



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

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

-----SIGNATURE

9/4/24
-----DATE

CASE NUMBER: 19/13509

In the matter between :

BP SOUTHERN AFRICA (PTY) LTD

Applicant

and

EDUARDO JORGE DE OLIVEIRA

First Respondent

RHINOLINE MANUFACTURERS CC

Second Respondent

FULLIMPUT 1540 (PTY) LTD

Third Respondent

In re:

EDUARDO JORGE DE OLIVEIRA

First Plaintiff

RHINOLINE MANUFACTURERS CC

Second Plaintiff

and

FULLIMPUT 1540 (PTY) LTD

First Defendant

BP SOUTHERN AFRICA (PTY) LTD

Second Defendant

JUDGMENT

RANDERA A.J.

1. In this matter the Applicant (“**BPSA**”) seeks an order requiring the First and Second Plaintiffs to furnish security for BPSA’s costs of defending the action brought by the first and second Plaintiff under case number 19/13509.
2. The First Respondent claims in his personal capacity and is the holder of the patent forming the subject matter of the claims against the Applicant. The Second Respondent is a Close Corporation having the First Respondent and his wife as members.
3. There is a history of litigation between the Applicant and the Respondents and which litigation is relevant to this Application. Given this history the Applicant, after receiving the summons, filed a notice on 7 June 2019 in terms of Rule 47 (1) requesting security for costs.

4. The Applicant (BPSA) stopped purchasing product through the Third Respondent Fullimput 1540 (Pty) Ltd (Fullimput). The Second Respondent (Rhinline Manufacturers CC) (Rhinline), made Application on an urgent basis in the High Court in KwaZulu Natal. BPSA drew the attention of Rhinline to the fact that it had issued an Application for a patent infringement in the wrong Court. Rhinline thereafter withdrew its Application.
5. On 8 November 2016 Rhinline filed a complaint with the Competition Commission alleging that BPSA had contravened section 8 of the Competition Act of 1988 by terminating its supply relationship and by failing to agree to pay higher prices for the product. The Commission investigated the matter and decided not to refer the complaint to the Tribunal. Rhinline then referred the matter to the Competition Tribunal in terms of Section 51 of the Competition Act.
6. BPSA brought an exception to Rhinline's referral on the basis that no cause of action had been disclosed. Shortly before the hearing of the exception Rhinline consented to the grant of BPSA's exception with costs. BPSA taxed a bill of costs and which taxed bill remains unpaid.

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7. Subsequent to the exception Application Rhinoline filed a supplementary affidavit which did not cure the deficiencies in the complaint referral. BPSA then raised a second exception in response to which Rhinoline filed an answering affidavit. Shortly before that matter was to be heard Rhinoline approached BPSA to settle the Competition Tribunal complaint. The matter did not settle. A day prior to the hearing of the matter Rhinoline advised BPSA through its attorneys that it would not be attending the hearing the following day. The matter was heard at the Competition Tribunal, the exception was upheld, and Rhinoline's complaint referral was dismissed with costs.
8. On the same day the Respondents issued summons out of this Court.
9. On the 3rd of May 2019, BPSA obtained a warrant to execute against the movable property of Rhinoline. The sheriff's return of service records that Rhinoline no was no longer in operation at its previous place of business and the sheriff was therefore unable to attach any assets to satisfy the debt owed to BPSA.
10. The Applicant seeks security for its costs on the basis that, under the common law, a Defendant is entitled to seek security for costs from an *incola* Plaintiff, whether an individual or a company, where –

