

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: A49/2013

In the matter between:-

HENNIE LAMBRECHTS ARCHITECTS

Appellant

and

BOMBENERO INVESTMENTS (PTY) LTD

Respondent

CORAM:

MOCUMIE, J *et* MOLOI, J *et* LEKALE, J

HEARD ON:

25 NOVEMBER 2013

DELIVERED ON:

20 FEBRUARY 2014

JUDGMENT

MOCUMIE, J

- [1] This is an appeal against the dismissal of the appellant's application that the respondent, a private *incola* company registered in terms of South African laws be ordered to furnish security as provided for in terms of Rule 47(1) of the Rules of Practice. The appeal is with leave of the Court *a quo*.
- [2] The grounds are lengthy but set out in the Notice of Appeal, the essence of which is covered under paragraph 1 as follows:

“1. That the court a quo erred in following the reasoning in *Ngwenda Gold (Pty) Ltd v Precious Prospect Trading 80 (Pty) Ltd* 2011 ZAGPJHC 217 (unreported) in finding that the absence of an equivalent to section 13 suggests that the legislature placed greater emphasis on the entitlement of even impecunious or insolvent corporate entities to recover what is due to them in courts without the obstacle of having to provide security in advance for costs of the litigation. The court a quo failed to consider and find that the legislature is presumed to have knowledge of the case law and was satisfied that the requirements developed and applied by courts for consideration whether a company or close corporation must set security, notwithstanding the provisions of s13 of the old Companies Act (no 61 of 1973), rendered it unnecessary to contain an equivalent to s13 in the New Act (no 71 of 2008) ...”

- [3] The appeal concerns the question whether the High Court is empowered to order an *incola* company to furnish security, and if so, on what grounds. Conversely, the right of the defendant litigant to apply to court for such an order.
- [4] The respondent, the plaintiff in the main action, issued summons against the appellant, as defendant, for payment of certain amounts for damages allegedly suffered by the plaintiff due to the appellant's alleged breach of an agreement between the parties. The appellant filed a plea and a counter claim for payment of amounts allegedly due in terms of the agreement. Pursuant to the respondent's action being instituted the appellant requested the respondent to furnish security for its costs on the basis that

- (a) the respondent did not own immovable property and or tangible assets capable of attachment which rendered it impecunious;
- (b) the respondent did not disclose its financial statements as the appellant requested; and
- (c) it did not indicate whether any funds had been set aside for the prosecution of the action.

Consequently, so the applicant submitted, in the event that it succeeded with its defence and have the claim against it dismissed with costs it would be unable to execute against the respondent to recover its costs.

- [5] The applicant failed and or refused to tender such security. In its answering affidavit the respondent disputed that it would be unable to pay the costs. It alleged that it owned two Iveco trucks worth R1.4 million each and it had sufficient funds to pay the costs if the appellant was successful. It maintained that it was not in the interest of justice that it disclosed its financial statements to the appellant as requested. The appellant filed a Notice in terms of Rule 47(1) of the Superior Courts Practice. The respondent persisted in its refusal and or failure. The appellant then applied to this Court for an order compelling the respondent to comply with its request under case no: 3032/2012 in the amount of R150 000, 00; alternatively such amount as the Registrar of this Court may determine and that all proceedings under the main action be stayed pending the respondent providing such security to the satisfaction of the Registrar together with an order that the respondent pay the costs of the application. The Court *a quo*

dismissed the application. It is that decision that is appealed against.

- [6] Section 13 of the Companies Act 61 of 1973 (“the old Companies Act”) provided:

“Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.”

There is no similar provision under the Companies Act 71 of 2008 (“the new Companies Act.”)

- [7] The fact that the new Companies Act does not have a similar provision as s13 of the old Companies Act has raised a lot of debate and drawn divergent views. Section 13 conferred discretion upon courts to order the payment of security for costs by a plaintiff company if there was reason to believe that the company would be unable to pay the costs of its opponent. It is a long standing provision in our law, and indeed, mirrors provisions in other countries. The provision constitutes an exception to the ordinary common law rule that plaintiffs who reside in South Africa may institute actions in our courts without furnishing security for costs. As has been stated there are exceptions to this common law rule, i.e. actions by insolvents, vexatious actions and cases where a plaintiff is a man of straw who litigates in a nominal

capacity. See Erasmus, Superior Court Practice. Although there is a general acceptance by courts that the principles of common law prevail in applications of this nature, to date we have at least four categories of judgments from which divergent views can be discerned.

