IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 6/3/15

CASE NO: 75356/2013

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
2015/03/06
DATE **SIGNATURE**

IN THE MATTER BETWEEN

LUMEKA MINING (PTY) LIMITED — Respondent/Plaintiff

and

OPTIMUM COAL HOLDINGS LIMITED — First Defendant/Applicant

WARRIOR COAL INVESTMENTS (PTY) LTD — Second Defendant/Applicant

ELIPHUS MOKOE — Third Defendant/Applicant

CRIMSON KING 303 (PTY) LTD — Fourth Defendant

JUDGMENT

LEGODI J

INTRODUCTION

[1] Three interlocutory applications were simultaneously heard before me. The first two applications were launched by Warrior Coal Investments (Pty) Ltd (Warrior Coal) and Eliphus Monkoe. The other application was launched by first defendant Optimum Coal Holdings Ltd (Optimum). Optimum is the first defendant in the main action launched by the plaintiff, Lumeka Mining (Pty) Ltd (Lumeka). On the other hand, Warrior Coal and Monkoe are the second and third defendants in the main action.

[2] The interlocutory application by Optimum is an exception to Lumeka's particulars of claim. Optimum is also having an interest in the application for security for costs by Warrior Coal and Monkoe which application is an alternative to its main application. The main application by Warrior Coal and Monkoe is that they want Lumeka to be declared a vexatious litigant.

BACKGROUND

[3] On the 29 November 2007, Lumeka instituted motion proceedings in the South Gauteng High Court. It was motion proceedings against many people/entities including Warrior Coal, Mokoe and Optimum. In the proceedings a relief was sought as follows:

> *"1. Ordering the ninth respondent and/or the second respondent to take steps forthwith:*
>
> *1.1 to cause 90% (ninety percent) of the shares in the first respondent be transferred to the applicant and 10% (ten percent) of the shares in the first respondent to be transferred to the fifth respondent; and*
>
> *1.2 that would result in the resignation of the ninth respondent as director of the first respondent.*
>
> *2. Declaring that:*
>
> *2.1 the shareholders agreement in respect of the fourth respondent, a copy of which is Annexure "IRM2" to the founding papers, has not lapsed and is of full force and effect amongst the parties thereto; and*

2.2 *the first respondent is entitled to 30% (thirty percent) of the issued share capital of the fourth respondent.*

3. *Pending the issue to the first respondent of 30% (thirty percent) of the issued share capital of the first respondent, the second, third, fifth, seventh, eighth, ninth, tenth, eleventh and twelfth respondents be interdicted from alienating, encumbering or otherwise dealing with shares in the fourth respondent,*

4. *Ordering the second respondent and such other respondents who oppose the application to pay the costs thereof.*

5. *Granting the applicants such further or alternative relief as this court deems meet".*

[4] The ninth and the second respondents referred to in paragraph 1 quoted above were Warrior Coal and one Thomas Ignatius Bosman respectively. Monkoe and Optimum were cited as the third and fourth respondents respectively. On the 27 March 2008 Sapire AJ dismissed the application with costs.

[5] On the 24 February 2010 Lumeka instituted action proceedings against Optimum, Warrior Coal and Mokoe as the first, second and third defendants respectively In the action, Lumeka claimed the amount of R5 940 000 000 centered around a shareholding agreement concluded between Warrior Coal, Liberty Lane Trading 25 (Pty) Ltd, (now Optimum), Monkoe, and a company known as Chrinson King Property 303 (Pty) Ltd (CKP), 'confidentiality undertaking concluded on the 22 November 2006 with BHP Billiton Energy Coal (BECSA) and the envisaged signing of the memorandum of understanding (MOU). The MOU was to be concluded by 19 March 2007 in accordance with the alleged shareholders agreement concluded on 19 November 2006.

[6] On the 8 April 2010, Warrior Coal and Mokoe filed notices in terms of Rule 23(1) and 30 of the Uniform Rules. In the notice, Lumeka was informed that its particulars of claim disclosed no cause of action and that they were vague and embarrassing. Lumeka was called upon to remove the embarrassment within 15 days. When Lumeka

failed to heed to the notice, Warrior Coal and Mokoe on the 14 May 2010 filed an exception to the particulars of claim. On the 8 April 2010, Warrior Coal and Monkoe also filed notice in terms of Rule 47 calling on Lumeka to furnish security for costs in the amount of R250 000.

[7] The exception and security for costs application were heard on the 8 October 2010. Classen J upheld the exception and granted Lumeka leave to amend its particulars of claim within 10 days failing which its claim was automatically to be struck out. Lumeka was further ordered to give security for costs. Costs order was granted against Lumeka.

[8] On the 8 December 2010 Warrior Coal and Monkoe caused bill of costs for the exception and application for security to be taxed. The bill was allowed in the amount of R210 794.04 which amount was paid to Warrior and Monkoe's attorneys and thus leaving a balance of R39 205.96 to the credit of Lumeka.

