Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE DIVISION, KIMBERLEY]

CASE NO: 627/2014

In the matter between:

BLUE CHIP SECURITIES LIMITED — PLAINTIFF

And

FERNANDO MANUEL FREIRE GAUPO GARCAO — FIRST DEFENDANT

JOHN EDWARD BROIDO — SECOND DEFENDANT

GIDEON ANDRIES PETRUS KOTZE — THIRD DEFENDANT

Date of hearing: 19 September 2014

Date of judgment: 07 November 2014

JUDGMENT

PHATSHOANE J

1. There are two applications before me which stem from an action instituted on 04 November 2013 by Blue Chip Securities Limited, the plaintiff, against Mr Fernando Manuel Freire Gaupo Garcao, Mr John Edward Broido and Mr Gideon Andries Petrus Kotze, the first to the third defendants. For convenience the parties are referred to as cited in the action.

2. The first application is for summary judgment by the plaintiff against the defendants for the payment of an amount of R150 000 000.00 (One Hundred and Fifty Million Rand)

as set out in Claim 4 of the summons, interest thereon at the legal rate and costs. In the second application, filed on 24 April 2014, the defendants seek security for costs from the plaintiff in the amount of R1 280 000.00 (One Million Two Hundred and Eighty Thousand Rand), alternatively for an amount as the Registrar may determine, and that the action be pended until such time as the security is provided. The plaintiff's answering affidavit in respect of the latter application was filed on 31 July 2014 whereas the defendants replying affidavit thereto followed on 01 September 2014. The parties took no issue with the condonation of the late filing of their respective affidavits. In my view it is in the interest of justice that condonation be granted as there can be no prejudice.

3. The factual milieu pertaining to the two applications conflate to some extent. Blue Chip Securities Ltd is a peregrine company incorporated in terms of the company laws of Ireland with its principal place of business at 21 Prioray Hall, Stillorgan, CO Dublin, Ireland. It was a shareholder of a Swiss Holding Company, New African Mining Limited AG (NAM), presently deregistered, and took cession of claims of its shareholders. Having done so it instituted the trial proceedings against the defendants. NAM was the shareholder of Meepo Investment Consortium (Pty) Ltd, now in liquidation.

4. Around 2007 Mr Paul Ekon, the deponent to the plaintiff's application for summary judgment, Mr Garcao and Mr Broido, the first and second defendants, set up a joint venture to develop mine properties; to mine; and to sell diamonds in the Northern Cape. The vehicle for this joint venture was NAM through which capital would be raised and wholly owned by a South African subsidiary, Meepo (in liquidation). Meepo was an existing entity which had rights in mineral properties.

5. Garcao, Broido and Kotze, the defendants, were the directors of NAM and Meepo while Ekon was the manager and financial advisor to the boards of these companies. The substratum of NAM and Meepo disappeared around April 2010. In 2011 Meepo was placed in liquidation.

SUMMARY JUDGMENT:

6. In terms of Rule 32(4)[1] it is impermissible for the plaintiff to file a replying affidavit to the defendant's answering affidavit. In the defendants' founding affidavit in respect of the application for security for costs, they incorporated by reference their answering affidavit in respect of the application for summary judgment. This necessitated a reply thereto by the plaintiff. It is no longer a contentious issue that the reply to a summary judgment's answering affidavit is not permissible but should only be considered for purposes of the question of security for costs.

7. Five claims are set out in the simple summons. The application for summary judgment concern only Claim 4, the payment of an amount of R150 million. This claim is sketched as follows in the summons:

"Payment of an amount of R150 000 000.00 (one hundred and fifty million rand), for complete loss of shareholder value, such loss arising out of and caused by the wrongful and intentional misappropriation of the NAM shareholders' investment in NAM and/or Meepo and/or following monetary investment/s in NAM, thereafter into Meepo, by NAM shareholders, and/or the consequent liquidation of Meepo, the latter also being the foreseeable consequence of the wrongful and intentional misappropriation, the shareholders having no other remedy and there being no possibility of a double recovery by virtue of NAM deregistration, the defendants owing NAM and/or shareholders of NAM a legal duty of care, and the defendants further having failed to account for the use of the amount invested/claimed, and the defendants further having unlawfully removed assets belonging to Meepo in December 2010 and thereafter having unlawfully also removed the diamond register of Simolotse from the sort house on the Simolotse Mine."