[8] The First Category: **Haitas and Others v Port Wild Props 12 (Pty) Ltd** and subsequent cases which followed it. In **Haitas** the Court stated the following:

- (a) The omission in the Companies Act of a similar provision such as s13 of the old Companies Act is for the common law to prevail. That is to say, an impecunious or even an insolvent company or other corporate entity which is an *incola* of South Africa cannot be required to give security for costs for proceedings instituted by it.
- (b) The mere fact that an *incola* plaintiff is insolvent does not justify that such a plaintiff should be ordered to furnish security for costs.
- (c) Since allowing impecunious or insolvent plaintiffs to indulge in risk free litigation would encourage unnecessary or vexatious lawsuits, the courts, should, in cases in which the interests of justice demand it invoke their inherent power to protect and regulate their own process by ordering the furnishing of security.
- (d) In **Western Assurance Co v Caldwell's Trustees** the court reasoned that the basis upon which security for costs may be demanded from an insolvent *incola* plaintiff vests in the court's inherent power to regulate its process which power must be executed sparingly.

- (e) In regulating their own process, courts should guard against vexatious, reckless and unmeritorious litigation bearing in mind the right of every litigant to have any dispute settled in a court of law.
- (f) Each case must be decided on its own peculiar facts. When such peculiar facts scream for the furnishing of security, the Court should not hesitate to order such a party to file security for costs if the interests of justice demand of the *incola* insolvent to furnish security for costs in terms of Rule 47.

[9] The 2nd Category: **Ngwenda** and subsequent cases that followed it. In **Ngwenda** which was followed by the Court *a quo*, the Court held that:

- (a) The absence of an equivalent to s13 suggests that the legislature placed greater emphasis on the entitlement of even impecunious or insolvent corporate entities to recover what is due to them in courts without the obstacle of having to provide security in advance for the costs of the litigation.
- (b) Although courts have a duty to protect themselves against vexatious litigation, this does not mean that the impecunious corporate litigant should be denied redress simply because they lack the means to provide security for their opponents' costs
- (c) As was held in **Ramsamy NO v Maarman NO and Another** as a general rule the mere inability of a plaintiff or applicant as the case may be who is an *incola* to satisfy a potential costs order against him or her is insufficient in itself to justify an order that (s)he furnish security for his or her opponent's

costs. Something more than this is required before this can be done.

- (d) As was held further in in **Ramsamy** the fact that there were poor prospects of recovering any substantial costs from the respondents the latter could only be ordered to furnish security for costs only if the court was satisfied that the respondents' main application was (i) vexatious or (ii) reckless or (iii) amounted to an abuse of the process of the court.
- (e) The litigation is considered to be vexatious only if it is obviously unsustainable.

[10] The 3rd Category: **Siemens Telecommunications (Pty) Ltd v Datagenics (Pty) Ltd** and subsequent cases which followed it. In **Siemens**, the Court *a quo* stated:

- (a) The old Companies Act provided the court with discretion to order a plaintiff company to furnish security for costs if there was reason to believe that the company would be unable to pay the defendant's costs. Since the new Companies Act made no provision for security for costs by companies the common law still applied.
- (b) Rule 47 did not create any right for an applicant for security for costs. It was solely and purely procedural in kind, providing only for the procedure to be adopted if a party was entitled to security for costs.
- (c) The High court's inherent power under s173 of the Constitution to regulate its own process did not include the power to extend the common law grounds on which security for costs could be granted. It did not enable a court, 'under

the mantle of regulating its own process', to impair the existing substantive rights of a litigant.

[11] In **Maigret (Pty) Ltd (In Liquidation) v Command Holdings Ltd and Another** the Court stated:

- (a) Under the old Companies Act 61 of 1973 applicants for security for costs had a fairly low hurdle to cross to persuade a court to grant security.
- (b) Drafters of the new Companies Act expressly omitted a corresponding provision to s13 of the old Companies Act with the result that corporate plaintiffs were now treated in the same way as any other.
- (c) The preferred approach was the one adopted by Thring J in **Ramsamy**.
- (d) The court had discretion, but such discretion only fell to be exercised when a party had set up facts to bring it within the ambit of the approach suggested in **Ramsamy**.
- (e) An applicant may not rely exclusively on the insolvency of a company.

