

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

...5 June 2010..
DATE

.....(signed).....
SIGNATURE

Case No: 09/12628

In the matter between:

ANGERMAIER: WOLF DIETER

Applicant

and

DE WET: CHRISTIAAN FREDERIK

First Respondent

MCQUARRIE: ADEL DOREEN

Second Respondent

MCKENZIE: WERGELE STAFFORD

Third Respondent

PANAMO PROPERTIES 105 (PTY) LTD (In liquidation)

Fourth Respondent

JUDGMENT

A J Bester, AJ

[1] In March 2009, the First to Third Respondents, in their respective capacities as joint liquidators of the Fourth Respondent, a bankrupt company, launched an action against the Applicant for damages in a sum exceeding R13 million arising out of the purchase of an immovable property at a price of over R20 million.

[2] It is unnecessary for the purposes of this judgement to recite the allegations in the particulars of claim; suffice it to say that it is common cause between the parties that the Fourth Respondent was finally wound up on 13 June 2006, upon the basis that it was unable to pay its debts. It is alleged in the particulars of claim that, when purchasing the immovable property, the Fourth Respondent's liabilities exceeded the value of its assets; that it was unable to pay its debts; and therefore that it was commercially insolvent. In those premises it is alleged that the Fourth Respondent had carried on business recklessly, as contemplated in terms of Section 424 of the Companies Act, 61 of 1973, and that it did so with the full knowledge and approval of the Applicant, who was in fact the sole cause of the Fourth Respondent's demise.

[3] It is apposite to mention here that, at the date of the hearing of this application, some 15 months after the launch of the action, the Applicant is yet to plead its defence to that action.

[4] On 24 April 2009, the Applicant served a notice in terms of Rule 47(1) on the Respondents in which it called for the furnishing of security in the sum of R500,000.00. The Respondents did not respond. They were reminded on 28 September 2009, that a response had still not been received and threatened that unless a response is received, an application for security would be launched. Again there was no response; therefore on 29 January 2010, the Applicant launched an application for security for costs.

[5] The Applicant gave notice in the security application that the relief sought in it would be moved on 23 February 2010. Of course, that application, as is the case with any other interlocutory application, is

brought under Rule 6(11) on a short form notice of motion. On 3 February 2010, the Respondents served a notice of intention to oppose the security application, and apparently assumed that they then had the customary 15 court days for the filing of their answering affidavit, which would then have been due on 24 February 2010, i.e., the day after the proposed hearing date.

[6] Notwithstanding the Respondents' notice of opposition, the Applicant then, on Thursday, 18 February 2010, proceeded to set the security application down for hearing on 23 February 2010. The Respondents' attorney immediately requested a postponement, but was strangely, in view of the opposition, rebuffed. The Respondents, in order to avoid a hearing of the security application in the absence of their answering affidavit, were compelled to launch a formal application in which they sought condonation for the "late" filing of their answering affidavit in the security application. That, they did on 22 February 2010. The Applicant opposed that application.

[7] On 23 February 2010, the security and condonation applications served before this court, but were postponed *sine die*, with costs reserved.

[8] On 26 February 2010, the Respondents served their answering affidavit in the security application. On 12 March 2010, the Applicant served an answering affidavit in the condonation application and a replying affidavit in the security application.

[9] The security and condonation applications were then set down for hearing on the opposed motion court roll for the week of 1 June 2010 and both applications were heard on 2 June 2010.

[10] The condonation application can be disposed of with relative ease.

[11] Rule 6(11) states that "*(n)otwithstanding the foregoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge*".

[12] Rule 6(11), of course, does not stipulate a time for the filing of answering and replying affidavits in interlocutory applications. However, that does not mean that the respondent in an interlocutory application has unlimited time within which to file an answering affidavit (and the same applies of course to an applicant's replying affidavit). It has been held that Rule 6(11) should at least be read to mean that the answering (and replying) affidavits in interlocutory applications must be filed within a reasonable time and, *prima facie*, that a reasonable time would be the time prescribed in terms of Rule 6(5)(e) unless there were some special circumstances that dictated longer or shorter periods. See: **Gisman Mining and Engineering Co (Pty) Ltd (in liquidation) v LTA Earthworks (Pty) Ltd** 1977 (4) SA 25 (W); **Muller v Paulsen** 1977 (3) SA 206 (E); **Hendricks v Santam Insurance Co Ltd** 1973 (1) SA 45 (C).

[13] In this division the practice, as I understand it, is generally that a notice of set down in an interlocutory application is served only when the papers in the application are complete in the sense that all the affidavits which the parties are entitled to file, have been filed. I put that to counsel for the Applicant, but she held a different view. Even if I am wrong in my understanding of the practice, then it would seem to be a salutary approach to interlocutory applications that would avoid exactly the type of dilemma that the Respondents faced in this application.

[14] Nevertheless, in my view, the set-down of the security application by the Applicant was premature; he ought to have accorded the Respondents at least the time prescribed in terms of Rule 6(5)(e) for the filing of an answering affidavit. That premature set-down and the refusal to postpone the hearing day pending the filing of the Respondents' answering affidavit precipitated and necessitated the condonation application. Such conduct, in the face of the Respondents' notice of opposition, was entirely unreasonable. The Applicant ought to have accorded the Respondents at least the time prescribed in terms of Rule 6(5)(e) or, if that was unacceptable, to arrange time periods for the filing of affidavits with the Respondents. Viewed from this perspective, the fact that the Respondents' answer was, in the event, filed a mere 2 days late is of no consequence and the

condonation must be allowed with costs. The reserved costs of the unnecessary hearing on 23 February 2010, must then follow that result.

