

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

CASE NO: 2018/16715

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

[17 SEPTEMBER 2021]

In the matter between:

STN

First Applicant

HN

Second Applicant

and

MRMD

Respondent

In re:

MRMD

Applicant

and

STN

First Respondent

HN

Second Respondent

JUDGMENT

MUDAU, J:

[1] This is an opposed interlocutory application in terms of Rule 47(3) of the Uniform Rules of Court calling upon the respondent ("D[....]") to furnish security for the applicants' costs. Accordingly, having reason to believe that the respondent would be unable to pay their costs if successful in the pending application, the applicants ("the N[....]s") seek an order that security be given by D[....] in the amount of R70 000,00 as demanded, and that the proceedings launched by D[....] in respect of which they are respondents, be stayed until such order is complied with, failing which the N[....]s be entitled to apply for a dismissal of the proceedings. After hearing arguments on the merits I reserved judgment, but subsequently granted an order on 13 September 2021 with costs for the relief sought with reasons to follow consistent with the notice of motion. These are my reasons.

[2] Rule 47(3) relied upon states the following: *"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."*

[3] The context is the following. Mr D[....] and the N[....]s are all Zimbabweans. Ms N[....] and Mr D[....] were once married. Their marriage was terminated pursuant to a decreed of divorce in the High Court of Zimbabwe (Bulawayo) dated 17 January 2019. The backdrop to the current dispute arises out of the division of immovable property situated in Johannesburg at [....] C[....] Hills Private Estate, C[....] Road ("the Property"); by the Cowen AJ order dated 22 January 2019 instituted in terms of the *actio communi dividundo*. The Property was jointly owned by the first applicant and the respondent in the present application, Ms N[....] and Mr D[....] respectively.

[4] On 20 September 2019 and utilising that part of the Cowen AJ order which enabled the parties to approach the Court for a variation¹, Mr D[...] brought what he describes as a "variation application". At para 8 the Cowen AJ order reads: *"Should either party be aggrieved that in all the circumstances there is an unreasonable delay in the finalization of case number 2017/252710 (including any appeal), such party may approach the Court on the same papers supplemented where necessary, to (request the immediate distribution of the remaining proceeds on a just and equitable basis but neither party may so approach the Court for a period of 15 months from the date of this order"*.

[5] In his variation application, Mr D[...] seeks the following relief: that paragraphs 7 and 8 of the Cowen AJ order be "disposed with" and that the order be varied so as to provide that paragraph 3.10.3 will as amended provide that the *"After collection of conveyancing fees, the remaining proceeds shall be immediately distributed, in equal proportion between Mr D[...] and Ms N[...]"*. The N[...]s are opposing to the variation application and in addition launched a counter application to declare the respondent a vexatious litigant. They point out, *inter alia*, that D[...] ignored the 15 months' moratorium in launching the variation application.

[6] As Rome AJ pointed out elsewhere in a judgment between the same parties, since the launch of the variation application, the N[...]s have racked up several costs orders as against Mr D[...]. In order to give some context to these orders, it is necessary to fill in more piece of the chronicle background. The Cowen AJ order links the release of the sale proceeds to the finalisation of case number 2017/252717. This case number pertains to a trial action between Mr N[...] and Mr D[...]. Mr N[...] is Ms N[...]s father and Mr D[...]s ex-father-in-law. In the trial action, Mr N[...] seeks the recovery of a loan which he alleges he advanced to his daughter and his then son-in-law to enable them to purchase the Property. The impact of the dispute on the proceeds accruing from the sale of the Property is reflected in the judgment of Cowen AJ and paragraph 8 of the Cowen AJ order.

¹ The order by Cowen AJ in part read: *"Should any party to these proceedings encounter any practical impediment implementing this order or a change in circumstances warrant it, such party may approach the Court for further directions or a variation of the order"* at para 9

[7] I turn to the facts of the current application. The applicants allege as a basis for the relief sought in paragraph 9 of the founding affidavit that: the respondent is not domiciled in the Republic of South Africa; does not have residence of some permanent or settled nature in the Republic of South Africa; and therefore is a *peregrinus*; does not own an unmortgaged immovable property in the Republic of South Africa; does not carry on business in the Republic of South Africa; and that he has no assets or income of his own. The allegations are founded upon the respondent's own founding affidavit ("FA 4") in the variation application in which he stated that he is "*functionally bankrupt*"; *his "business endeavours have come to a standstill such that he is) unemployed and (has no access to any other financial means"; he is a "destitute foreign national; and he is unable to afford accommodation"*.

[8] In addition, the applicant attached as annexure 5, a judgment of 5 February 2019 in the High Court of Zimbabwe pursuant to the first applicant and the respondent's divorce in which the respondent stated under oath that he does not have a permit to reside and work in South Africa and resides here unlawfully (last paragraph on page 12 and first paragraph on page 13 of the judgment); and he is not in full time of employment, has no accommodation (in Johannesburg) in view of the impending sale of the matrimonial home, and was financially dependent on the first applicant up until the divorce. The respondent has at least 10 courts orders against him, nine of which have since been taxed to a total of R169,740-24 and subsequently presented to him for payment but remain unsettled. On the applicants' version, the respondent is a vexatious litigant which is borne out by the numerous court judgments and most against him involving the same parties.