[12] The emerging 4th Category: **Genesis On Fairmount Joint Venture v KNS Construction (Pty) Ltd and Others**. The Court, in **Genesis**, relied on **MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd** which dealt with the interpretation of s13 of the old Companies Act, to come to the conclusion that:

- (a) Applications of this nature can be dealt with at common law.
- (b) The judgment of the Supreme Court of Appeal **MTN Service Provider** above whilst dealing with an application in terms of

s13 of the old Act was significant with regards to what the court had to say regarding the common law and its purpose.

- (c) The common law relates to insolvent natural persons who are *incola*. In such instances security will only be ordered in exceptional circumstances.
- (d) Whilst it is understandable at common law why there would be a reluctance to slam the door of justice in the face of a poor litigant, there is no reason why the common law should be confined to preventing corporate litigants from litigating only in vexatious and or reckless and or frivolous circumstances.
- (e) There is no reason why the common law principles against slamming the doors of justice against a widow and orphans should extend to purely commercial matters.
- (f) There was no reason why companies should be ordered to furnish security only in exceptional circumstances.
- (g) With reference to **National Coalition For Gay and Lesbian Equality and Others v the Minister of Home Affairs and Others**, a court had a judicial discretion which must be appropriately exercised having regard to all the facts and circumstances.

[13] Mr Snellenburg urged this Court to follow **Genesis**, which followed **MTN Service Provider** to hold that the appellant was not confined to the exceptions set down in **Ramsamy** to seek security from a respondent.

[14] He submitted that in its exercise of the discretion it was bestowed with under s173 of the Constitution, the court exercising such

discretion was also bound to take into account other factors such as the financial inability of the respondent to comply with an order to pay the appellant costs should it prove to be unsuccessful and other relevant considerations as the court did in **Fitchet v Fitchet** where it stated:

“In applications for security for costs, the test should be somewhat different. Where, in an application for dismissal of an action, the Court without hearing evidence on the merits will require moral certainty alone that the action is unsustainable, in an application for costs the merits test should be less stringent, and other factors, which are irrelevant in a dismissal application, should be taken into account.”
(Own emphasis.)

- [15] He submitted further that the exceptions set out in **Ramsamy** and applied in subsequent cases were inadequate for modern day companies. The common law should be developed because it was out-dated and not in line with the commercial realities of present day; that there was no justification to continue on the same grounds regardless of the developments which have occurred and have been incorporated in the new Companies Act.
- [16] Mr van der Merwe submitted that the court in *Siemens* reaffirmed the position under common law. He submitted further that even if this Court did not share the view as expressed in *Siemens* and found that there were other considerations a court should take into account in its exercise of its discretion and that this case was not such case. He contended that even if the Court shared the views expressed in **Haitas** that when a peculiar set of facts screamed for the furnishing of security courts should not hesitate to order such a

party to furnish security, the appellant did not make a case out that the respondent embarked on a vexatious, reckless and unmeritorious litigation as was the case in Haitas. The only averment regarding vexatiousness was that the respondent being impecunious was vexatious. Furthermore the appellant relied solely on the fact that the respondent was insolvent, which courts have stated was not enough. The appellant did not show 'something more' than the mere inability of the respondent to satisfy a potential cost order. Even if the old Companies Act was not repealed, the respondent would not have been ordered to furnish security.

- [17] Applying the Ngwenda decision the court *a quo* came to following conclusion at para 23 of the judgment:

“[23] The main emphasis is on the inability to pay costs and there is no substantial indication that the respondent’s litigation is either vexatious, reckless or amounts to the abuse of process of this court. There is thus nothing more, other than the respondent’s solvency.”

- [18] In its application in terms of Rule 47(1) the applicant contended that the respondent had demonstrated that it was not in a position to pay costs in the event the applicant succeeded in its defence or counterclaim. It had failed to provide a balance sheet; it stated on its affidavit that the R150 000, 00 security would disturb its cash flow; it relied for its funds on a contract which was due to expire long before the main case had been finalised; it failed to provide the valuation certificates of the trucks, or for that matter, proof of

ownership of the trucks. In its Answering Affidavit, the respondent alleged that it owned the two Iveco trucks carrying a value of R1, 400,000.00 each and the two trucks were unencumbered. It alleged that it was not bound to disclose its financial statements to the appellant but maintained that it had sufficient funds to cover the costs of the appellant's counterclaim if successful.

