

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG**  
**(REPUBLIC OF SOUTH AFRICA)**

CASE NO: 2011/31664

In the matter between:

**NGWENDA GOLD (PTY) LTD**

First Applicant

**NGWENDA GOLD CORPORATION (PTY) LTD (formerly  
ALL-TECH LOGISTICS (PTY) LTD)**

Second Applicant

and

**PRECIOUS PROSPECT TRADING 80 (PTY) LTD**

First Respondent

**ATOMAER HOLDINGS (MAURITIUS) (PTY) LTD**

Second Respondent

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**JUDGEMENT**

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LJ VAN DER MERWE, AJ

1. The respondents seek an order directing the applicants to provide security for costs in the amount of R250,000. The application is opposed by the applicants. Whilst the respondents in the main application are the applicants in the application for security, I shall, for ease of reference, nevertheless refer to them as "the respondents" in this judgement.
2. The litigation arose out of a memorandum of understanding entered into between the parties, in terms whereof the respondents undertook to *inter*

*alia* provide the applicants with investment capital as well as development and operational assistance in order enable the applicants to exploit the valuable prospecting rights, granted to the first applicant in terms of the Mineral and Petroleum Resources Development Act, 28 of 2002, in respect of certain farms situated in the Free State Province. The second applicant is the holding company of the first applicant. Although the full value of the prospecting rights are in dispute, the parties are in agreement that the value of such prospecting rights runs into hundreds of millions of Rands.

3. The memorandum of understanding was implemented between the parties and the respondents advanced in excess of R2 million to the applicants. In exchange, certain subscription shares amounting to 50% of the shareholding in the first applicant were transferred to the first respondent and three representatives of the respondents were appointed as directors to the first applicant's board of directors. The applicants contend that the respondents breached their obligation to advance a total of R20 million in loans and that the conditions precedent to the implementation of the memorandum of understanding had not been fulfilled. Consequently, the applicants gave notice to the respondents of the failure of the memorandum of understanding. It is further alleged that the respondents are, notwithstanding the termination of the memorandum of understanding, utilising confidential information concerning an intended transaction with Harmony Gold Mine (Pty) Ltd in respect of adjacent properties and that they are frustrating a potential new investment transaction with a new investor.

4. As a result, the applicant has approached the court for an order declaring that the memorandum of understanding has failed retrospectively or has been cancelled, declaring that the directorship of the respondents' three directors on the first applicant's board of directors has been terminated, that the hundred share certificates issued to the first respondent be returned and other related relief. The respondents filed a preliminary answering affidavit which also served as a founding affidavit to a counter application. The respondents did not dispute that they failed to comply with the terms and conditions of the memorandum of understanding and that the memorandum of understanding had failed retrospectively. They tendered an undertaking not to continue to use the applicants' confidential information.
5. In the counter application, the respondents sought an order *inter alia* declaring that a further agreement concluded between the parties on 8 June 2011 and reflected in an unsigned e-mail attached to the answering affidavit, was validly concluded. The e-mail recorded that an agreement of settlement was entered into between the parties in terms whereof the respondents undertook to return the share certificates, to deliver the resignation in writing of the respondents' directors on the board of the first applicant and to return the corporate records and confidential information to the applicants, against the repayment of all loans advanced to the applicant in the amount of R2,394,559. The respondents alleged that they were exercising a right of retention in respect of the share certificates, the company books and records of the first applicant and the first applicant's

confidential information as a means of securing payment of the loans advanced until such time as the debt has been satisfied.