- 10.1 the Plaintiff is insolvent or unlikely to be able to satisfy any costs order against it; and
- 10.2 the action is vexatious, or reckless or amounts to an abuse of the Court process.
11. The Applicant submits that: having regard to considerations of equity and fairness; the history of this matter; the lackadaisical manner in which the Plaintiffs have conducted this litigation to date; the Plaintiffs' admission that they will not be able to satisfy any adverse costs order against them; and the fact that, even if the Plaintiffs' allegations can be proved, their claim is without legal basis and obviously unsustainable and accordingly reckless and/or vexatious.
12. The Respondents contend that the injustice and unfairness of preventing the Plaintiffs from pursuing their claim by ordering them to furnish security for cost will far outweigh any injustice or unfairness to the Defendants, who may merely be unable to recover costs, accordingly that the request to furnish security for cost is unconstitutional.
13. In *Boost Sports Africa (Pty) Ltd v South Africam Bremsives (Pty) Ltd 2015(s) SA38 (SCA)*, the Supreme Court of Appeal considered whether the

legislature's omission of a provision similar to that of section 13 of the 1963 Companies Act within the Companies Act 71 of 2008 ("**the new Companies Act**") signalled an intention to recognise a litigant's fundamental right of access to the Courts, as enshrined in section 34 of the Constitution. In this regard, it was held that:

"But that may be to ignore the fact that a Court was vested with a discretion in terms s 13 and that in exercising its discretion a Court performs a balancing act. On the one hand it must weigh the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security and against that it must weigh the injustice to the Defendant if no security is ordered and the Plaintiff's claim fails and the Defendant finds himself unable to recover costs. Significantly, on that score, the European Court of Human Rights appears to have inclined to the view that security for costs pursued a legitimate aim, namely to protect a litigant from being faced with an irrecoverable bill for legal costs and since regard was had to prospects of success the requirement could be said to have been imposed in the interests of the fair administration of justice. It is also noteworthy that back home, as long ago as *Lombard* it was stated by Bristowe J that the power to order security for costs is a most reasonable one. Why the legislature saw fit to exclude it (or a provision that mirrors it) is fortunately a debate that is not necessary for us to enter. Fourth, s 39(2) of the Constitution makes plain that, when a Court embarks upon a course of developing the common law, it is obliged to '*promote the spirit, purport and objects of the Bill of Rights.*' This ensures that the common law will evolve, within the framework of the Constitution, consistently with the basic norms of the legal order that it establishes."

14. The Court therefore continues to enjoy a discretion on whether to order an *incola* Plaintiff to furnish security for costs. Unlike the position under section 13 of the old Companies Act, something more than the mere

inability of an *incola* company to satisfy a potential costs order is required to justify an order for security.

15. This Court must now exercise a discretion with due regard to the nature of the Plaintiff's claim; the financial position of the company at the stage of the Application for security; and its probable financial position should it lose the action.
16. A mere inability to pay is insufficient to justify the ordering of security for costs. If the Court is satisfied that the contemplated main action is vexatious, or reckless, or amounts to an abuse, then security should be ordered.
17. In their original opposing affidavit, the Plaintiffs state repeatedly that they do not have sufficient resources to pay any adverse costs against them. There is therefore no dispute that the Plaintiffs will not be able to satisfy a costs order against them in these proceedings.
18. It is also important to note that:
 - 18.1 Rhinoline has failed, notwithstanding demand, to make payment of the taxed bill of costs pursuant to the order handed down by the Competition Tribunal on 3 August 2017;

18.2 the Plaintiffs have failed to make payment of the taxed bill of costs pursuant to the order handed down by the Competition Tribunal on 11 April 2019; and

18.3 the sheriff has been unable execute against the moveable property of Rhinoline and, to the best of BPSA's knowledge, Rhinoline does not own any immovable property.

19. Rhinoline has significant liabilities (if only to BPSA) and has, according to the First Plaintiff (Mr. De Jesus) under oath in the course of proceedings before the Competition Tribunal, "*ceas[ed] all business operations*". It can therefore reasonably be inferred that Rhinoline is insolvent.

20. Similarly, the first Plaintiff has confirmed under oath in the affidavit filed before the Competition Tribunal in support of Rhinoline's complaint referral that the business' closure had left him (*inter alia*) "*without any active source of income*". It is therefore clear that Mr. de Oliveira will not be able to satisfy an adverse costs order against him in his personal capacity.