- [19] The appellant's case was that the respondent's financial inability coupled with its lack of bona fides by inter alia refusing to provide its financial statements or proving ownership of the two trucks it alleged it owned, and giving conflicting explanations on whether it had sufficient funds or not made a strong case against it that it would not pay costs if any award was made in favour of the applicant. Moreover, when consideration is given to the respondent's case as opposed to the appellant's counter claim the circumstances were such that the respondent had no prospects of success and thus causing the applicant unnecessary and irrecoverable legal expense. The peculiar circumstances of this case were such that the appellant had proved that the respondent was not only impecunious but also vexatious albeit not as is commonly understood. As the court *a quo* itself remarked obiter at para 27:

“... [T]his is a typical part of the law where one cannot have “one size fit[s] all” approach, each case must be dealt [with] on its own merits and circumstances, emphasis being on legitimate litigations as well as the interest of justice...”

[20] The respondent's case was not that in the event that security was ordered it would not be able to prosecute its claim. Initially its defence was that it had sufficient funds, but if it gave security its cash flow will be adversely affected. However, in its replying affidavit when pressed to explain where it will get such funding it changed or expanded on its defence. It maintained that it had sufficient funds to cover the costs without disclosing where such funds would come from or whether it had approached other investors to fund it in the event that it could not pay the costs.

[21] The purpose of s13 was to protect 'persons against liability for costs in regard to any action instituted by bankrupt companies.' As the Constitutional Court stated at para 7:

"The salutary effect of ordinary rule of costs –that unsuccessful litigants must pay the costs of their opponent-is to deter would be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects of success are poor. Where a limited liability company will be unable to pay its debts, that salutary effect may well be attenuated. Thus the main purpose of s13 is to ensure that companies, who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense." (Own underlining)

[22] The Constitutional Court continued on paragraph 8 that:

"The Courts have accordingly recognised that in applying s13, they need to balance the potential injustice to the plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to

pay security for costs, on the one hand, against the potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its own costs in the litigation. To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An applicant 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 prospects of success. Equipped with this information, a court will need to balance the interests of the plaintiff in pursuing the litigation against the risk to the defendant of an unrealizable costs order.”

- [23] Although not referring to **Giddey** and the paragraphs highlighted the Court in Genesis echoed the same sentiments that the purpose of common law was to protect poor litigants, widows and orphans, from being prevented from accessing courts before they paid security.

- [24] As the Supreme Court of Appeal in **MTN Service Provider** stated the common law related to insolvent natural persons who were *incolae*. In such instances security was ordered only in exceptional circumstances. Thus it was understandable at common law why there was a reluctance to slam the door of justice in the face of a poor litigant.

- [25] With regard to whether s13 infringed s34 of the Constitution, this question was recently raised in **Fourways Precinct (Pty) Ltd v Signal Capital and Securities (Pty) Ltd In Re Signal Capital and Securities v Fourways Precinct (Pty) Ltd** and effectively

answered in the negative with the court, in effect, holding that it did not per se lead to the doors of the court being closed when the respondent was ordered to furnish security. The Constitutional Court in **Giddey** effectively found that the discretion conferred on the courts by s13 was compatible with the Constitution in so far as it expressed the view that a reading of that section against the Constitution did not exclude such discretion where an order for security for costs would have the effect of terminating litigation. The Constitutional court further highlighted the impact of the provisions of s34 of the Constitution on such discretion by pointing out that, in the exercise of the discretion in question, the courts are obliged to have regard to s34 and to weigh its provisions in the light of other factors put before them. I agree with this judgment.

- [26] Having said so, considering the judgment of the Court *a quo* it is clear that it did not take into consideration the principles laid down under the previous s13 as set out in cases referred to above. Neither did it properly and adequately take into account the nature of the claim, the financial position of the respondent company at the stage of the application for security and the probable financial position if it should lose the action. The Court *a quo* made no reference nor did it attach any weight to the respondent's lack of bona fides in the application for security. Importantly the respondent company did not establish that the order for costs might well result in it being unable to pursue the litigation. Neither did it indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospects of success.