6. It was contended on behalf of the applicants, with reference to Commissioner South African Revenue Service v East Coast shipping (Pty) Ltd 2000 (4) SA 533 (C) 540D-F, that the merits of the dispute should be disregarded in light of the factual disputes that existed between the parties. Whilst it is evident from the affidavits filed that the claims of the applicants are disputed by the respondent, the nature of the applicants' claim remains a relevant consideration which should be considered by the court in appropriate instances. (See Giddey NO v J C Barnard and Partners 2007 (5) SA 525 (CC) 538, par 30.) Thus, the relevant facts establish that the applicant's claim can by no means be regarded as frivolous and that the litigation cannot be regarded as reckless or vexatious. It is a relevant consideration against the granting of an order for security for costs that the evidence presented in the affidavits on behalf of both parties indicates that the litigation concerns issues of material significance to the applicants.
7. In seeking an order directing the applicants to provide security for the cost of the proceedings, the respondents alleged that the respondents have no immovable property registered in their names and that the respondents have no trading income, cash flow or liquid assets. Whilst it is conceded by the respondents that the prospecting rights of the applicants are worth several hundreds of millions of Rands, they contend that such assets are not readily realisable. In particular, the respondent refers to the provisions

of section 11 of the Mineral and Petroleum Resources Development Act, 28 of 2002, which provides that a prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation may not be ceded, transferred, alienated or otherwise disposed of without the written consent of the Minister of Minerals and Energy, except in the case of change of controlling interest in listed companies.

8. The contentions of the respondents disregard the fact that the Minister is obliged to grant the consent referred to in section 11(1) if the preconditions stipulated in section 11(2) are complied with. The Minister clearly does not have an unfettered discretion. Furthermore, the contentions of the respondents do not take the full implications into account of the fact that the new Companies Act, 71 of 2008, does not contain a provision similar to section 13 of the previous Companies Act. Section 13 of the previous Companies Act provided as follows: *"Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondents if successful in his defence, require sufficient security to be given for those costs and may stay or proceedings until the security is given."*
9. In Haitas v Port Wild Props 12 (Pty) Ltd 2011 (5) SA 562 (GSJ), it was held that by virtue of the court's inherent power to regulate its own process and

to develop the common law, the court has the power to require of an *incola* company, which was under final liquidation, to provide security for the cost of the litigation. It was emphasised in the judgement that such power should be exercised where it was demanded by the interests of justice and by the peculiar facts of the matter. This judgement is not authority for the proposition that the approach reflected in section 13 of the previous Companies Act should still find application, notwithstanding the fact that the legislature has seen fit not to retain the equivalent of section 13 of the previous Companies Act in the new Companies Act. The judgement is also not authority for the proposition that an insolvent company or even a company in liquidation is in general obliged to provide security for costs. Contrary to the contentions advanced on behalf of the respondents, the judgement is even less authority for the proposition that a company whose assets exceed its liabilities by a large margin, but whose assets are not readily realisable, is obliged to provide security for costs.

10. In the absence of a provision similar to section 13 of the previous Companies Act, an applicant in an application for security for costs must found its entitlement to security for costs on the principles of the common law. High Court rule 47 only deals with procedural aspects of applications for security for costs and does not state the instances in which security for costs can be obtained. Erasmus Superior Court Practice (service 35, 2010) at B1-342 states as follows in this regard, with reference to Ramsamy v Maarman NO 2002 (6) SA 159 (C) at 172E-173E: "*As a general rule, the mere inability of a plaintiff or applicant as the case may be, who is an*

*incola, to satisfy a potential costs order against him or her is insufficient in itself to justify an order that he or she furnish security for his or her opponent's costs. Something more is required. The court must be satisfied that the main application is vexatious or reckless or amounted to an abuse of the process of the court."*

11. Meskin, in Henochsberg on the Companies Act (issue 30), states as follows at page 28(1): *"At common law an impecunious company or even an insolvent company or other body corporate which is an incola of South Africa cannot be required to give security for the costs of proceedings instituted by it. However, section 13 creates an exception to this rule by according to the court a discretion to order a plaintiff company to furnish security for its opponent's costs if there is reason to believe that it will be unable to pay such costs if ordered to do so. The policy underlying the section, as was the case in relation to section 216 of the 1926 Act, is that the immunity accorded to an impecunious incola under the common law should not exist."*
12. It would be inappropriate to assume that the absence of a provision similar to section 13 of the previous Companies Act was as a result of an oversight on the part of the legislature. The fact that the new Companies Act was promulgated after the inception of the Constitution of the Republic of South Africa, 1996, suggests that the legislature, in not retaining an equivalent provision to the previous section 13, was mindful of the

provisions of section 34 of the Constitution of the Republic of South Africa, 1996, in terms whereof access to the courts is enshrined.