8. Adv Miltz SC, for the plaintiff, argued that the aforementioned claim is for a liquidated amount in money being an investment by NAM shareholders. He contended that the investment is readily capable of speedy and prompt ascertainment or calculation.

[1] Rule 32(4) provides that: "No Evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in sub-rule (2), nor may either party cross-examine any person who gives evidence *viva voce* or on affidavit: provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter".

9. In their answering affidavit the defendants do not challenge the averment that the plaintiff lost R150 million but they deny responsibility or liability. They maintained that the reason for the demise of the companies (Meepo and NAM) stem from excessive payments and commission paid to the plaintiff on Ekon's instructions which landed in his pockets or those of his friends or his associates. They state that apparent from Ekon's errant action is the concerns raised by the investors and claim that they are being used as scapegoats whereas Ekon, as the financial Manager and Mr Russel Chweidan, as the financial director, were sole decision makers that ran these companies into the ground.

10. Adv Snellenburg, for the defendants, argued that this was not a case in which the plaintiff should have resorted to a simple summons in setting out its case or claim. He contended that the cause of action is not for a debt or liquidated amount but for damages proper. In any event, he contended, it is unknown how the loss was quantified.

11. It is settled authority that a claim cannot be regarded as one for a liquidated amount in money unless it is based on an obligation to pay an agreed sum of money or is expressed in such a manner that it is capable of easy and prompt ascertainment or mere calculation. In Neves Builders & Decorators v De la Cour 1985 (1) SA 540 (C) at 544G -545C the Court pronounced as follows:

"If from the defence as disclosed, it appears to the Judge that proof of the claim may be protracted and difficult rather than prompt, then it seems to me that that is a matter which he may take into account in deciding whether or not the claim is liquidated. I accordingly propose to have regard to the defendant's affidavit for this purpose.

Before doing so, however, it is necessary to examine more closely what is meant by prompt ascertainment and by similar expressions which denote the concept of a liquidated claim. The case law is not harmonious. Some of the decided cases have held that a claim is susceptible of prompt ascertainment if it is for an agreed contract price or for an amount which is a matter of arithmetical calculation (see for example the Consolidated Fish Distributors [1966 (4) SA 427 (C)] case and Botha v W Swanson & Co [1968 (2) PH F85 (C)] (both supra) or, in some instances, where proof of the claim would be simple and brief. Ford Brothers v Clayton 1906 TS 205 illustrates the latter test, which has subsequently been described as strict. The case law was reviewed by MURRAY J in Whelan v Oosthuizen 1937 TPD 304 from 310 and again by VAN WINSEN AJ, as he then was, in Lester Investments (Pty) Ltd v Narshi 1951 (2) SA 464 (C) from 470. I do not intend to quote from those judgments at length. They show that the Judge has a discretion to be exercised judicially according to the facts before him. They also show that in general Judges have exercised that discretion in favour of liquidity, at least in cases of set off. Numerous examples are given of claims which have been held to be liquidated, and capable of being set off, despite the fact that proof of such claims was, or was likely to be, "neither free from difficulty nor entirely expeditious" (per VAN WINSEN J in the Lester Investments case). Nevertheless, the judgments recognise that there comes a stage when the difficulty or intricacy or time involved in proving a claim, or a combination of these factors, exceeds even a generous test of prompt ascertainment. Precisely where the line is to be drawn depends in each case on the discretion of the Judge."