[9] On the 20 October 2010 Lumeka served a notice of intention to amend its particulars of claim. On the 9 November 2010, Warrior Coal and Monkoe objected to the proposed amendment on the basis that if it were allowed, Lumeka's particulars of claim would remain to be exciapible, vague and embarrassing and disclosing no cause of action. Having been served with notice of objection on the 9 November 2010, Lumeka was supposed to have filed an application for leave to amend by not later than the 23 November 2011. It did not.

[10] On the 4 March 2011, Lumeka's attention was drawn to the fact that in terms of Classen J's order of the 6 October 2010, its claim had been struck out and dismissed. Lumeka was further called upon to pay costs associated with its failure to proceed with the matter. When no response was forthcoming and in order to obtain finality and certainty regarding Lumeka's claim being struck out, Warrior Coal and Monkoe instituted an application on the 30 May 2011. In the application, they sought a declaratory order to the effect that Lumeka's claim had been struck out in terms of Classen J's order.

[11] Lumeka opposed the application. On the 5 July 2011 it filed the answering affidavit. At the same time, it filed notice of intention to amend its particulars of claim in terms of Rule 28. Warrior Coal and Monkoe saw the latter move as irregular because as

at that time, Lumeka's claim had automatically been struck out or dismissed and that there was therefore nothing to amend. On the 20 July 2011, they filed notice in terms of Rule 30(2)(b) calling on Lumeka to remove the purported notice to amend the particulars of claim. Lumeka did not respond. Warrior Coal and Monkoe brought an application to declare the intended amendment irregular. On the 20 September 2011, the application was granted on an unopposed basis. Lumeka however still sought to pursue the matter. On the 16 November 2011 it filed supplementary papers putting up new grounds on which it claimed it should be granted the opportunity to amend its particulars of claim. The move was opposed by Warrior Coal and Monkoe. At the hearing on the 24 November 2011, Lumeka abandoned the supplementary affidavit, but continued to oppose the declaratory proceedings regarding the dismissal of its claim as per the order of Classen J.

[12] On the 25 November 2011, a declaratory order confirming the striking out of Lumeka's claim was granted. Warrior Coal and Monkoe incurred significant costs. The bill of costs on the Rule 30 application was taxed at R15 216.21. Bill of costs for the declaratory proceedings was allowed at R208 412.77. As on the 20 May 2014, being the date the founding affidavit was deposed to in the present proceedings the taxed costs were not paid.

[13] On the 15 December 2011, Lumeka applied for leave to appeal against the order granted on 25 November 2011. The application was set down for hearing on the 15 April 2013. Lumeka failed to attend. The application was accordingly dismissed by default with costs. Bill of costs was taxed in the amount of R47 139.89. These costs too were not paid and they remain unpaid.

[14] On the 5 June 2012 payment for taxed costs in respect of Rule 30 application was demanded. The issue of costs was later suspended in the light of Lumeka's leave to appeal. On the 9 December 2013 a further demand was made on Lumeka to pay the cumulative taxed costs for the Rule 30 application, the declaratory proceedings, and the leave to appeal in the amount of R270 768.87. No response was forthcoming.

[15] Instead, the present action was instituted against Optimum, Warrior Coal, Monkoe and Crimson King Property 3030 (PTY) Ltd (CKP). Lumeka's cause of action is based on the alleged oral agreement concluded during November 2007, Shareholder's

Agreement concluded on the 19 November 2006 and referred to earlier this judgment, CKP Shareholders Agreement concluded on the 11 January 2007 and confidentially undertaking with BKP Billiton Energy Coal mentioned earlier in this judgement.

[16] On the 19 February 2014, in a letter addressed to Lumeka's new attorneys of record, historical background to the dispute was alluded to. A demand was made for payment of outstanding amount of costs owed to Warrior Coal and Monkoe. The furnishing of security for costs in the present action, in an amount of R500 000 was also demanded. On 24 February 2014, Lumeka's new attorneys responded by suggesting that R230 000 as a security for costs should be sufficient and that a greater amount would be prejudicial to Lumeka's ability to pursue its claim. They also suggested that an amount of taxed costs should be deducted from the security for costs previously furnished in the amount of R250 000. On the 5 March 2014 it was explained to Lumeka's attorneys that the amount had been used to settle costs associated with successful exception and that only R42 379.17 remained to the credit of Lumeka and that, that was insufficient to settle R220 768.87 outstanding in respect of the Rule 30 application, the declaratory proceedings and application for leave to appeal.

