

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 717/2015

- | | |
|-----|----------------------------------|
| (1) | NOT REPORTABLE: |
| (2) | NOT OF INTEREST TO OTHER JUDGES: |
| (3) | NOT REVISED |

DATE

SIGNATURE OF JUDGE

In the matter between

BROWNS THE DIAMOND STORE CC

APPLICANT

and

STIAAN VAN ZYL

RESPONDENT

J U D G M E N T

KATHREE-SETILOANE J:

[1] The respondent instituted an action against the applicant, Browns The Diamond Store CC (Browns), claiming amongst other things an upgrade on a platinum claw set diamond protea solitaire ring, which he had purchased from Brown's Menlyn store on 3 April 2013, on the basis that he had been promised a

platinum open petal diamond protea solitaire ring as an upgrade on the initial ring purchased.

[2] It is common cause that the respondent is a South African citizen, but is domiciled in, and is a resident of, the United Kingdom. He does not possess any immovable property in South Africa. Thus, having reason to believe that the respondent would be unable to pay its costs if successful in the action, Browns brought an application in terms of Rule 47(3) of the Uniform Rules of Court calling upon the respondent to furnish security for its costs in the action in the amount of R150 000. The respondent contests his liability to furnish security on the basis that he possesses movable property in the form of furniture, a BMW F800 GS motor cycle and riding apparel which are purportedly of high value and are stored in Storage Unit [...] Street, Durbanville, Western Cape. He claims that these assets are of sufficient value to satisfy any costs order which may be granted in favour of Browns in the main action.

[3] In addition, he says that he has two bank accounts with ABSA Bank in South Africa with a combined balance of R20 000, which are readily available to satisfy any costs order awarded in favour of Browns. He also claims to have a 33,33 per cent member's share, and a loan account in the amount of R200 000, in A-list storage company. He contends that these movable assets are cumulatively of sufficient value to satisfy any costs order in favour of Browns and as such constitute a basis on which the court should exercise its discretion against ordering him to furnish Browns with security for its costs in the action. Browns rejects the respondent's tender of these movable assets as adequate security ostensibly because it has no assurance that they will be available to execute against, when the time arrives to do so, as they can be easily sold or moved to the United Kingdom where the respondent is resident.

[4] The issue that arises for consideration is whether the possession of movable property by a peregrine plaintiff in the country would constitute sufficient security to satisfy any costs order made in favour of an incola defendant. In terms of Rule 47 of the Uniform Rules, a peregrine plaintiff (or applicant) who does not own unburdened immovable property in the country, may be ordered to give security for the costs of

his action. The objective of the rule is to ensure that if the peregrine plaintiff is unsuccessful, payment of the incola defendant's costs is secured.

[5] An incola defendant does not, however, have a prima facie right to be furnished with security for costs by a peregrine plaintiff. Whether or not the latter should furnish an incola with security for its costs lies within the discretion of the court. In exercising its discretion, the court must have regard to the particular circumstances of the case as well as considerations of equity and fairness to both the incola and the peregrine.¹ Factors that our courts have taken into account when deciding whether or not to order a peregrine to provide security are his impecuniosity and whether an order compelling him to furnish security would deprive him of the right to litigate against an incola; whether he is economically active within the jurisdiction of the court; and whether execution of the court's judgment is possible in the jurisdiction in which he resides. None of these factors are, however, decisive.

[6] Historically, our courts were predisposed in applications for security for costs against a peregrine to protect the incola 'to the fullest extent'.² As such, it found in favour of a peregrine 'only sparingly and in exceptional circumstances'.³ The general rule was that unless the peregrine had unburdened immovable property within the jurisdiction of the court to satisfy any costs order, security had to be furnished. The Supreme Court of Appeal in *Shepstone & Wylie & Others v Geyser NO*⁴ rejected this approach to security for costs applications, and gave guidance on the proper exercise of the court's discretion in such applications. In so doing, it said this:

'In my judgment, this is not how an application for security should be approached. Because a Court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security ... I prefer the approach in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER (CA) at 540 A-B where Peter Gibson LJ said:

¹ *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14E-F.

² *Saker & Co Ltd v Grainger* 1937 AD 223 at 227.

³ *Santam Insurance Company Ltd v Korste* 1962 (4) SA 53 (ECD) at 56E. See also: *Fraser v Lampert NO* 1951 (4) SA 110 (T) at 113-115.