12. The plaintiff's claim, in my view, is clearly one for damages due to the alleged loss of an element of patrimony. In Joubert, Law of South Africa (LAWSA) First Reissue Vol 7 at 9 para 10 the following analytical definition of the concept of damage is given:
"Damage is the diminution, as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognised needs of the person involved."

13. It has been held that, provided that damages for theft are for a fixed, certain and definite amount, a claim therefor could properly be termed a liquidated demand. See International Hardware Corporation (Rhod) (Pvt.) Ltd. v. Appleton 1971 (1) SA 404 (R); Colrod Motors (Pty) Ltd v Bhula 1976 (3) SA 836 (W) and the cases there cited. In LAWSA, op cit at 87 para 112, the following is propounded with regard to a claim for damages which are capable of exact mathematical computation:

"The plaintiff must, therefore, be alert to find and produce all the available evidence to substantiate his claim for damages, and to enable an accurate assessment to be made thereof. It is not competent for the court to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made."

14. In the case at hand, it cannot be discerned from the structure of the claim how the complete loss of the shareholder value was calculated. In my view this would require further evidence to be adduced to substantiate the claim. In any event, the damage-causing event or the alleged wrongful and intentional misappropriation of the shareholders' investment is in dispute. Ordinarily the resolution of factual disputes should be dealt with by a trial court and not through summary judgment proceedings. In Maharaj v. Barclays National Bank Ltd. 1976 (1) SA 418 (A) at 426A-C the following dictum appears:

"Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. "

15. The summary judgment procedure was designed to benefit a plaintiff. It is therefore pivotal that its claim be within the ambit of the remedy. SJ Van Niekerk et al Summary Judgment- Practical Guide at 11-10 para 11.2.3 further puts it thus:

"Any defects in the presentation of his case which are not merely technical and, for that reason, cannot be condoned, will have as their consequences a refusal of summary judgment, even if no bona fide defence has been disclosed by the defendant. A court will not assist a plaintiff by breathing life into a poorly presented case- on the contrary, the Court will consider itself bound to the terms in which the plaintiff has elected to formulate his claim."

16. For reasons aforesaid I am not swayed that this is a case in respect of which summary Judgment should be granted regardless of whether the defence put forward by the defendants is sustainable or not. Even if I am wrong, my conclusion is further fortified by the averments captured in paras 52.1 and 52.2 of the plaintiff's affidavit attempting to impermissibly reply to the defendants' answering affidavit in respect of the summary judgment. They read:

> "52.1 I deny that the claim is not liquid. It is for a liquidated amount of money in the sum of R150 000 000.00 (One Hundred and Fifty Million Rand) being in essence for the repayment of the amount invested by the shareholders in NAM and lent on indefinite period shareholder loan to Meepo under the directorship of the applicants who failed to account for the loan.
>
> 52.2 In the alternative and since this affidavit is being made in opposition to an Application for Security for Costs of Trial, I aver that the exact extent of the Claim will be easily determinable upon the granting of order in the normal course upon Claims 1 and 2 in the Summons".

In my view these paragraphs illustrate that the claim is not capable of expeditious quantification.

17. On the question of costs Mr Snellenburg urged that costs be awarded on a punitive scale as against the plaintiff and that the action be stayed until such time that the defendants' bill of costs is taxed and paid in full. He argued that this is so because the application was stillborn as the R150 million loss of total shareholder value as set out in the simple summons falls outside the purview of the summary judgment procedure and that the normal cost order, in other words, that costs be in the cause, would be inappropriate.