[17] On the 7 March 2014, Lumeka attorneys requested for a meeting to discuss the issue of payment of costs and security for costs. The meeting was held on 25 March 2014. During that meeting, parties agreed to suspend the litigation instituted in January 2014 until 3 April 2014. Lumeka's attorneys were promised to be provided with reconciliation of outstanding taxed costs. Upon receipt thereof, Lumeka's attorneys were to revert with proposals thereto. On the 28 March 2014, Lumeka's attorneys were provided with reconciliation of all outstanding costs. An amount of R336 143.44 was reflected outstanding as on the 28 March 2014. Lumeka's attorneys' responded on the 3 April 2014. They requested more detail account of the outstanding costs which they claimed were exorbitant. These costs were already taxed. An amount of R500 000 as a security for costs was said to be unreasonable. It was stated in the respondent's that when taking into account Lumeka's circumstances, it was not practically implementable and that Lumeka did not have that kind of amount for security. On the 4 April 2014 complete copies of the taxed bill of costs were provided to Lumeka's attorneys. They were also informed that Warrior Coal and Monkoe had instructed that legal steps be taken to ensure that the taxed costs were recovered. There was no response to the demand.

[18] On the 7 April 2014 the Sheriff attended at the office of Lumeka's attorneys to execute the writs in respect of judgment on taxed costs. The sheriff was sent there because during the meeting of the 25 March 2014, Lumeka's attorney Mr Gugulethu Oscar Madlanga allegedly confirmed that an amount of R500 000 was held in trust for Lumeka with a view to meeting Lumeka's obligations regarding costs. When the Sheriff arrived at the attorney's offices, he was allegedly told that Lumeka was not known to them and that no funds were held on behalf of Lumeka. However, on the same date, Lumeka's attorneys in question delivered notices in terms of Rules 26 and 35(14). On the 10 April 2014 Lumeka's attorneys addressed a letter to Warrior Coal and Monkoe's attorneys complaining about service of the writs on them. On the 9 April 2014, the sheriff was sent again to deliver notice of attachment. In the attachment, the sheriff sought to have attached an amount standing to credit of Lumeka in its attorneys' trust account. The present interlocutory application declaring Lumeka as vexatious litigant was instituted on the 23 May 2014.

VEXATIOUS LITIGANT

[19] In their notice of motion for vexatious proceedings, a relief is sought in the following terms:

> *"1. Striking out the first respondent's claims against the applicants, on the basis that they are frivolous and vexatious;*
>
> *2. declaring that the first respondent is a vexatious litigant;*
>
> *3. Ordering that the first respondent shall institute no further legal proceedings against the applicants unless it has first obtained the leave of this Honourable Court to do so;*
>
> *4. Alternative to prayers 1, 2 and 3 above, staying the action instituted under case number 75356/2013 until the first respondent has paid all outstanding taxed costs that it owes to the applicants, and further until it has provided security for costs in an amount of R500 000.00, or such*

> *alternative amount as may be directed by the Registrar of the above Honourable Court in respect of the action;*
>
> *5. Costs of suit;*
>
> *6. Further and/or alternative relief".*

[20] In simple terms, a vexatious litigation in a legal action is initiated without probable cause by an individual who is not acting in good faith for the purpose of annoying or embarrassing an opponent. A legal action that is not likely to lead to any procedural result is classified as vexatious litigation. Such litigation is regarded as frivolous and will in appropriate cases result in the dismissal of vexatious litigant's action.

[21] The provisions under Vexatious Proceedings Act 3 of 1956 are relevant to the present proceedings. Section 2(1)(b) thereof provides:

> *"(b) If, on an application made by any person against whom legal proceedings have been instituted by any other person who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings".*

[22] In paragraphs 60, 61 and 62 of Warrior Coal and Monkoe's heads of argument, is submitted as follows:

> *"60. An order can be granted in terms of that provision wherever a litigant has persistently and without legal ground instituted legal proceedings against a party (or several parties).*

61. *We submit that Lumeka's conduct plainly warrants the grant of an order. As we have set out above, it has repeatedly pursued the applicants (among others) for the same or substantially similar relief – each time without success. Its conduct is clearly vexatious.*

62. *Moreover, Lumeka has itself recorded that it intends to keep instituting similar proceedings. Its deponent states that:*

> *"It [Lumeka] will continue to engage with the courts regarding this matter for the court to determine the merits of the case".*

In the absence of an order from this Court, then, Lumeka will continue to bring proceedings notwithstanding the fact that any purported claim it may have had, has long since prescribed".

[23] However, on behalf of Lumeka, it was contended that it would be inappropriate for this court to grant an order in terms of section 2(1) of Act 3 of 1956. Lumeka was entitled to be heard on merits and that is constitutionally entitled to do so. In paragraph 33.2 of Lumeka's answering affidavit the point is raised as follows:

> *"It is unfortunate that the Respondent's/Plaintiff's exercise of its rights is seen as a distraction. The merits of the case were never argued in any court of law. It is the Respondent / Plaintiff's constitutional right to seek justice, and, to that extent, it will continue to engage with the courts regarding this matter for the court to determine the merits of the case…"*

[24] True, whilst in terms of section 34 of the Constitution everyone has a right to have any dispute that can be resolved by the application of the law, decided in a fair public hearing before court of law, such a right does not entitle a litigant to annoy, embarrass his or her opponent and or persistently pursue a litigation that is likely to have no practical result.