⁴ *Shepstone & Wylie & Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045I-1046C.

“The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff’s claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.”

These are probably the ‘considerations of equity and fairness’ mentioned in *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14D-F in regard to the consideration of an application for security for costs against a peregrinus, and should, in my judgment, also prevail in an application under s 13.’

[7] This approach was subsequently endorsed by the Constitutional Court in *Giddey NO v JC Barnard and Partners*,⁵ which concerned the correct constitutional approach to a court’s discretion as whether to require a litigant to furnish security for costs. There the Constitutional Court stated as follows in relation to the balancing exercise:

‘To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An application for security will therefore need to show that there is a probability that the plaintiff company will be unable to pay costs. The respondent company, on the other hand, must establish that the order for costs might well result in it being unable to pursue the litigation and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospect of success. Equipped with this information, a court will need to balance the interest of the plaintiff in pursuing the litigation against the risks to the defendant of an unrealisable costs order.’

[8] Turning to a consideration of the specific circumstances of this case, the respondent argues that the various moveable assets which he owns in the country constitute adequate security that could be executed against by Browns should costs be awarded in its favour in the action. In support of this contention, the respondent relies on the decision of *Majunga Food Processes Sarl v South African Dried Fruit Co-operative Ltd*⁶ where Moosa J in the Cape Provincial Division held that movable property can be given as security provided it is tangible, durable, possesses value and is negotiable. In this regard, he held that:

⁵ *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) para 8.

⁶ *Majunga Food Processes Sarl v South African Dried Fruit Co-operative Ltd* 2000 (2) SA 94 (C) para 8.

‘Security for costs is part of the practice and not part of the substantive law. (*Saker & Co Ltd v Grainger* (supra at 226-7).) The normal practice, in terms of our common law, is that security takes the form of a suitable bank, institutional or personal guarantee, or other acceptable guarantee. To comply with the objective of giving security, in my view, it ought to be tangible and durable. It ought to possess value and be negotiable. These attributes are not necessarily exhaustive. There can be no reason to exclude movable property as a form of security provided it complies with the criteria mentioned above. In the Roman Dutch tradition the practice was for a pledge (*actio pignoratitia*) to be a form of security. Rule 47(5) does not impose any limitation on the form of security the Registrar of the Court can direct to be given.’

[9] It was not disputed in *Majunga* that movable property can be given as security. The objection was to mangoes being offered as security due to their nature, value and marketability. The court found that the mangoes did not constitute suitable security because they were inter alia perishable and would defeat the very object for which security had to be given.⁷ In the current matter, Browns disputes that moveable assets can constitute sufficient security to defeat an application for security for costs. The ownership of immovable property by a peregrinus is considered to be a defence to a claim by an incola for security for its costs. It is Browns’ contention that this principle has not been extended to include movable property.⁸ I do not agree.

[10] My understanding of the common law, as it has developed through the ages on the question of security for costs, is that the presence of immovable property is not the default position. This means that a court should not order a peregrine to furnish security for an incola’s costs simply because a peregrine does not own immovable property.⁹ As indicated, at common law, a peregrine plaintiff may be required to furnish security in order to ensure that a successful incola can recover its costs. The power of the court to order security is discretionary. In exercising this discretion it must have regard to all the circumstances of the case. The non-ownership of immovable property by a peregrine plaintiff or applicant is but one factor that a court must give consideration to – it is by no means decisive. Other

⁷ *Majunga* paras 9-11.

⁸ *Burton v Villeria Diamond Syndicate Ltd* 1905 TS 85 at 87; *Cohn v Weston Email Industrie Handels AG of Vienna* 1926 WLD 20.

⁹ Hogan Lovells *Security for Costs Without Prejudice* (October 2015).

factors that a court must have due regard to is whether the peregrine owns other significant movable assets such as motor vehicles, money, bonds, shares, art, jewelry, etc.

[11] Further support for the principle that assets, other than immovable property, can defeat an application for security for costs is to be found in *Schunke v Taylor and Symonds*¹⁰ where, as far back as in the 19th century, the court accepted this principle when it said:

‘On the same principle this Court recently, in the case of *Hulbert & Co v Caporn & Marriott*, refused to order a foreign plaintiff to give security. There the plaintiff was not an incola, nor had he any landed property in the colony, but as the defendants admitted to be indebted for part of the amount sued for, and such amount was ample to cover their costs, it was held that they were not entitled to any further security. What then the Court looks to is that the defendant shall not be left unprotected when sued by a foreign plaintiff.’