21. In Boost Sports the SCA noted at [17]

”Absent section 13, there can no longer be any legitimate basis for differentiating between an *incola* company and an *incola* natural person. Our Superior Courts have a residual discretion in a matter such as this, arising from their inherent power to regulate their own proceedings.) It must follow that the former can at common law be compelled to furnish security for costs. Accordingly, even though there may be poor prospects of recovering costs, a Court, in its discretion should only order the furnishing of security for such costs by an *incola* company if it is satisfied that the contemplated main action (or Application) is vexatious or reckless or otherwise amounts to an abuse.”

22. In **African Farms and Township Ltd v Cape Town Municipality** 1963 (2) SA 555 (A) at 565D-E, the Appellate Division (with reference to *Western Assurance Co v Caldwell’s Trustee* 1918 AD 262 at 272 recognised the Court’s inherent power to strike out claims which are vexatious.

”An action is vexatious and an abuse of the process of Court *inter alia* if it is obviously unsustainable. This must appear as a certainty, and not merely on a preponderance of probability.”

23. This principal, insofar as it applies to an Application for security for costs, was qualified by the Supreme Court of Appeal in **Boost Sports** at [18] – [19] as requiring a less stringent test than one for the stay of vexatious proceedings.

24. This is so, despite the provisions of section 34 of our Constitution with regards to the right to have a matter adjudicated at our Courts. The court

seized with the Application for security for costs should perform a balancing act of ensuring that access to justice is not denied purely on the basis of inability to provide security for costs. (*Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1) 1997 (4) SA 908 (W) 919G-H*).

25. It is for this reason that the court's discretion ought not to be fettered by preconceived points of departure. *Cooper NNO v Mutual and Federal Versekeringsmaatskappy Bpk 2002 (2) SA 863 (O) 874B-C*. It is important in exercising its discretion and balancing the interests of the parties that the Court shall not deny justice to any of the Parties on the basis of security for costs especially where any of the parties on the basis of security has a good case in the form of either claim or defence. The jurisprudence on security for costs has been developed to root out litigation in cases which are vexatious or frivolous.

26. In coming to a decision as to how it should exercise its discretion to order or refuse security for costs, the Court may take into consideration the nature of the claim and the defence, but the merits of the dispute are almost invariably irrelevant in deciding whether a Plaintiff or Applicant company should be ordered to furnish security for the proceedings. In addition to the particular circumstances of the case, the Court considering whether or not security should be ordered should also have regard to considerations of

equity and fairness to both parties. It may, in the exercise of its discretion enquire into the conduct of a party which has reduced the other party to penury. *Waste-Tech (Pty) Ltd v Van Zyl and Glanville 2000 (2) SA 400 (SE) at 404C 404G-H*

27. In the instant Case, the Plaintiffs have sought to pursue four separate causes of action against BPSA on the same set of “facts”.

27.1 Before the High Court, Kwa-Zulu Natal Local Division on 14 October 2016, the Plaintiffs sought urgent interdictory relief against the Defendants based on an alleged patent infringement. This Application was withdrawn.

27.2 Before the Competition Tribunal on 9 March 2017, Rhinoline alleged that BPSA had abused its position of dominance, in contravention of section 8 of the Competition Act, by terminating its supply relationship with Rhinoline in favour of Fullimput and by not agreeing to pay higher prices for the product. This complaint was dismissed on exception.

27.3 Rhinoline relies on an alleged breach of contract, as set out in its Particulars of Claim (as amended), the contract being a number of

oral agreements “*based on the 2007 procurement agreement*” alternatively tacit variations or ‘relocations of the 2007’ procurement agreement. My attention is drawn to the fact that this is the third version Rhinoline has advanced in seeking to identify and plead the terms of the contract which it relies upon in support of its case (previously, before the amendment to the particulars of claim earlier this year, reliance was placed on an agreement concluded in 2000 and the 2007 procurement agreement itself).

27.4 Finally, Rhinoline and Mr. De Oliveira bring a claim in delict, which appears to be founded on the assertion that large multinational companies are obliged, outside of any competition law obligation or the law of contract, to continue purchasing goods from a small business if that small business is reliant on those purchases for its continued operation.