[25] In the current action proceedings, instituted during January 2014, Lumeka has come back against Warrior Coal, Monkoe and Optimum. It seeks to enforce its alleged right in terms of the oral agreement of November 2006, Liberty Lane Trading 251 (Pty) Ltd (Optimum) Shareholders' agreement concluded on 19 November 2006, CKP

Shareholder's Agreement concluded on the 11 January 2007, confidentially undertaking allegedly concluded on the 22 November 2006. The main relief is framed as follows:

> *"1. A Declaratory Order to the effect that Plaintiff is a direct shareholder of CKP with corresponding rights and obligations;*
>
> *2. A Declaratory Order that the CKP Shareholder's Agreement is valid and enforceable at law:*
>
> *3. A Declaratory Order to the effect that Plaintiff is a lawful shareholder of Liberty Lane Trading (PTY) Ltd with effect from the 19 November 2006 with all the corresponding rights and obligations;*
>
> *4. A Declaratory Order that the Shareholder's Agreement between Plaintiff and Liberty Lane Trading (PTY) is valid and enforceable at law;*
>
> *5. A costs of suit;*
>
> *6. Further and/or alternative relief".*

[26] Then in paragraph 10 of the particulars of claim, Lumeka pleaded a breach of contract and that as a result, Lumeka has suffered damages. It further pleaded that had it not have been for the breach, Optimum Coal would have been obliged to declare a semi-annual dividend of at least 50% of the free cash flow of the company after provision has been made for capital expenditure and working capital in accordance with the approved company budget and that 80% of such dividends would have accrued to Lumeka for the financial years, 2008, 2009, 2010, 2011 and 2012. It is said Lumeka is unable to calculate its damages without the relevant company records of Optimum, Warrior Coal and CKP. As a result, Lumeka further seeks a relief as follows:

> *"1. That the plaintiff be given access to the audited and financial statements (income statement, balance sheets, sales records for both export and local) of the first, second and fourth defendants for the year 2008, 2009, 2010, 2011, 2012 and 2013.*
>
> *2. Costs of suit".*

[27] Counsel for Warrior Coal and Monkoe has proposed an order which this court can make. It reads as follows:

> "1 *The first respondent's/plaintiff's ("Lumeka's") claims brought under case number 75356/2013 are struck out.*
>
> 2. *Lumeka is declared a vexatious litigant*
>
> 3. *Lumeka is ordered to institute no further proceedings against all or any of the defendants cited in case number 75356/2013 (that is, Warrior, Monkoe, Optimum Coal (PTY) Ltd and Crimson King (Pty) Ltd), whether for declaratory relief, damages or any other type of relief, concerning its alleged rights to participate, directly or indirectly, in the Optimum Coal Mine Complex, unless it first obtains the leave of this honourable Court to do so.*
>
> 4. *Lumeka and Madlanga and Partners Inc (MPI) are ordered (with MPI being ordered de bonis propriis) jointly and severally, to pay Warriror's and Monkoe's costs such costs to include to two counsel.".*

[28] The first three prayers if they were to be granted, in particular prayers 1 and 3, would make it unnecessary to deal with the other applications. The submission on behalf of Warrior Coal and Monkoe was that all the failed proceedings were on the same purported cause of action. I have been asked to see those proceedings as frivolous and vexatious and intended to harass, embarrass and or to disadvantage all defendants at a huge legal costs. I tend to agree.

[29] Motion proceedings which were instituted in November 2007 ended up no way. But when it did, it was at huge costs. It was conducted in a manner which suggested that Lumeka was not serious. The relief sought in that application is quoted in paragraph 3 of this judgment. The application was dismissed by Sapire AJ in a very short judgment. In the founding affidavit relating to present interlocutory proceedings, it

was suggested that the dismissal was amongst others, on the finding that Lumeka did not have *locus standi*. I can find no such finding in the judgment by Sapire AJ. The application however resulted in the taxed costs of R162 727.25.

[30] Two years after the dismissal of the first legal proceedings, Lumeka instituted action proceedings, amongst others, against Lumeka, Monkoe, Optimum and CKP. Those were action proceedings instituted on the 24 February 2010 in terms of which an amount of R5 940 000 000 was claimed in damages based on the same transactions and or agreements relied upon in the proceedings of November 2007. That is, its cause of action was centered on its exclusion from Optimum Coal transactions. The particulars of claim in the second litigation were found wanting by the defendants in particular Warrior Coal, Monkoe and Optimum. An exception was noted. The exception was upheld by Classen J on the 8 October 2010. Lumeka having been directed to amend its particulars of claim within a certain period, failed to do so. As a result, its claim was automatically dismissed as per the order of Classen J. The exception came at huge costs. Warrior Coal's bill of costs was allowed and taxed at an amount of R210 794.04. The amount was paid out of security for costs given by Lumeka. The amount of security so held was R250 000 and therefore a balance of R39 205.90 was left to the credit of Lumeka.