13. Two conflicting considerations of public policy arise in instances where security for costs is sought from a plaintiff or an applicant. On the one hand, it was recognised in the case law that the object of section 13 of the previous Companies Act was to protect the public against the cost of litigation by bankrupt companies. (See Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd 1997 (4) SA 908 (W) at 919F-H.) On the other hand, it has often also been recognised that section 13 of the old Companies Act may have the undesirable consequence that an impecunious or insolvent company is precluded from recovering a valid claim. Thus, in Shepstone & Wylie v Geyser NO 1998 (3) SA 1036 (SCA) at 1046G-I, the court stated *"that the fact that an order of security will put an end to the litigation does not by itself provide sufficient reason for refusing it. ... If there is no evidence either way, the mere possibility that the order will effectively terminate the litigation can plainly not affect the court's decision ... it remains no more than a factor to be taken into account; by itself it does not provide sufficient reason for refusing an order."*
14. The absence of an equivalent to section 13 of the previous Companies Act indicates that the legislature, in promulgating the new Companies Act of 2008, deviated from the approach as reflected *inter alia* in the Shepstone and Wylie-judgement. The absence of an equivalent to section 13

suggests that the legislature placed greater emphasis on the entitlement of even impecunious or insolvent corporate entities to recover what is due to them in the courts without the obstacle of having to provide security in advance for the costs of the litigation. (See eg Crest Enterprises (Pty) Ltd v Barnett and Schlosberg NNO 1986 (4) SA 19 (C) at 20B-D, where the court stated that *"no hurdle should be permitted to stand in the way of any person's access to a court in seeking relief at its hands..."*.) A valid consideration in support of the approach of the legislature as reflected in the new Companies Act, would be the fact that litigation can seldomly, if at all, be instituted and proceeded with on a risk free basis. At the very least, those funding the litigation on behalf of the insolvent or impecunious corporate entity would normally be exposed to the deterrent that the funding provided would be irrecoverable in the event of unsuccessful litigation.

15. In the Haitas-judgement (above), the court recognised in paragraph 4 of the judgement that, in the absence of a provision similar to the previous section 13 of the previous Companies Act, the principles of the common law prevail, in terms whereof *"an impecunious or even an insolvent company or other corporate entity which is an incola of South Africa cannot be required to give security for costs for proceedings instituted by it. That being the case the mere fact that an incola plaintiff is insolvent, as is the case in the present matter, does not justify that such a plaintiff should be ordered to furnish security for costs."*

16. It is also evident from paragraph 14 of the Haitas-judgement that the court based its order on the approach that the courts should guard against vexatious, reckless and unmeritorious litigation. The feature in the Haitas-judgement, which distinguishes it from a situation where the application is based merely on the fact that the applicant or plaintiff is an impecunious or insolvent company, can be found in paragraph 10 of the judgement, where reference is made to the fact that the plaintiff has made no attempt for a period of 3 years to enrol the matter. Even after the plaintiff was finally liquidated, the liquidators have taken no steps to bring the matter to finality. The Haitas-judgement accordingly did not simply reintroduce the approach to security for costs as reflected in section 13 of the previous Companies Act, but specifically took into account special circumstances which indicated that the plaintiff was indeed proceeding with vexatious, reckless or unmeritorious litigation.
17. The Haitas-judgement indicates that other considerations which are recognised as special circumstances, justifying the granting of an order for security for costs, may very well be developed by the courts in those instances where insolvent corporate entities institute litigation. Different considerations apply where insolvent corporate entities institute the proceedings than where proceedings are instituted by an insolvent or impecunious individual. As indicated in Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd 1997 (4) SA 908 (W) at 920G-I, in the event of an insolvent company litigating, *"those who stand to benefit from the litigation in the event of an award being made in favour of the plaintiff,*