[12] What is clear from these authorities is that the ownership of certain movable property may constitute a defence to a claim for security of costs. This approach is consistent with the position that foreign courts have adopted in relation to movable assets. Closer to home, the Namibian Supreme Court found as follows in *Northbank Diamonds Ltd v FTK Holland BV & Others*:¹¹

‘In its replicating affidavit, and in answer to the applicants’ setting out of their financial position, the deponent on behalf of Northbank stated that although the applicants did not have to prove that they were solvent, they had to prove that they were possessed of sufficient liquid assets to pay Northbank’s costs if ordered to do so. If this means that the company must have some liquid funds ready and available to pay for such costs then I cannot agree. In my opinion the company must be able to show that it has free assets which can easily be liquidated or in respect of which the necessary funds can be raised to pay an order for costs.’

It follows that free or unburdened assets, whether movable or immovable, which can readily be liquidated may constitute a basis for a court to refuse to order a peregrine

¹⁰ *Schunke v Taylor and Symonds* (1890-1891) 8 SC 103.

¹¹ *Northbank Diamonds Ltd v FTK Holland BV & Others* 2003 (1) SA 189 (NmS) at 199H-J.

to furnish security for the incola defendant's costs. The position in neighbouring Botswana also allows for moveable assets to be used as suitable alternative security in applications for security for costs. In *Setaelo v Etube Engineering Pty Ltd*¹² the Court remarked as follows:

'It is also certain that the respondent is possessed of such movable property as will be sufficient in my opinion to satisfy any costs order by this court should the applicant succeed in the action.'

[13] Similarly, in Ontario Canada, a plaintiff is able to resist a motion for security for costs if it is able to show that it has sufficient assets (movable and immovable) in Ontario that would be available to satisfy a judgment for costs.¹³ Interestingly enough in the Caribbean, moveable (and other) assets may be utilised to defeat an application for security for costs as well.¹⁴ The same applies in the United Kingdom as appears from the matter of *Longstaff International Ltd v Baker & McKenzie*¹⁵ where the respondent had 'paper assets' in the form of shares. In this regard in *Nagshineh v Chaffe*¹⁶ it was held that the fact that liquid assets are susceptible to being moved is not a relevant consideration in the exercise of the discretion to award security for costs.

[14] I, accordingly, support the finding of Moosa J in *Majunga* that there can be no reason to exclude movable property that is tangible, durable, possesses value and is negotiable as a form of security but that these attributes are not exhaustive.¹⁷ In my view, there should be no fetter on a court's discretion to order security for costs. Central to the proper exercise of its discretion is whether the peregrine plaintiff has sufficient or adequate assets to meet any order as to costs, which is available for satisfaction. That enquiry is not limited to the presence of immovable property but must include an enquiry into all assets – including movable assets, both corporeal

¹² *Setaelo v Etube Engineering Pty Ltd* 2012 2 BLR 379 HC at 392.

¹³ *Chachula v Baillie* 2004 CanLII 27934 (ON SC).

¹⁴ *Caribbean Ventures International Ltd & another v Carosello Establishment & Others* Claim No SLUHCV2006/0293, 20 December 2006, Eastern Caribbean Supreme Court, Saint Lucia para 65 http://www.worldcourts.com/ecsc/eng/decisions/2006.12.20_Caribbean_Ventures_Intl_v_Carosello_Establishment.pdf (Accessed on 6 February 2017).

¹⁵ *Longstaff International Ltd v Baker & McKenzie* [2004] EWHC 1852.

¹⁶ *Nagshineh v Chaffe* [2003] EWHC 2107.

¹⁷ *Majunga* para 8.

and incorporeal, if they exist. The principal concern being that an incola defendant should not be left unprotected if ultimately successful in the main action.

[15] The respondent repeatedly asserts, in relation to the last-mentioned concern, that the presence of his movable assets in the country are of sufficient value to ensure that Browns will not be left unprotected should a costs order be granted in its favour. His say-so does not appease, principally because it is a bald assertion. The onus is on the respondent to establish that he has assets of sufficient value to meet an award of costs, yet fails to provide any assurance that the movable assets, which are purportedly in storage in Cape Town, are in fact of sufficient value to satisfy any such order. Crucially, in this regard, he produced neither proof of ownership nor a valuation attesting to the current value of the movables.