[31] Lumeka was however not deterred by the apparent huge costs which were still to be taxed. I say so, because on the 20 October 2010, it sought to revive its claim which was automatically dismissed as per the order of Classen J on 6 October 2010. It was automatically dismissed because Lumeka failed to meet the deadline to amend its particulars of claim to which an exception was upheld. Lumeka gave its intention to amend the particulars of claim only on 20 October 2010. The notice was objected to, as according to the defendants, the proposed amendment would still make the particulars of claim objectionable. Notice of objection was served on Lumeka on the 9 November 2010. In terms of Rule 28(5) it was supposed to respond thereto by 23 November 2010. However, Lumeka did not. It took its time. As a result, on 30 May 2011 Warrior Coal delivered an application to declare Lumeka's claim automatically dismissed as per the order of Classen J. It became necessary to have certainty regarding the status of Lumeka's claim seen in the light of Lumeka's attempt to amend its particulars of claim.

[32] The latter application by Warrior Coal was of course opposed by Lumeka. At the same time, Lumeka gave notice in terms of Rule 28 seeking to amend its particulars of claim. That was construed as irregular step by Warrior Coal. Rule 30 notice was as a result delivered. There was no response to Warrior Coal's notice in terms of Rule 30. On the 20 September 2011 an order was granted in terms of which Lumeka's claim was finally declared to have been dismissed or struck out. That again came at huge costs. For example, Warrior Coal's costs were taxed at R15 216.21 in respect of Rule 30 notice and R208 412.77 in respect of declaratory proceedings.

[33] One would have thought Lumeka would give up. But, that was not to be. On the 15 December 2011 it launched appeal proceedings against the dismissal of its claim. The leave to appeal was set down on 15 April 2013, but Lumeka failed to pitch up for court and as a result its application for leave to appeal was dismissed by default. One wonders why Lumeka noted an appeal in the first place. Probably it wanted to avert payment of taxed costs. The application for leave to appeal did not fail without costs. The taxed costs came up to R47 139.89. By that time, the previous costs taxed in the amount of R15 216.21 and R208 412.77 still remained unpaid despite demands.

[34] Two years after the last attempt by Lumeka to salvage itself, the present main application was instituted against Optimum, Warrior Coal, Monkoe and CKP. The last action by Lumeka was on the 15 December 2011 when it delivered an application for leave to appeal against the dismissal of its claim. The current action proceedings were instituted on 14 January 2014, more than two years after the 15 December 2011. It is also worth noting that the application for leave to appeal having been noted on the 11 December 2011 more than a year passed before the application could be enrolled for hearing. It was only enrolled on the 15 April 2013 and by Warrior Coal. Lumeka gave no explanation for all the delays. The current action proceedings remain objectionable. I deal later in brief with the exception noted by Optimum. It suffices to mention that the same commercial transactions/agreements as in the previous proceedings remain to be the basis for Lumeka's cause of action in the present proceedings.

[35] The main relief sought is quoted in paragraph [26] of this judgment. The question that comes to one's mind is when did Lumeka's cause of action arise? It wants damages from the defendants. When did the intended amount of damages become due and payable? The dispute with regards to the commercial transactions arose as early as

April 2007 when the suspensive conditions were not fulfilled. In November 2007 Lumeka attempted to enforce the transactions and when it failed, it tried again in February 2010 when it sought damages in the amount of over 5 billion rand. The current action is a complete u-turn to the 5 billion rand that was originally claimed. In its second claim, it seeks an order in terms of which certain information and or documents should be provided. The information and or documents so required are mentioned in paragraph 26 of this judgment.

[36] Counsel for Lumeka suggested that the relief sought as quoted in paragraph [26] above was meant to enable Lumeka to quantify its damages. On the other hand, the relief sought as quoted in paragraph [25] as I see it, is to justify Lumeka's *locus standi*. The effect of the current litigation if it was to be in favour of Lumeka, would mean that at a later stage, Lumeka would institute another action proceedings in terms of which a claim for damages is made. This would drag the defendants into another protracted litigation. The possibility of prescription in whatever claim or some of the claims Lumeka might have against the defendants, is not inconsequential to the relief which is been sought by Warrior Coal and Monkoe. Put this way, the alleged breach or breaches which are alleged in the present particulars of claim, were known to Lumeka as far back as April 2007. Whatever damages Lumeka might want to claim from the defendants, would still be the basis for Lumeka alleged cause of action. Therefore, the cause of action based on the alleged breaches would have arisen from the date of the breaches or from the date Lumeka became aware thereof. Legal proceedings which were launched in November 2007 and February 2010 referred to earlier in paragraphs 3 and 5 respectively attest to such knowledge. The defendants would therefore be entitled to raise a defence of prescription and the intended action by Lumeka would have no practical effect.

[37] Having regard to all of the above, I am satisfied that the relief sought by Warrior Coal and Monkoe with regards to vexatious litigations is justified. One is mindful of not denying Lumeka's constitutional right to litigate in the present case. Limitation of such right in the circumstances of the case cannot be said to be unconstitutional. In any event, the order as proposed and quoted earlier in paragraph [27] of this judgment, in my view, is conscious of Lumeka's constitutional rights. It is not a total bar from the courts, but, instead the exercise of such a right would be under judicial oversight. I now turn to deal with the second application.

