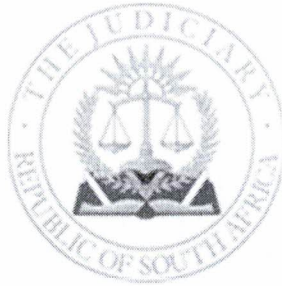
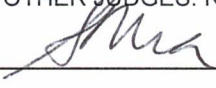


REPUBLIC OF SOUTH AFRICA



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

Case Number: 42818/2012

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
12 APRIL 2023	
DATE	SIGNATURE

In the intervention application between:

JOHANNES JACOBUS HENDRIK STEYN

First Applicant

GUNTER DONALD FREYER

Second Applicant

In re

**SINGLE DESTINATION
ENGINEERING (PTY) LTD**

First Respondent/First Applicant

GUARDIAN INTEGRATED SYSTEMS CC

Second Respondent/Second Applicant

And

THEO VAN DEN HEEVER N.O.

Third Respondent / First Respondent

NURJEHAN ABDOOL GAFAAR OMAR
Respondent

N.O. Fourth Respondent /Second

THEA CHRISTINA LOURENS N.O.

Fifth Respondent /Third Respondent

in their capacity as the joint liquidators
of Skincon Calibrate (Pty) (Ltd) (in liquidation)

JUDGMENT

MIA, J

Introduction

- [1] The application is for security for costs. I have had insight into the two related applications namely an application for inspection and an application to intervene, to determine the application for security for costs. The application is opposed.
- [2] The first applicant is Single Destination Engineering (Pty) Ltd (SDE), a company with limited liability incorporated in terms of the Companies Act, 71 of 2008, with its registered office at 29 Galaxy Avenue, Linbro Business Park, Sandton, Johannesburg Gauteng. The second applicant is Guardian Integrated Systems CC (GIS), a company with limited liability, incorporated in terms of the Close Corporation Act, 69 of 1984, with its registered office at 62 Turaco Street, Norscot, Fourways, Gauteng. The first respondent, also the first applicant in the intervention application, is Johannes Hendrik Jacobus Steyn, an adult male, the former director of Skincon Calibrated (Pty) Ltd., (in liquidation) (Skincon), currently residing in Australia. The second respondent is also the second applicant in the intervention application, Gunter Donald Freyer, an adult male and former director of Skincon Calibrated (Pty) Ltd., (in liquidation), currently residing in Australia. The third, fourth and fifth respondents (the liquidators) are the joint liquidators in the application to liquidate Skincon. They are not represented and are not opposing the application.

Background

- [3] A background to the present application is necessary. SDE, GIS and Skincon entered into a consortium agreement and undertook a construction project for FNB. Skincon was the principal contractor and responsible for managing the financing and implementation of the project. SDE was the engineer. Skincon received payments into its own bank account. Skincon paid SDE and other

subcontractors. Skincon retained payments until contracts were complete. The funds were intended to be held in trust by Skincon. The funds were allegedly utilised by Skincon and not paid to subcontractors. The subcontractors sued Skincon and obtained judgments for amounts in excess of R20 million. Before the orders were executed Skincon placed the company in liquidation. The directors of Skincon lived in Australia. When Skincon was liquidated an application to inspect Skincon's records followed. The directors applied to intervene in the application to inspect the records as they did not approve the inspection of its books by anyone who was not a creditor. They alleged SDE was not a creditor. SDE and GIS now seek security from the respondents who are the directors of Skincon as they do not reside in South Africa.

Issues for Determination

- [4] The parties agreed the issues for determination are whether:
 - a. The defences proposed by the intervening applicants are vexatious;
 - b. There is a reasonable prospect that the applicants may not be able to recoup from the intervening applicants;
 - c. Considering the totality of the circumstances in the matter, the intervening applicant should be required to put up security for costs.
- [5] The applicants, SDE and GIS, bring the application in terms of Rule 47(3) of the Uniform Rules of the High Court. They seek an order that Mr. Steyn and Mr. Freyer, (the respondents) be ordered to provide security for the costs of the application to intervene. There are two grounds proposed for this. The first ground indicated is that they are *peregrini* before this court and they do not have assets in the country which can serve as security. The second ground is that their intervention application and opposition to the inspection application is vexatious and amounts to an abuse of the court's process and has little prospect of success.
- [6] Rule 47(3) provides: "*If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount*

demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with". The respondents refused to furnish security and opposed the application.