[16] In his answering affidavit, he says, 'I have the keys to the storage facility with me in the United Kingdom and as a result a valuator cannot gain access to the movable assets'. Despite having a period of approximately a month and a half from receipt of Browns' Rule 47(1) notice to date of filing his answering affidavit, the respondent took no steps to have the keys to his storage facility couriered to South Africa for a valuator to gain access to the items. As such, the court is unable to discern the value of these items for purposes of the exercise its discretion. That the respondent considers his BMW F800 motorcycle, riding apparel and furniture to be of high value, and has attached photographs of them to his answering affidavit, is cold comfort because he fails to allege that he is the owner of the goods and that they are still in his possession. He, moreover, neglects to name and itemise the various pieces of furniture and riding apparel. Nor does he think it necessary to provide the court with details relating to the year in which his motorcycle was registered, its mileage and its condition. In the circumstances, I find it hard to believe that these assets are of sufficient value to satisfy a costs order in Brown's favour or that they are readily accessible for purposes of execution. A feat that is made all the more challenging because the keys to the storage facility are in the respondent's possession in the United Kingdom, thus potentially imposing on Browns the burden of instructing the Sheriff to employ the services of a locksmith – only to find movables of insufficient value to satisfy the costs order in its favour.

[17] The respondent claimed, in his reply to Browns Notice in terms of Rule 47(1) to have a single bank account with ABSA containing a balance of R20 000. However, in his answering affidavit he states that he has two bank accounts with ABSA; an investment account with a balance of R11 119.70 and the former account with a balance of R4 566.72. The two accounts have a combined balance of R15 688.42. This amount is hardly suitable to cover Browns' costs should a costs order be made in its favour. In any event, money in a bank account without a guarantee that such funds will not be dissipated and will be readily available to meet a costs order, would not constitute adequate security. The respondent offers no such guarantee in his answering affidavit. Nor does he tender to hand his funds over to the Registrar for safekeeping pending finalisation of the action.

[18] The respondent claims that he has a 33,33 per cent shareholding in a close corporation called A-list Storage CC with registration number 2011/080824/23. He says that he has a loan account in the corporation in the amount of R200 000, which could readily be attached by way of a garnishee order to settle any costs order against him. However, the CIPC report which the respondent has attached to his answering affidavit indicates that the corporation was deregistered on 6 February 2014 for failure to file its annual returns. The financial statements, which the respondent has attached to his answering affidavit are for the 2013 financial year. Needless to say, they do not assist in accessing the corporation's current financial status, since the repayment of the R200 000 loan to the respondent is dependent on the availability of funds in the corporation. In the premises, I am of the view that the respondent has failed to prove that he has movable assets of sufficient value in the country to satisfy an adverse cost order in the action, thus leaving Browns in a position where it will be unable to recover its costs in the action, should the respondents' claim against it fail.

[19] The respondent contends that if the court orders him to provide Browns with security for its costs in the amount of R150 000, then he will be precluded from proceeding with the action because he does not have sufficient funds available to both pay security for Browns' costs and the fees of his legal representatives. He, however, asserts that Browns will have no difficulty executing against him in the United Kingdom because it has business operations there. This brings to mind the

pronouncement of Leach JA in *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig*¹⁸ where he said this:

‘The appellants sought to avoid the general rule of practice that a *peregrinus* should provide security for an incola's costs by relying on the judgment in this court in *Magida v Minister of Police*, in which an impecunious *peregrinus* was excused from providing security, and making the bald and unsubstantiated averment that the appellants —

“ . . . will be unable to furnish security for costs, due to the (respondent) failing to honour his debts towards them the (appellants) are hardly in a position to finance their own costs . . . ”.

However, the appellants' case on this issue was ambivalent. While pleading poverty, on the one hand, they alleged, on the other, that the respondent would have no difficulty in recovering a costs order by suing them in Europe. Of course the appellants cannot have it both ways. If their financial status was relevant to the question of security it was incumbent upon them to take the court into their confidence and make sufficient disclosure of their assets and liabilities to enable the court to make a proper assessment thereof in the exercise of its discretion. In the case of the first appellant, a private company, this is generally done by disclosing its current balance sheet. This the appellants did not do. In these circumstances and in the light of the appellants' allegation that any costs order would be recoverable by way of litigation abroad, it must be accepted that the financial status of the appellants is in itself no reason to refuse security. This distinguishes this case from the decision in *Magida* relied upon by the appellants in which the fact that the *peregrinus* was indigent was a material consideration taken into account.

