impecunious but that, by reason of the way

in which he orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable, or enforceable only by a significant expenditure of time and money, the defendant sho

uld be entitled to security."

\par }\pard\plain \s17\qj \li0\ri0\sb62\sl-485\slmult0\widctlpar\faauto\rin0\lin0\itap0 \fs24\lang1033\langfe1033\cgrid\langnp1033\langfenp1033 {\cs37\insrsid7030012 In my view, that rationalisation is equally applicable to r. 100 of the Rul

es of this Court. And I am constrained to add that having regard to what I said earlier in this ruling about security for costs in appeals, the court should even more readily grant such security in an appeal where the respondent has incurred substantial c

osts, which remain unpaid.

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In the instant case, the problem that the applicants anticipate or fear is because the respondent chooses to live in Canada and to have no assets in Uganda. His attitude, as disclosed by his counsel, that he would rather put his

money to more profitable use than to secure payment of costs in a litigation he initiated, which is bound to exacerbate the applicants' fear, is also a matter of choice. In the circumstances, I think that this is a fit case where the applicants should be

accorded further security. I therefore allow their application. I direct that the respondent gives further security for costs of the appeal and for payment of past costs, by depositing in court, within thirty days from the date of this ruling, the sum of

shs.40,000,000/-. I also order that the applicants shall have the costs of this application.

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{\cs37\b\i\insrsid7030012\charrsid7030012 DATED at Mengo this 4th of March}

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\par }{\cs36\b\insrsid7030012 J. N. MULNGA\line JUSTICE OF THE SUPREME COURT}
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