- [7] Rule 47.14¹ provides that peregrine plaintiffs or applicants are obliged to provide security for costs for litigation they are pursuing. Incolae do not have this obligation although this is not always the position. The rule is ultimately aimed at protecting incola litigants. The court determines whether security should be incurred in a case or not. The court making the determination has regard to the residential circumstances or domicile of the foreigner and whether there is a fixed address. A foreign litigant without a fixed address and country of domicile poses more of a risk and an order for security becomes more appropriate under those circumstances.²
- [8] Counsel for the applicant submitted that the court should consider the respondent's indication that they have the means to pay for a costs order if they are unsuccessful in the intervention application. He continued that they are at this point applicants in the intervention application and not yet respondents in the liquidation. It is thus crucial to ensure their accountability as *peregrine* litigants, especially as they of their own admission indicate they can afford the costs if it is ordered to do so. Thus counsel submitted it would not be an inconvenience for them to be ordered to put up security and they would not be non-suited if they were ordered to pay security for costs. It will place them in no worse a position if they are ordered to pay security for costs, however, if there was no order that they pay security for costs, SDE and GIS will have great difficulty in recovering costs if a costs order were made against the respondents and they had to pursue the respondents abroad. This is especially as they are in a precarious position financially having not received payment from Skincon, and one of them are in business rescue at present.

¹ Harms *Civil Practice in the Superior Court*

² Harms *Civil Practice in the Superior Court*

- [9] Moreover, counsel for the applicant, submitted it was appropriate for this court to do so considering that the respondents/applicants seeking to intervene do not own any assets in South Africa. They are the directors of Skincon and their company has been liquidated. Their attempt to intervene, it was submitted was vexatious and was an attempt to withhold information from creditors. This they would accomplish by stepping into the shoes of the liquidators, to prevent creditors from inspecting documents. Moreover, Counsel argued that they have not put up a viable defence to the intervention application. If they are successful in keeping the creditors from inspecting the books, the injustice will be palpable and take the matter no closer to resolving the issues and tracking where the funds went to in order to pay the creditors and contractors who completed work on the project. Counsel pointed out that this court should consider the merits of the main proceedings only to the extent that the claim or the defence is *bona fide*. In the present matter, counsel argued that if the directors were transparent and were not hiding information, it was not necessary to bring the application to inspect. It was evident, counsel submitted that their conduct is vexatious where their defences were not known. He referred to *Zietsman v Electronic Media and Others*³, where the Court held:

“In deciding whether the appeal should be upheld, the Court was influenced largely by the fact that the respondents had not disclosed a defence. It deemed it unreasonable to order a plaintiff incola to provide security for the costs of an action instituted by him, at the behest of a defendant who may not even have a defence worthy of consideration.”

- [10] Counsel compared this application to the facts in *Lurco Group South Africa (Pty) Limited v Knoop NO and Others (Oakbay Investments (Pty) Ltd Intervening)* (38647/2019) [2020] ZAGPJHC 74 (5 March 2020), and submitted that similarly a foreign company sought to intervene in proceedings where they had departed from the country and were not residing in South Africa. The court in that matter ordered that the foreign intervening party pay R500 000 as security for costs of the business rescue practitioners. The courts view is encapsulated as follows:

³ *Zietsman v Electronic Media and Others* [2008] All SA 523 SCA

“It follows that the court has to weigh up the injustice caused to the defendant if no security for cost order is made, against the possible injustice that the plaintiff would suffer if he is prevented from instituting a claim based on a security for costs order. The court must have regard to the nature of the claim, the financial status of the incola and the incola's probable financial status, should it fail in the matter. The applicant for security for costs must also satisfy the court that the main action is vexatious, reckless or otherwise amounts to abuse”

- [11] Thus it was argued that the respondents as *peregrinus* who live in Australia and admit they have means to pay, should pay. In the present matter there is no cooperation from the respondents in resolving issues with their partners in the consortium and their attorneys have not been of assistance in this regard either. They have not indicated their impecuniosity and they have the financial ability to pay a cost order if they fail in the intervention application.
- [12] Counsel for the respondent submitted that this court should consider the purpose behind the main application before ordering the respondent to pay security for costs. Having regard to the main application and the reply, it is evident in the main application⁴ that the applicants state they require the documents to prove their claims. However, this is not so as the first meeting of creditors was scheduled for 21 July 2021⁵. At that meeting on 21 July 2021, the claims were proved. Moreover, counsel submitted that they do however have sufficient information to complete their claim form as their claim form was submitted as is evident from their completed claim form attached to the papers.⁶ Furthermore, counsel submitted it is also evident that they proved their claims at the meeting of creditors at the Magistrates Court, Cullinan and there was no indication that their claims were not accepted. If the claim was not proved at the second claim meeting he submitted it was not proved intentionally, because they did not wish to contribute towards the costs.
- [13] Counsel for the respondent, argued further that the applicant's insistence to proceed with the request for documents is not for a legitimate purpose and is