As against that, the fact that the respondent will have to proceed against the appellants abroad if he obtains a costs order in his favour, with the associated uncertainty and inconvenience that would entail — and it is his undisputed allegation that it would be substantially more expensive to do so than litigating in this country — is one of the fundamental reasons why a *peregrinus* should provide security.¹⁹

[20] In seeking to avoid the provision of security for Browns' costs, the respondent says this:

¹⁸ *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV & Another v Honig* 2012 (1) SA 247 (SCA) paras 18-19.

¹⁹ Footnotes omitted.

‘Whilst I am not what one would consider to be a “man of straw” I am still an ordinary person possessing only finite means and various liabilities. Provision of the requested security would therefore have the effect that I will be unable to pursue the action due to my inability to pay my representatives fees.’

The respondent makes this assertion without disclosing any information relating to his assets and liabilities in the United Kingdom to enable the court to make a proper assessment in the exercise of its discretion. His reticence to adduce evidence of his means coupled with the assertion that Browns will have no difficulty executing against him in the United Kingdom inclines me to conclude that his financial status is not a reason to refuse security. If it were, then the respondent would have made full disclosure.

[21] As things stand, without the protection of security for its costs in the action, Browns will have to proceed against the respondent in the United Kingdom to recover its costs. But as rightly contended for on its behalf, seeing as the respondent had elected to institute his action in South Africa, it should not be expected of Browns to go through the trouble and expense of instituting proceedings in the United Kingdom in order to recover its costs, should the action fail. Decrying this approach as backward looking, the respondent seeks to persuade the court to consider the question of the enforceability of the order in the United Kingdom in the light of the global economy and the significant advances in relation to communication and travel. In support of this submission, the respondent referred the court to the decision of *B&W Industrial Technology (Pty) Ltd & Others v Baroutsos* in which Marais J held:²⁰

‘[I]t seems to me that a court should be slow to conclude that considerations of fairness and equity favour the granting of security, particularly in present-day circumstances. Practice changes with the times (or should do so) and therefore practice (or the sensible application thereof) dictated by circumstances prevailing in long bygone centuries, or in 1937, may differ radically from practice (or the sensible application thereof) in 2005, when intercontinental travel and communication has become infinitely swifter and more convenient. In the second half of the 20th century, the world shrunk with the advent of the jet airliner and later with the revolution in methods of communication. Legal practice should not stand aloof from such changes but should recognize them and their impact. As it was put by Goldstone J in *Elscint (Pty) Ltd v D Mobile Medical Scanners (Pty) Ltd* 1986 (4) SA 552 (W) at 557H:

²⁰ *B&W Industrial Technology (Pty) Ltd & Others v Baroutsos* 2006 (5) SA 135 (W) para 38.

“Considerations of fairness and justice and the reality of modern international commerce and efficient means of travel and communication militate against treating foreign defendants who have submitted to the jurisdiction more harshly than *incola* defendants.”

It is important to bear in mind that this statement was made by Marais J in the context of an application by an *incola* defendant against a peregrine plaintiff for security for its costs for the potential value of its counterclaims in the event that they succeeded. In distinguishing this type of application from one in which an *incola* defendant requires a peregrine plaintiff to give security for its costs, Marais J said this: ²¹

‘Finally and not without significance, it should be noted that in *Magida's* case Joubert JA was dealing purely with the question of a peregrinus being ordered to give security for costs of a claim brought by him against an *incola*.

The reasons why a court may exercise a discretion in favour of ordering security for costs where an *incola* is sued by a *peregrine* plaintiff are too well known and readily understandable to require restatement. The reasons are based on a desire, in proper circumstances, to protect an *incola*. “Proper circumstances” include general considerations of equity and fairness to both parties.