SECURITY FOR COSTS

[38] The application for security for costs is supported by both Warrior Coal and Optimum. I do not find it necessary to say much about the application for security for costs. Much has already been said in this judgment. The following are taxed costs which remain unpaid:

37.1 R15 216.21 being in respect of irregular proceedings in terms of Rule 30;

37.2 R208 412.77 being in respect of declaratory order regarding the striking out of Lumeka's claim;

37.3 R47 139.89 being in respect of the application for leave to appeal against the striking out of Lumeka's claim.

[39] Counsel for Lumeka argued that the amount was not paid as Warrior Coal failed to furnish a breakdown of the costs. Of course this cannot be correct. On the 28 March 2014, Lumeka's attorneys were provided with reconciliation of all outstanding costs. On the 3 April 2014, Lumeka's attorneys requested yet more details on the outstanding costs, claiming that the costs provided were exorbitant. That was despite the fact that those costs were taxed. The outstanding amount as on the 28 March 2014 was indicated as R336 143.44. The amount included interest.

[40] Lumeka sought to question the right to claim security for costs. For example, in paragraphs 29 and 30 of its heads of argument, is argued as follows:

"29. Plaintiff / Respondent is an incola company. Previously under the old Companies Act No. 61 of 1973 (the old "Act") security for costs for incola companies was governed by section 13 of the old Act. The new Companies Act No. 71 of 2008 does not contain a similar clause to section 13 of the old Act.

> 30. *In the absence of a provision similar to section 13 of the old Companies Act in the new Companies Act, an applicant in an application for security for costs must found its entitlement to security for costs in the principle of common law. The matter is therefore governed by common law."*

[41] The Warrior Coal and Monkoe are of course relying on their common law rights. I do not see such a right as being curbed by the provision of section 34 of the Constitution referred to earlier in paragraph [24] of this judgment. Fairness to all the parties should be a guiding factor. It cannot be fair to bombard an opponent with litigations and fail to pay costs when such costs are granted and taxed. Lumeka in the present case and throughout the previous proceedings had shown a tendency to be reluctant to pay costs. It still owes costs in the amount of over R300 000. Warrior Coal and Monkoe' rights in common law should therefore prevail. Even if I was to be wrong with regard to vexatious proceedings, the current action proceedings were destined to be stayed pending payment of the outstanding taxed costs and secondly pending furnishing of security for costs. I now turn to deal with the last application.

EXCEPTION

[42] Optimum vigorously pursued the exception in the present interlocutory proceedings. As I said earlier, my findings for Warrior Coal and Monkoe with regard to the vexatious proceedings and or security for costs application, make it unnecessary to deal with the exception. But, because of the history of this matter, I find it necessary to do so for whatever is worth.

[43] Dealing with the exception, was a very tedious process. One had to dissect the particulars of claim against ten grounds of exception which consisted of about 18 pages. It is not my intention to get into the details of any of these grounds. It suffices to mention that the particulars of claim are said to be vague and embarrassing and that they disclose no cause of action. For example:

43.1 Lumeka in paragraph 5 of the particulars of claim alleges an oral agreement concluded during November 2006. Optimum, Warrior Coal and Monkoe are cited as the parties to the agreement, including Lumeka. It is stated that the parties agreed on a shareholding. It is averred that in terms of the alleged oral shareholding agreement, Optimum would be used to acquire mine complex referred to as Optimum Coal Mine Complex. That Lumeka will acquire the entire shareholding in Crimson King Property 303 (Pty) Ltd (CKP), being the fourth defendant. That CKP will acquire 30% of the shares in Optimum and that the agreement was subject to the suspensive conditions that Optimum Acquisition Memorandum of understanding was to be concluded and become unconditional in accordance with the terms within 120 days. The difficulty with these averments is that the parties to the alleged oral agreement are cited in paragraphs 5.2 to 5.5 of the particulars of claim as Lumeka, Optimum, Warrior Coal and Monkoe. CKP is one of the parties. Yet in the particulars of claim, is alleged that CKP was to acquire 30% of the shares in Optimum. This renders the particulars of claim vague and embarrassing and disclosing no cause of action insofar as Lumeka might want to suggest that it has acquired shares in Optimum as it is allegedly owning all shares in CKP. It is also not alleged in the particulars of claim that suspensive conditions referred to in paragraph 5.7.5 of the particulars of claim had been fulfilled and or that all the parties to the alleged oral agreement failed to use 'all commercially reasonable endeavors' to procure the fulfillment of the suspensive conditions as so required in terms of clause 5.7.6. All of these must be found to be vague and embarrassing and disclosing no cause of action.