[9] In the answering affidavit, the respondent admits the contents of paragraph 9 of the applicants' founding affidavit referred to above inter alia that he is a *peregrinus* without financial resources. He confirms that he has always been financially dependent on his previous wife, Ms N[...]. Boldly, the respondent astonishingly denies the contents of his affidavit, "FA4" without more. The thrust of his complaint being that the variation application was launched first, and thus pending before the court and should be dealt with first. In addition, that the relief sought forms part of the prayers that the applicants seek. He is of the view, that the first applicant has no

business in launching these proceedings as she too, is a Zimbabwean citizen with no permanent residency in the Republic. As for the second applicant, he decries his *locus standi*.

[10] In terms of Rule 47 of the Uniform Rules, a *peregrinus* 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. The court has a discretion to grant an order for security for costs where both parties are *peregrini*. The court must be satisfied that the main application is vexatious or reckless or amounted to an abuse of the process of the court². A *peregrinus* who is plaintiff (or applicant) and who does not own unmortgaged immovable property in the Republic may be ordered to give security for the costs of his action³ or as in this instance an opposition to the pending application.

[11] The starting point is that an incola is not generally compelled to furnish security for costs except where there is an abuse of the process of court, namely where the claim is vexatious⁴. An action is vexatious if it is obviously unsustainable, frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant⁵.

[12] In an application for security for costs a court does not have to be convinced as a matter of certainty that the matter is incapable of succeeding but rather as a probability. The test whether an action is vexatious on the grounds that it is unsustainable can therefore be summarised as follows: the applicant does not have to establish this as a certainty; a court should not undertake a detailed investigation of the case nor attempt to resolve the dispute between the parties. This would be tantamount to pre-empting the trial court, in this case the court seized with the

² *Ramsamy NO v Maarman* 2002 (6) SA 159 (C) at 172l; *Boost Sports Africa (Pty) Ltd v South Africa Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at 50C–I.).

³ *Brearley v Faure, Van Eyk and Moore* (1905) 22 SC 2; *Lowndes v Rothschild* 1908 TH 49; *Kachelnik v Afrimeric Distributors (Pty) Ltd* 1948 (4) SA 279 (C).

⁴ *Ecker v Dean* 1938 AD 102; *Zietsman v Electronic Media Network Ltd* 2008 (4) SA 1 (SCA), para 4

⁵ See *Fisheries Development Corporation of SA Ltd v Jorgenson and Another* 1979 (3) SA 1331 (W); *Golden International Navigation SA v Zeba Maritime Co Ltd*; *Zeba Maritime v MV Visvliet* 2008 (3) SA 10 (C) para 9).

variation application. Rather, the court in a security for costs application brought upon these grounds, should merely decide on a preponderance of probabilities whether there are any prospects of success⁶. *“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.”*

[13] This approach was subsequently endorsed by the Constitutional Court in *Giddey NO v JC Barnard and Partners*⁷, 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.’*

[14] However, 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 *peregrinus* to furnish security for the *incola* applicant’s costs.

[15] The fact that the respondent in this matter has not paid numerous taxed bills upon presentation and as ordered by the court is a relevant consideration. It matters not that the application was launched after the pending variation application. As for the second applicant’s standing in these proceedings, he is directly affected by the relief that the respondent seeks which flows from the order by Cowen AJ. If D[...] is

⁶ *Zietsman* (supra) at para 21.

⁷ 2007 (5) SA 525 (CC) at para 8.

successful in obtaining an immediate release of the funds, Mr N[....]'s rights in terms of Cowen AJ's order will be prejudiced, and any order or award in his favour in the civil trial will be a hollow victory. Mr N[....] has substantial interest in preventing the incurrence of further costs in these proceedings as he is directly affected in the pending civil action. The respondent's complaint in this regard is therefore of no moment and meritless. It is trite that the court has an inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the process of the court, and one of the ways of doing so is by ordering the vexatious litigant to furnish security for the costs of the opposing side⁸. An action is vexatious if it is clearly unsustainable.

[16] Accordingly, I conclude that considerations of fairness and equity favour the granting of security as borne out by the totality of the facts. In the current matter from the papers, the respondent quite clearly owns no significant movable and by his admission no immovable assets in South Africa and has failed to disclose what assets he owns in Zimbabwe if any, making execution of any costs order abroad more onerous. So although in this age of globalisation, suing a *peregrinus* 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.

[17] The first applicant maintains she has permanent residency in the Republic and gave an address where she currently resides. There is no reason why she cannot pursue a claim against the respondent. Even if the N[....]s were to bring proceedings in Zimbabwe to recover their costs, the respondent's reticence to make any disclosure of his assets and liabilities in 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 the N[....]s' costs in the pending application. Without pre-empting the end result of the variation application, on the probabilities, the chance of success seems deem.

[18] The prospects of the applicants recouping all their costs from Dhlodlo, who as indicated, confirmed that he is impecunious are slim, regard being had to his conduct in this matter. This is one prime example of a matter which calls out for a security for

⁸ Zietman, *supra* at 4E.

costs order. To refuse the applicants right to claim security for costs could in these instance may lead to great injustice. There is no reason why the question costs should not follow the result. It is for these reasons that I granted order.

T P MUDAU
[Judge of the High Court]

Date of Hearing : 05 August 2021

Date of Judgment : 17 September 2021

APPEARANCES

For the Applicant : Adv H Viljoen

Instructed by : Ramsay Webber Inc

For the Respondent: Mr M Dlodlo
(In Person)