The equity and fairness of directing security for costs where an *incola* is sued by a peregrine plaintiff is far more readily apparent than the equity and fairness of requiring a peregrine plaintiff to give security for the judgment likely to be obtained against him on a counterclaim by an *incola*. In the first instance, the claim has been brought by the *peregrinus*; he has chosen to litigate against the *incola*. In the second case, the claim for which security is sought is brought by the *incola* and not the *peregrinus*; it is the *incola* who has chosen to litigate insofar as his claim is concerned. Where the *incola* is a defendant in convention, he is such involuntarily. He has no choice in the matter. In the case of a counterclaim, the *incola* acts voluntarily and chooses to sue. Having done so, he now turns to his peregrine opponent and requires that the latter secures the *incola's* counterclaim.’

Marais J accordingly concluded as follows:²²

‘I am of the view that, insofar as a practice existed to permit a court to order security for the amount of a claim where an *incola* counterclaims against a peregrine plaintiff, it, in present-day circumstances, should not be followed, save perhaps in the most exceptional of circumstances. It is not in accordance with modern commercial needs nor is it just or equitable to impose such a burden on *peregrine* plaintiffs who chose to sue their alleged debtors in South African courts.’

[22] Mindful of the burden that such an order would impose, Marais J refused to order the peregrine plaintiff to pay the *incola* defendant security for the full amount of the counterclaim. He found that since the peregrine plaintiff resided and was

²¹ *B & W Industrial Technology* paras 35-38.

²² *B & W Industrial Technology* para 42.

domiciled in 'Greece, a civilised country with a civilised legal system, there [was] nothing to prevent the appellants, given the ease of travel and of communication, from suing the respondent in Greece'. The factors that militated against the court's discretion to order security were that that the appellants chose to sue in South Africa; that they did so of their own volition and that the respondent owned substantial fixed property in Greece and some R500 000 held by Investec within the jurisdiction of the court.²³ To the contrary, in the current matter, the defendant owns no significant movable or immovable assets in South Africa and has failed to disclose what assets he owns in the United Kingdom, making execution of any costs order abroad more onerous.

[23] So although in this age of globalisation, suing a peregrine in his own jurisdiction to recover costs may be less arduous, the extra burden of costs and delay in enforcing a judgment abroad is an obvious reality that cannot be ignored. It, therefore, comes as no surprise that as recently as in 2015, the Supreme Court of Appeal in *Exploitatie-en Beleggingsmaatshappij Argonauten 11 BV* could still recognise this to be a primary reason for why a peregrine plaintiff should provide security. In fact due to the sliding Rand, litigation in the United Kingdom has become even more prohibitive. That said, even if Browns were to bring proceedings in the United Kingdom to recover its costs, the respondent's reticence to make full disclosure of his assets and liabilities in the United Kingdom will preclude, hinder or add to the burden of enforcement against any such assets that do exist abroad. This, in my view, is a further factor that weighs in favour of granting an order for security for Browns' costs in the main action.

[24] It is settled law that in an application for security for costs, the court is not required in the exercise of its discretion to consider the merits or prospects of success of the claim.²⁴ This is, however, not an inflexible rule and a court may do so where, depending upon the nature of the dispute, it is practicable or necessary to do so. One such instance, is where the defendant has failed to disclose a defence.²⁵

²³ *B&W Industrial Technology* para 40.

²⁴ *Exploitatie– en Beleggingsmaatschappij Argonauten 11 BV* para 20.

²⁵ *Zietsman v Electronic Media Network Ltd & Others* 2008 (4) SA 1 (SCA) para 21.

Another would be where a peregrine has been able to demonstrate impecuniosity or an inability due to lack of funds. In this instance a court may find it necessary to enquire into the prospects of a peregrine's claim in order to ensure that his right to prosecute the claim is not infringed. In the present case, however, the respondent has failed to prove that he is unable for financial reasons to furnish Browns with security for its costs in the action. In the premises I see no good reason to consider the prospects of success of the respondent's claim. Even if I were to do so, there is inadequate information before me on the papers.

[25] Accordingly, on the facts and circumstances of this case, I am satisfied that it would be just and equitable to order the respondent to furnish security for Browns costs in the main action. In the result, I make the following order:

- 1 The respondent is ordered to furnish security for the applicant's costs of the main action in an amount of R150 000.
- 2 The main action is stayed pending compliance by the respondent of the order in paragraph 1 above.
- 3 The respondent is ordered to pay the costs of the application.

**F KATHREE-SETILOANE
JUDGE OF THE GAUTENG LOCAL DIVISION
OF THE HIGH COURT OF SOUTH AFRICA
JOHANNESBURG**

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Judgement Reserved:	30 October 2016
Date of Judgement:	3 February 2017