43.2 Lumeka also seeks to rely on an agreement concluded on the 19 November 2006. The agreement is referred to in the particulars of claim as "THE LIBERTY LANE SHAREHOLDER'S AGREEMENT". In paragraphs 6.2 to 6.5 Optimum, Lumeka, Monkoe and CKP are cited as being parties to the said shareholder's agreement. Lumeka is not a party to the agreement. The terms and conditions of the agreement are briefly set out in the particulars of claim as follows:

43.2.1 Optimum would be used to acquire Optimum Coal Mine Complex from BHP Billiton Energy Coal SA (Pty) Ltd (BBECSA), previously known as Ingwe (Pty) Ltd;

43.2.2 Warrior Coal would acquire the entire shareholding in Optimum (then Liberty Lane);

43.2.3 Optimum shares would be distributed as follows:
-30 % to Warrior Coal
-30% to CKP, and
-40% to Monkoe.

43.2.4 The implementation of the agreement would be subject to the suspensive conditions that Optimum acquisition memorandum of understanding, is concluded and become unconditional in accordance with its levies within 120 days from the signature date. The signature date is the 19 November 2006;

43.2.5 The parties to the agreement would use all commercial reasonable endeavours to procure the fulfillment of the suspensive conditions stipulated in clause 3.1 thereof within 120 days from the date of signature of the agreement.

43.2.6 Lumeka having set out what is said are the terms of the agreement, then in paragraphs 6.6.6 to 6.6.8 of the particulars of claim makes averments as follows:

"6.6.6 On the 13th February 2007 BHP Billton wrote a letter to the first defendant (then still Liberty Lane (Pty) Ltd), and confirmed that the confidentiality agreement signed with Liberty Lane remained in full force and effect.

6.6.7 On the same letter BHP Billton further advised that the first defendant in writing that it had agreed and irrevocably and unconditionally undertakes to continue negotiations and discussions with Liberty Lane and not to enter into discussions and or negotiations with and or to treat with any other than Liberty Lane in respect of or in connection with the possible disposal by BECSA of the Business, for a period commencing on the date of the letter *and terminating by not later than the 30th March 2007 or such later date as the parties agreed in writing. The defendants accepted these conditions and continued negotiations accordingly.*

6.6.8 The tacit/alternatively expressed conduct of the parties amended the original 120 days envisaged by the suspensive condition in the Liberty Lane Shareholder's Agreement entered into on the 19 November 2006 which was envisaged as alleged in par 6.6.4 above".

[44] Now, as I said, the agreement makes no reference to Lumeka as a party. Therefore, inasmuch as Lumeka wishes to rely on the agreement to which it was not a party and without averring more, it must be found that it discloses no case of action. At one stage during argument, counsel for Lumeka suggested that Lumeka was a party to Optimum Shareholding's agreement. In making the submission he wanted to rely on what is pleaded in paragraph 6.6.8 of the particulars of claim and that the word "parties" therein should be seen to include Lumeka. But of course this cannot be correct. Paragraph 6.6.8 of the particulars of claim must read in the context of what is pleaded in paragraph 6.6.7 as quoted above. Clearly, 'the defendants' as having 'accepted the conditions and continued negotiations accordingly' as referred to in the last sentence under paragraph 6.6.7 are "the parties" referred to in paragraph 6.6.8 and those are the defendants. This, in my view, is the extent of the vagueness and embarrassment in Lumeka's particulars of claim.

[45] The other agreement which is pleaded is what is referred to in the particulars of claim as "THE CKP SHAREHOLDER'S AGREEMENT". It was concluded on the 11 January 2007. The parties to the agreement are cited as Lumeka, CKP and Mobu Resources (PTY) Ltd. The defendants, that is, Optimum, Warrior Coal and Monkoe are not parties to the agreement. The only reference to Optimum is 'the first defendant' and 'All defendants' pleaded in paragraphs 7.5.5 and 7.5.6 of the particulars of claim as follows:

"7.5.5 By virtue of its shares in CKP, Plaintiff was entitled to acquire a direct or indirect shareholding in the First Defendant.

7.5.6 All the defendants, by virtue of their responsibility in representing all the members of the consortium had a corresponding duty to ensure that Plaintiff acquired the said shareholding as agreed".

[46] The basis for Lumeka, to be entitled to institute all previous litigations and the present litigation appears to be founded in what is averred in paragraphs 7.5.1 to 7.5.3 of the particulars of claim. They read as follows:

"7.5.1. It was recorded that the plaintiff had acquired the entire shareholding of CKP,

7.5.2 The shares held by the plaintiff in CKP would be distributed amongst the plaintiff (90%) and Mobu Resources (PTY) Ltd (10%).

7.5.3 The implementation of the agreement would be subject to the suspensive condition that the Optimum acquisition memorandum of understanding be concluded and becomes unconditional in accordance with its terms within 120 days from the signature date".