Alleged Breach of Contract

28. It is the Plaintiffs’ position that subsequent to the expiry of the 2007 procurement agreement, (attached to the Plaintiffs’ particulars of claim), Rhinoline and BPSA concluded a new agreement (alternatively, a series of annual agreements) “*based on the 2007 procurement agreement,*”

alternatively tacit variations or relocations of the 2007 procurement agreement (“the oral/tacit agreement”). BPSA denies these allegations.

29. Given the agreement and the flow of procurement, any tacit agreement would have to be concluded between Rhinoline and Fullimput, as the company that purchased and paid for the product from the Plaintiffs.

30. Accordingly, the claim against BPSA, as pleaded in its Particulars of Claim is unsustainable

31. Rhinoline claims in this regard that BPSA breached the agreement between the parties in that it failed to:

31.1 continue to purchase cartridges from Rhinoline;

31.2 afford Rhinoline an opportunity to meet or beat the price charged by Fullimput for the supply of comparable rock drill grease cartridges (and thereby compete with Fullimput for this supply);

31.3 pay for the cartridges within an agreed period;

31.4 review the purchase price payable for the cartridges, and

31.5 conduct itself in good faith.

I deal with each of these below:

32. In paragraph 14(a) of the amended particulars of claim it is alleged that BPSA breached the oral/tacit agreement by ceasing to purchase the cartridges from Rhinoline. Similarly, in paragraph 14(c), it is alleged that BPSA failed to issue Purchase Orders for supply and delivery as and when it required the cartridges.
33. However, in terms of the procurement agreement, BPSA is entitled to issue Purchase Orders “*in its sole discretion*” and is under no obligation to commit itself to any number of Purchase Orders.

BPSA’s failure to afford Rhinoline an opportunity to meet or beat Fullimput’s price

34. In terms of Clause 5.1 of the 2007 procurement agreement, which expressly states that the relationship is to be non-exclusive, the question as to whether or not BPSA afforded Rhinoline an opportunity to meet or beat the prices charged by Fullimput for the supply of comparable cartridges is not required by the agreement.

35. BPSA states that its reason for seeking an alternative source of supply was because Rhinoline was unable to supply the cartridges, either timeously or at all and therefore had nothing to do with price. This allegation BPSA points out, has not been disputed by the Plaintiffs.

BPSA's alleged failure to pay Rhinoline within a set time period is unsubstantiated

36. The Plaintiffs have failed to plead any facts in support of their contention that BPSA failed to pay Rhinoline for the supply of the cartridges within 7(seven) days of the date of invoice, alternatively, within 30 (thirty) days of receipt of invoice as allegedly required in terms of clause 7.3 of the 2007 procurement agreement.
37. BPSA's founding and supplementary founding affidavits draw attention to the fact that prior to the termination of the supply arrangement, Rhinoline had started to request payment for the supply of the cartridges in advance. In compliance with this request, and in an effort to secure the necessary supply of the product required by its mining customers, BPSA paid Rhinoline an amount of R667 913, 68 for cartridges that were to be supplied in the future.

38. Notwithstanding this payment and numerous demands, Rhinoline failed to supply the cartridges ordered and paid for by BPSA (through Blendcor), with the result that Rhinoline is significantly indebted to BPSA.

BPSA's alleged failure to review the price payable for the cartridges

39. Clause 7.1 of the 2007 procurement agreement provides for the regular review of the prices charged by Rhinoline. However, the clause further provides that in the event that the parties are unable to agree then either Party may terminate the agreement, and pending the termination the existing prices will apply.

40. In other words, if BPSA was unwilling to pay a higher purchase price for the cartridges, either party was entitled to terminate the supply arrangement, BPSA was not obliged to purchase the cartridges at a price higher than it was willing to pay.

BPSA's alleged failure to conduct itself in good faith without merit

41. Finally, the Plaintiffs allege that, through its failure to afford Rhinoline an opportunity to meet and beat the prices charged by Fullimput for the supply of comparable cartridges, BPSA failed to conduct itself in good faith.

42. In terms of clause 7.4 of the 2007 procurement agreement, BPSA is at liberty to purchase product from third parties where the reasons for the purchase do not relate to price. The right to deal with others is not restricted.
43. For all the reasons set out above, Rhinoline's claim based on an alleged breach of contract, is without merit, and is in the circumstances vexatious.