[27] The main thrust of Mr Snellenburg's argument was from the onset that the common law was simply inadequate and not aligned to the demands of the modern commercial world. It was appropriate for this Court, having considered the development of the jurisprudence under the old Companies Act to develop the common law. The issue was never raised in the cases referred to in the above paragraphs with reference to the new Companies Act.

[28] I am in agreement with Mr Snellenburg that in the light of the circumstances of this case and so many divergent decisions, this is a typical case that the common law should be developed beyond existing precedent as the Constitutional Court has stressed in similar circumstances. In Carmichele the Constitutional Court stated at para 39:

"It needs to be stressed that the obligation of Courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives; the Courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.

[29] The Constitutional Court went on to state at para 40:

“In such a situation there are two stages to the inquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of s 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives.”

- [30] In developing the common law in this case I take cognizance of the following cautionary words of the Constitutional Court in **Carmichele**:

“It is necessary to be mindful...‘of the fact that the major engine for law reform should be the Legislature not the Judiciary’. In the same breath in which it issued this ...it drew attention to the imperative need for the common law to be consonant with a completely new and different set of legal norms.’ It therefore urged that courts should remain vigilant and not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights.”

The Supreme Court of Appeal recently reiterated this principle in **Lee v Minister for Correctional Services** with reference to **Carmichele**.

- [31] The purpose of s13 of the old Companies Act as set out above was to protect

“persons against liability for costs in regard to any action instituted by bankrupt companies and to ensure that companies, who are unlikely to

be able to pay costs and therefore not effectively be at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense.”

- [32] South Africa like the rest of the world has evolved commercially to the extent that the Companies Act had to be amended in its entirety to deal with inter alia new entities and issues such as mergers of companies and international companies existing in their own right in the Republic of South Africa. All these phenomena were previously unknown to South African law, but have now become part thereof.
- [33] Corporate companies comprise of natural persons, directors who, when sued can hide behind the corporate veil and not furnish security well knowing that the company they run is actually or commercially insolvent and will not afford the costs of an award in favour of the respondent. It cannot be ‘just or equitable’ to equate companies to what the Supreme Court of Appeal referred to as ‘widows and orphans’. More so where there have been instances where even such ‘widows and orphans’ were ordered to furnish security depending on the circumstances of the particular case.
- [34] A finding, as a general rule, that an *incola* company regardless of the peculiar facts which scream for the furnishing of security is not bound to provide security would be incongruent with the spirit, purport and objects of a Constitution designed to ensure equality of all before the law. Such a finding would mean that a party, who

would be gravely prejudiced by another's refusal to furnish security because of the unfortunate absence of the equivalent of s13, would be without remedy and, thus, left to suffer considerable financial consequences of such an absence which eventuality would, in turn, offend against the principles of equality and of 'just and equitable decisions'.

[35] The approach in an application in terms of Rule 47 should be that in the case of an *incola* company, unlike a natural person, the respondent should put all the evidence which will convince the court that it has sufficient funds to pay costs in the event costs are granted against it. Courts should insist on more details and not say so of the *incola* company. As a precautionary measure to protect its own process and to protect the rights of the other party, make such order of security as is reasonable in the particular set of facts. This approach is evidenced by s158 (a) of the new Companies Act which compels a court to 'develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act.'

[36] What also makes a strong case for the development of the common law in this case is that the courts have always had the discretion, depending on the circumstances of each case and in line with the grounds set out in s13 of the old Companies Act and those pronounced upon by courts as illustrated above, to determine whether to order the respondent to furnish security.

[37] In conclusion, it would have been advisable, for the sake of clarity, if the legislature had retained s13 in the new Companies Act. In

the result the appeal should succeed and the following order is granted:

ORDER

1. The order of the Court *a quo* is set aside and replaced with the following:
 - “1. The respondent (the plaintiff in the main action) is ordered to furnish security for the applicant’s (the defendant in the main action) costs of the main action in an amount to be fixed by the Registrar of this Court, such security to be furnished 10 days from the date on which security is fixed.**
 - 2. The respondent (the plaintiff in the main action) is ordered to pay the costs of the application.”**
2. The appellant is granted leave to apply, on the same papers that served before the court below duly amplified, for the dismissal of the respondent’s (the plaintiff in the main action) action against it in the event of the respondent (the plaintiff in the main action) failing to comply with the aforesaid order for security.
3. The respondent (the plaintiff in the main action) is ordered to pay the costs of the appeal.