⁴ Caseline 01-12 para 18.5

⁵ Caselines 01-14 para 21

⁶ Caselines 01-73 completed claim form

pursued for their own purpose. It cannot be to prove a claim as the claims were already proved before the Magistrate Cullinan. SDE was the only claimant who did not prove its case and it follows that SDE is not a creditor of Skincon. He argued that the rules of court may be utilised to issue a *subpoena duces tecum*. In the present circumstances, he continued that the claims that were proved before the Magistrate Cullinan are not contested by Skincon. There are in fact judgments taken against the respondent which is evident from the papers. It is also not true, counsel submitted that the consortium requires information. He continued that it was a different litigant, a Mr. Gaffner, who is engaging in litigation with the directors who attested to the affidavit. Mr. Gaffner is seeking information. The application is therefore undertaken to assist some other litigant who is being sued. He argued moreover that the litigation will have no prospects of success. The respondents in the present matter will be respondents in the application to inspect once they are granted leave to intervene and it would not be appropriate to grant security for costs against the respondents.

- [14] Counsel for the respondents submitted that the request for security was an abuse by the applicants who sought to dictate the pace of litigation and to keep the respondents out of the main application. They lodged a Rule 47(1) application withdrew it and launched the present application later. The respondents' position was misrepresented where they were portrayed as respondents leaving with the funds. The true position is that they relocated to Australia prior to the project commencing and travelled frequently to the country. The company was placed in liquidation due to the product failing.
- [15] Having considered the submissions of both counsel, as well as the authorities and the decision in *Exploitatieen Beleggingsmaatschppij Argonauten 11BV and another v Honig*⁷ where the Court held:

“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. That was not

⁷ *Exploitatieen Beleggingsmaatschppij Argonauten 11BV and another v Honig* [2012] 2 All SA 22 SCA

done. In any event, the fact that the respondent would have to proceed against the appellants abroad if he obtained a costs order in his favour with the associated uncertainty and inconvenience that would entail, was one of the fundamental reasons a peregrinus should provide security”

- [16] In the present matter, the factors which I have considered are that respondents are peregrine and indicate that they are in a position to litigate and have no difficulty paying a costs order if one were ultimately ordered. In contrast the applicants, SDE and GIS one of whom are in the process of business rescue, would experience great difficulty in pursuing their costs if they were to pursue the respondents in another country. It is evident that the applicants will have difficulty if they are to recoup their costs in another country. These two factors support the applicant’s case in favour of the granting security for costs where the primary consideration in deciding whether to grant security for costs is the domicile of the respondents.
- [17] The consideration whether they are entering an opposition is vexatious cannot be fully ascertained at this stage. There are disputes about whether SDE is a creditor or not. That SDE’s claim was not proved and is not a creditor is a red herring. According to counsel for the respondent, it was only because they cannot or will not pay the costs that their claim was not proved. As counsel for the respondent argued, it did not indicate that SDE’s claim was not good or that it would not be accepted, it just indicated that they had an issue with covering the costs and did not accept this. This highlights the very issue of costs and why the respondents who say they can pay the costs should pay security for costs. The determination about the vexatious element of the respondent merely clouds the issue at this point and I do not deem it necessary to determine the issue of security for costs. For the present application where the respondents seek to intervene and are peregrine it is appropriate that they be ordered to pay security costs.
- [18] The respondents in the matter have not yet been permitted to intervene in the inspection matter at the time the matter appeared before me. Their circumstances are that they are not residing or domiciled in the country and *peregrini* are usually required to provide security. The factors usually considered

are the character of the *peregrine*. In these circumstances the *peregrine* directors placed the company in liquidation and have not been candid with their partners in the consortium. Skincon was responsible for the retentions of funds on behalf of subcontractors. It is not clear what has happened to the funds that was kept in retention for the contractors. The application to inspect and the application to intervene are pending. The respondents as peregrine have relocated prior to the project commencing and have no assets in this country and it will be difficult for the applicants to recover costs against them in another country. I have considered that they may be respondents in the application to inspect. There are no circumstances indicated that suggested it is not appropriate and unjust or inequitable that they be ordered to provide security in the present circumstances.

[19] The rule 47(3) provides that security be provided in the amount demanded or an amount fixed by the Registrar within 10 days of demand or when application is made to this court for an order that such security be given and the proceedings be stayed until such order is complied with.

[20] There are no reasons why there should be any deviation from the usual cost order in this application.

[21] For the reasons above I hereby grant the following order:

Order

1. That the respondents be ordered to provide security to the applicants in the amount of R169 042,50 within 10 (TEN) of this order.
2. That the proceedings of the intervention application be stayed pending compliance with prayer 1 (above).
3. Cost of the application.


SC MIA
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: Adv W.K.C Pretsch

instructed by Primerio International

For the Respondent: Adv M.P Van Der
Merwe SC

instructed by Tim Du Toit & Co Inc

Date of Hearing: 01 February 2023

Date of Judgment: 12 April 2023