The delictual claim

44. the Plaintiffs' delictual claim is said to be based on the following facts:
- 44.1 BPSA is part of a large multinational group with access to extensive resources;
- 44.2 Fullimput was able to produce and sell a comparable cartridge with the support of BPSA;
- 44.3 The only commercial resource available to Rhinoline was the production and sale of the cartridges to BPSA;
- 44.4 It would be very costly for Mr de Olivera to institute proceedings for the enforcement of this patent; and

44.5 the alleged breach of the contract.

45. Furthermore, within the supplementary answering affidavit deposed to by Ms De Oliveira it is stated that BPSA:

“Must have realised the impact this would have had on Rhinoline’s liquidity and ability to trade, and of the knock-on affect on the first Plaintiff’s ability to defend or protect the patent”

46. It is trite that a Plaintiff cannot advance both a contractual and delictual cause of action based on the same set of facts unless the causes of action are pleaded in the alternative.
47. It would thus appear to be the Plaintiffs’ case, that BPSA was under a legal duty to continue to remain bound to the oral/tacit agreement, notwithstanding Rhinoline’s inability to supply the cartridges and the substantial debt owed by Rhinoline to BPSA as a result of Rhinoline being a small family business financially dependent on BPSA’s custom and Mr de Oliveira cannot afford to defend his patent.
48. The Plaintiffs’ delictual claim is, in sum, manifestly ill-conceived and baseless. Furthermore, there is nothing to support the claim brought by Mr de Oliveira in his personal capacity.

49. For the reasons set out above, neither of the two causes of action relied upon by the Plaintiffs in the proceedings before this Court are sustainable and the action is vexatious.

The claim for damages

50. The Plaintiffs state at paragraph 21 of the amended Particulars of Claim that:

“the damages suffered by the Plaintiff are the reasonable and foreseeable consequence of the breach of the procurement agreement, alternatively the wrongful and unlawful conduct of the Defendants.

51. It is pointed out that, having accepted that the 2007 procurement agreement was never signed and, at best, expired no later than 31 August 2007 (which is disputed by BPSA), the Plaintiffs have sought to rely on a series of oral agreements, described as the “oral/tacit agreement”). However, for the purposes of pursuing damages against BPSA, the Plaintiffs appear to have reverted to the original written agreement, an agreement which both sides appear to agree was never concluded.

52. It is unclear whether the Plaintiffs’ claim is based on damages arising from the alleged breach of contract, or the alleged patent infringement and, in either event, on what basis damages for “*the lifetime of the patent*”: are

claimed. The Plaintiffs have also failed to plead the basis upon which they claim damages for a period of 9 (nine) years (for an agreement that was renewed annually), and how the start and end of that period has been determined.

53. In any event, if one considered that this action was launched on 11 April 2019, a material portion of the Plaintiffs' claim has already prescribed.
54. In light of the above, the claim for damages (whether in contract or delict) is obviously unsustainable.

Having regard to the principles set out above and the facts of this case, I am persuaded that the Defendants have discharged the onus to prove that they are entitled to Security for Costs.

55. As a result, the following Order is made:

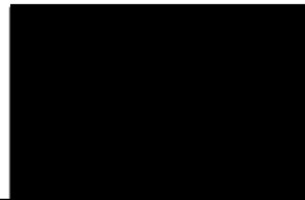
55.1 the Plaintiffs are ordered to furnish security for the First and Second Respondents legal costs in the action.

55.2 the form, amount and manner of security to be provided by the Plaintiffs shall be determined by the Registrar on Application made

by the Second Defendant to that office within 10 (ten) days of this order, failing which Application for this order shall lapse.

55.3 in the event that the Plaintiffs fails to provide security as determined by the Registrar within 10 (ten) days of the Registrar's order or determination, the action shall be stayed.

55.4 the Respondents are ordered to pay the costs of this Application.



MOHAMED RANDERA AJ

**Acting Judge of the High Court
Gauteng Division, Johannesburg**

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 09 April 2024.*

Date of Hearing: **27 February 2024**

Date of Judgment: **09 April 2024**

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