[15] To return to the security application, counsel for the Applicant and the Respondents were *ad idem* that I should decide the question as to whether security had to be furnished upon the procedural and substantive bases provided under Rule 47(1) and section 13 of the Companies Act. They were further *ad idem* that, although the Respondents' particulars of claim in the action was not incorporated in, and confirmed in the parties' affidavits filed in the security application, I should take cognisance of it.

[16] It was held in **MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd** 2007 (6) SA 620 (SCA), at paragraph 7, that section 13 of the Companies Act anticipates a two-stage enquiry: "*At the initial stage, the question is whether the applicant for security had established, by credible testimony, that the body corporate, if unsuccessful, will not be able to pay the applicant's costs in the main proceedings. If the applicant fails to meet this threshold requirement, that is the end of the proceedings. The application is bound to be refused. If, on the other hand, the Court is satisfied that such reason to believe exists, it must, at the second stage, decide, in the exercise of the discretion conferred on it by this section, whether or not to compel security.*"

[17] The Applicant bases its entire case on averments made by the Respondents in their particulars of claim in the action, in other words, the allegation that the Fourth Respondent is a bankrupt company that was finally wound up *because* its liabilities exceeded the value of its assets, and/or it was unable to pay its debts, and/or the Fourth Respondent was commercially insolvent. Based on those allegations in a pleading, which is certainly not evidence, the Applicant then contends that the First to Third Respondent, in their respective capacities as joint liquidators of the Fourth Respondent, and the Fourth Respondent, will on their own version be unable to satisfy a costs order should the Applicant be successful with his defence to the action.

[18] It is common cause that the Applicant was at all relevant times the sole director of the Fourth Respondent. Presumably, he should therefore have been in a position to give direct evidence as to the cause of the Fourth Respondent's demise, even if just to confirm the above allegation in the particulars of claim. But that he does not do. The Applicant's attorney of record swore the Applicant's founding affidavit. The attorney says that the facts sworn to, are within his personal knowledge, but it seems relatively self-evident that all that can be within his personal knowledge, is the fact that certain allegations were made in the particulars of claim. These hearsay allegations can hardly pass muster as "*credible testimony*" to the effect that the Fourth Respondent, if unsuccessful in the action, would not be able to pay the Applicant's costs.

[19] The scantiness of the Applicant's mentioned "evidence" notwithstanding, the Respondents show in their answering affidavit that a current account in the name of the Fourth Respondent has a credit balance of R684,528.71. That account was opened by the liquidators for the purposes anticipated in section 394 (1) (a) of the Companies Act. It was submitted on behalf of the Respondents that any costs order against them in the main action would form part of the costs of administration. Any costs, order awarded against the respondents and in favour of the applicant; would accordingly enjoy preference over pre-liquidation creditors and other costs of administration and would be payable immediately. I agree. It was held in **Parity Insurance Co Ltd (in liquidation) v Hill** 1967 (2) SA 551 (A) at 562 that a litigant who has been granted an order for post-liquidation costs by a competent court is, after taxation of such costs, entitled to immediate payment of them in full.

[20] The Applicant fairly concedes that argument, but contends that there is no guarantee that the funds would remain available because there is "*no limit or prohibition on the Respondents to utilise (those funds) ... for any other purpose*". What that "other purpose" might be, is not declared; the Respondents cannot, for example, pay any creditor until after confirmation of a liquidation and distribution account. But it is unnecessary to speculate about such matter; the Respondents have shown that they sufficient funds to cover even the Applicant's overly

generous estimate of the anticipated costs in the action and they have shown that the funds cannot simply be dissipated at will or whim.

[21] Applicant therefore failed to show, by credible testimony, that these funds will not be available to pay the Applicant's costs if the Fourth Respondent is unsuccessful in the action. The security application therefore stands to be dismissed. Even if I am wrong in concluding thus, then I would in any event not have exercised my discretion in favour of the furnishing of security. The Applicant has had 15 months since the service of the summons to plead; he has not done so. Neither has he specified his defence in his security application. I would think that, before the Applicant can claim security, he should have pleaded or specified his defence and, until he has done so, his claim for security would be premature. The Applicant has therefore not even shown that he has a defence to the action. It is apposite to point out that the Applicant also does not contend that the action by the liquidators is frivolous or without merit. The main purpose of section 13 might well be to discourage bankrupt companies from litigating vexatiously or where they have no prospects of success, thus causing their opponents unnecessary and unrecoverable legal expense. But the converse is also true. A company with a legitimate claim should not be burdened with security obligations where its opponent raises a vexatious defence or one with no prospects of success. Although it is not necessary for me *fully* to enquire into the merits of the action, the nature of the Applicant's defence is therefore not irrelevant and the failure on the part of the Applicant to inform the court of such information relating to the action, must militate against the granting of security.

[22] In the premises, I grant the following order:-

- a. the late filing of the Respondents' answering affidavit in the Applicant's security for costs application is condoned;
- b. the Applicant's application in terms of Rule 47(1) is dismissed;
- c. the Applicant is ordered to pay the costs of the condonation and security for costs applications, which costs include the costs reserved on 23

February 2010.

(Signed)

Bester, AJ

Acting Judge of the High Court

5 June 2010