*are financing the plaintiff's litigation whilst shielding behind the plaintiff's corporate identity insofar as the defendant's costs are concerned."* In such event, in the words of Tsoka J in paragraph 13 of the Haitas-judgement, insolvent plaintiffs would be encouraged *"to unnecessarily embark on litigation with a clear knowledge that they have nothing to lose."*

18. By contrast, an insolvent individual, who stands to benefit directly from litigation and who institutes litigation in his or her own name, would at least face the consequences of a potential sequestration if an adverse cost order is not satisfied in the event of having litigated unsuccessfully. The Haitas-judgement has already established that one of the considerations which may constitute special circumstances justifying the granting of an order for security for costs against an insolvent or impecunious corporate entity is the fact that the plaintiff or applicant had for an extended period of several years lost interest in the litigation and failed to proceed expeditiously with the finalisation thereof.
19. Whether these distinguishing features between an individual insolvent or impecunious plaintiff or applicant and between an insolvent or impecunious corporate entity are of such material significance that they may justify a difference in approach in respect of insolvent individuals than in respect of insolvent corporate entities regarding the obligation to provide security for costs under the common law, will be a matter for future legal development. Whilst future legal development may entail that special circumstances or considerations are recognised in the case of insolvent or impecunious

corporate entities which justify the granting of an order for security for costs, it is clear that the common law requires "*something more*" than mere insolvency or impecuniosity in the event of *incola* plaintiffs or applicants, irrespective of whether the plaintiff or applicant is a private individual or a corporate entity. Since the respondents' case in the present instance is focused exclusively on the applicants' alleged inability to pay a potential costs order against them and on the allegation that the very substantial assets of the applicants are not readily realisable, it follows that there are no special circumstances present in the instant matter and that the established common law approach to an order for security for costs should be applied. The inevitable result is that the order for security for costs sought against the applicants cannot be granted.

20. Future legal development may very well recognise the fact that the plaintiff or applicant "*has nothing to lose*" in the litigation as a relevant factor which contributes to a finding that special circumstances are present which justify the granting of an order for security for costs. In the present instance, it is unnecessary to determine this issue, as the applicants clearly stand to lose an asset worth hundreds of millions of Rands, in the event of the applicants being liquidated for their failure to make payment of a costs order against them.
21. Even if the approach reflected in section 13 of the previous Companies Act were to be applied in the current matter, the respondents may very well not have acquitted themselves of the onus to establish that there is reason to

believe that the applicants will be unable to pay the costs of the respondents, if successful in their defence. The contentions of the respondents are firmly based on the allegation that the assets of the applicants, whilst commercially valuable, are not readily realisable. Whilst this may be a relevant consideration, it will not necessarily be a decisive consideration in an application for security for costs under an approach which is similar to that reflected in section 13 of the previous Companies Act. It is, on the probabilities, improbable that a litigant will run the risk of being liquidated (and as a result thereof lose its valuable prospecting rights worth hundreds of millions of Rands) as a result of its inability to pay a costs order of R250,000, which is the amount for which security is sought by the respondents. It is, likewise, improbable that the applicants, whilst being the owners of assets worth hundreds of millions of Rands, will not be able to raise finance for an amount of R250,000 should it become necessary to do so, in order to avoid being liquidated.

22. I make the following order:

22.1 The application for security for costs is dismissed with costs.

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LJ VAN DER MERWE, AJ  
ACTING JUDGE OF THE HIGH COURT  
14 December 2011.