[47] However, the fulfillment of the suspensive conditions is not pleaded at all or is not sufficiently pleaded. 'All the defendants;' and reference to Optimum without being parties to the agreement, in my view, establishes no cause of action against them. The particulars of claim as pleaded should be found to be vague and embarrassing. Therefore, even if I was to be wrong with regard to the vexatious proceedings and security for costs proceedings, I would uphold the exception.

PUNITIVE COSTS ORDER

[48] On behalf of Warrior Coal, it was argued that regardless of the outcome of these proceedings, this court should award costs *de bonis propriis* against Lumeka's attorneys, Madlanga and Partners Inc as a mark of displeasure at Mr Madlanga's conduct in these proceedings. The submission was based on the following set of facts:

48.1 On or about 25 March 2014, Mr Madlanga is alleged to have told Warrior Coal and Monkoe's attorneys that there was R500 000 held in the trust account on behalf of Lumeka;

48.2 As a result, writ of execution was issued for the attachment of portion of the said money in trust to defray outstanding taxed costs;

48.3 On the 7 April 2014 the Sheriff attended at Lumeka's attorneys office to serve the writs. He was allegedly told by Mr Madlanga that Lumeka was unknown and that Madlanga and Partners Inc, did not represent Lumeka. The averment was based on the sheriff's return of service. Three days thereafter, Lumeka's attorneys addressed a letter to Warrior Coal's attorneys. They complained that the writs ought not to have been issued. Based on this, it was argued that it was clear that attorneys Madlanga and Partners were acting on behalf of Lumeka. The denial of Lumeka was branded as 'patently false' and Lumeka's attorneys were called upon to explain. The deponent to Lumeka's answering affidavit noted the allegations made against Madlanga and Partners without admitting the averments thereof. Mr Madlanaga filed a confirmatory affidavit to the answering affidavit. In paragraph 3 thereof he states as follows:

> "*3.*
>
> *I have also read the answering affidavit of Sulaiman Lawal and I confirm the contents thereof insofar as they relate to me".*

[49] Counsel for Lumeka argued that before a *de bonis propriis* costs order can be made against Mr Madlanga, the court needs to be satisfied that Mr Madlanga conducted himself in the manner as described in the founding affidavit. The deponent to the founding affidavit relied on the sheriff's return of service which had not been confirmed by the sheriff. Secondly, there is no clear cut admission of the allegations. Mr Madlanga did not deal with the allegations made against him in the founding affidavit. However, paragraph 3 of the confirmatory affidavit should be seen in the context of what is stated in paragraph 35.2 of the answering affidavit wherein is stated as follows:

"35.2 At the meeting of 25 March 2014, my attorney of record, Mr Madlanga further advised me that they made proposals for the security of costs for the instant matter to the amount of R500 000,00 for both Baker McKenzie and Norton Rose Fulbright Attorneys which proposal was vehemently refused by both representatives of these law firms".

I am therefore at pains in awarding costs de bonis propriis against Lumeka's attorneys.

[50] Consequently I make an order as follows:

50.1 The first respondent/plaintiff's ("Lumeka")'s claims brought under case number 75356/2013 are struck out on the basis that they are frivolous and vexatious;

50.2 Lumeka is declared a vexatious litigant;

50.3 Lumeka is ordered to institute no further proceedings against all or any of the defendants cited in case number 75356/2013 (that is, Warrior Coal, Monkoe, Optimum Coal (PTY) Ltd and Crimson King (PTY) Ltd), whether for declaratory relief, damages or any other type of relief, concerning its alleged rights to participate, directly or indirectly, in the Optimum Coal Mine Complex, unless it first obtains the leave of this Honourable Court to do so;

50.4 Lumeka is ordered to pay the costs of the three applications including the costs of two counsel, for both Warrior Coal and Monkoe and Optimum respectively.

M F LEGODI
JUDGE OF THE HIGH COURT

FOR THE RESPONDENT/PLAINTIFF: ADV. D B NTSEBEZA SC
ADV. S X MAPOMA

INSTRUCTED BY: MADLANGA & PARTNERS
C/O NGENO & MTETO ATTORNEYS
425 Standard Bank Chambers
Church Square, PRETORIA
Tel: 012 323 0154
Ref: Mr Tando Ngeno
Tel: 011 447 3720 / 012 323 0154

FOR THE FIRST DEFENDANTS: ADV. C D A LOXTON SC
ADV W T ROWAN

INSTRUCTED BY: NORTON ROSE FULBRIGHT SA
C/O FRIEDLAND HART SOLOMON
& NICOLSON
Suite 301, Block 4
79 Steenbok Avenue,
Monument Park
PRETORIA,
REF: Mr Painter/lm319834
TEL: 012 424 0200

FOR THE 2ND, 3RD & 4TH DEFENDANTS: ADV BHANA SC

INSTRUCTED BY: BAKER & McKENZIE
C/O ADAMS & ADAMS
Adams & Adams Place
Lynwood Bridge,
Lynwood Manor, PRETORIA
REF: GWW/aj/LT1573
TEL: 012 432 6000

Matter heard on: 10 February 2015
Judgement handed down: 6 March 2015