B. C. MOCUMIE,

I concur.

L. J. LEKALE, J

DISSENTING JUDGMENT OF MOLOI, J.

1. I read the judgment of Mocumie J and concurred to by Lekale, J.
I agree with the exposition of the various and conflicting views taken by the Courts in dealing with the issue of security for costs with regard to *incola* companies. I agree that the courts have the inherent power to protect and regulate their own process and to develop the common law in the interests of justice in terms of section 173 of the Constitution and that they (the courts) when developing the common law or customary law must strive to promote the spirit, purpose and objects of the Bill of Rights as required by section 39(2) of the Constitution. See also **Carmichele v Minister of Safety and Security** 2002 (1) SACR 79 (CC) at par 39 especially where the “..the common law as it stands is deficient in promoting the section 39(2) objectives.”
2. The previous section 13 of the Old Companies Act is deliberately omitted by the legislature in the new Companies Act. My belief is that this omission was deliberate and conscious as its inclusion would limit the fundamental right of access to the courts as provided for in Section 34 of the Constitution and would thus be unconstitutional and invalid.

Section 34 of the Constitution simply state that:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

I do not understand the above provision to make exception as to the ability or not of a party to pay security for costs as was possible when Section 13 of the Old Companies Act was operative, but it is not, and consciously so, as the legislature omitted it in the New Companies Act. It's inclusion in the New Act would negate the clear letter and spirit of Section 34 of the Constitution.

3. In the desire to develop the common law it is important to bear in mind that the Constitution, when dealing with an entrenched fundamental right such as section 34 thereof, sets out the requirements to be met in section 36 thereof. Section 36(1) provides as follows:

“The rights in the Bill of Rights may be limited only in terms of a law of general application to, the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including....”

(My emphasis)

In the first place the omission or repeal of section 13 of the Old Companies Act in the New Companies Act leave us with no law of general application in terms of which the right in section 34 of the Constitution would be justifiably and reasonably limited.

Subsection (2) of section 36 of the Constitution provides as follows:

“Except as provided for in sub-section (1) or in any other provision of the constitution, no law may limit any rights entrenched in the Bill of Rights”

(My emphasis)

4. In the light of the above provision I fail to comprehend how the development of the common law may be used to limit the provisions of a constitutionally entrenched fundamental right. I equally do not agree that the constitutionality of section 13 of the Old Companies Act had been settled in **Giddy, NO v JC Barnard and Partners 2007** (5) SA 525 (CC). In that case the respondent argued that any material bar to a litigant’s access to court constituted a limitation of the rights protected by section 34 of the Constitution. The courts per O’Regan J, held at 533 D-E:

“The applicant did not challenge section 13 of the Companies Act on the basis that it constitutes an unjustifiable limitation of section 34. Nor did the applicant argue that section 13 was unconstitutional on the basis that it conferred an inappropriate discretion on the courts. Accordingly, the courts must proceed on the basis that section 13 is constitutional. Section 36 would only arise if section 13 were directly challenged and found to limit a constitutional right. The question that would have to be asked is whether, as a law of general application, section 13 constitutes a reasonable and justifiable limitation of section 34. There is no such challenge in this case.” (My emphasis)

The above does not in the slightest suggest that the constitutionality of section 13 has been determined. In our case

section 13 does not exist at all. The development of the common law to resuscitate the repealed section 13 would not be justifiable nor be reasonable as the court would thereby usurp the powers of the legislature: **Carmichele**. In **S v Matyityi** 2011 (1) SACR 40 (SCA) Ponnann JA put it as follows at p 53.

“Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their power by showing the deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken....Courts are not free to subvert the will of the legislature by...”

To my mind, the effect of developing the common law to give the courts discretion to order payment of security for costs by an *incola* limited liability company would amount to subverting the legislature that consciously and deliberately removed section 13 of the old Companies Act and resuscitate it even without applying the provisions of section 36 of the Constitution.

For the above reasons I dissent from the above judgment and would DISMISS the appeal with costs.

K.J MOLOI, J

On behalf of the appellant:	Adv. N Snellenburg
Instructed by:	Lovius Block
	BLOEMFONTEIN

On behalf of respondent:	Adv. J Els
Instructed by:	Neuhoff Attorneys
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