18. Rule 32(9)(a) provides:

> "(9) The court may at the hearing of such application make such order as to costs as to it may seem just: Provided that if-
>
> (a) the plaintiff makes an application under this rule, where the case is not within the terms of subrule (1) or where the plaintiff, in the opinion of

> the court, knew that the defendant relied on a contention which would entitle him to leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client;"

19. Even though I have concluded that the summary judgment procedure should not have been invoked, I do not believe that the plaintiff set in motion this procedure in a vacuum. In my view, it may have overestimated the strength of its case. As already alluded to, a claim for damages, under certain circumstances, may satisfy the requirements of a summary judgment procedure. Therefore, I can find no rational basis upon which a special costs order should be awarded against it. On the view I take of this matter, costs should follow the success in the ordinary party and party scale.

SECURITY FOR COSTS:

20. Matsepes Inc, the defendants' attorneys, directed a letter dated 15 November 2013 to Adrian B Horwitz & Associates, the plaintiff's attorneys, wherein they sought to be provided with reasons why the plaintiff should not provide security for the defendants' costs. The Notice, in terms of Rule 47, to furnish security in the amount of R1 280 000.00 (One Million Two Hundred and Eighty Thousand Rand) was filed with the Registrar on 27 January 2014. The plaintiff failed to furnish the security.
21. It is common cause that the plaintiff is a peregrine company which does not own unencumbered immovable property in the Republic of South Africa. The defendants also state that the plaintiff failed to disclose its financial statements or indicate whether any funds had been set aside for the prosecution of the action; that the assets and liabilities of the plaintiff are unknown to them and this information has been intentionally withheld from them; that there is a substantial risk that they will not be able to recover their costs; and that it will be difficult for them to proceed against the plaintiff in its country of origin regard being had to the Rand/Pound and Euro exchange rate. They further contended that the issues in the action are complex and that the costs would be astronomical relative to the quantum claimed. To this end they submitted that there is no question that the action would require the employment of a senior and junior counsel.

22. In resisting the security for costs application the plaintiff argued that the defendants have adduced no evidence to show that it will be unable to meet an adverse costs order against it; that an order for security may retard its claim which has reasonable prospects of success; that the principal proceedings involve matters of public importance viz. the retention of shareholder and international investor confidence in the South African Judicial System of redress where there has prima facie been considerable commercial and corporate misconduct in relation to inward investment solicited by a South African company and that the security sought is totally disproportionate to the complexity of the issues in dispute.

23. Mr Miltz further contended that the timing of the application would appear to have been incidental to a desire to impede the summary judgment application in that the summary judgment application was set down for hearing on 16 April 2014 whereas the respondent filed their application for security on 24 April 2014. On this aspect I must immediately point out that the defendants commenced demanding security for their costs even before the summary judgment application was lodged on 05 December 2013. The likelihood that this application could follow, if liability to furnish security was contested, was always present. It is not in dispute that on 20 March 2014 the Registrar informed the defendants' attorneys that he was of the view that a substantive application for security be filed. Clearly, there is nothing on the papers to demonstrate that the defendants acted mala fide in bringing the application at the time they did so as to stymie the summary judgment application.

24. The determination of the question whether security should be furnished or not is a matter of judicial discretion. The Court should exercise its discretion neither with a predisposition to granting security or refusing it[2]. In exercising its discretion the Court should have regard to the circumstances of the case and consideration of equity and fairness to both parties. In Magida v Minister of Police 1987 (1) SA 1 (A) at 14D-G the Court, after an in-depth analysis of the Roman-Dutch authorities, lucidly enunciated the principle as follows:

[2] See Shepstone & Wylie and Others v Geyser NO 1998 (3) SA 1036 (SCA) at 1045I; Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1) 1997 (4) SA 908 (W) 919G-H.

"Notwithstanding the obsolescence of the cautio juratoria as security on oath we must bear in mind that our common law principles which underlie its granting are still applicable in our modern practice when a peregrinus in his answering affidavit deposes to his inability to furnish security for costs owing to his impecuniosity, since it must be left to the judicial discretion of the Court by having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both the incola and the peregrinus to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs. Nor is there any justification for requiring the Court to exercise its discretion in favour of a peregrinus only sparingly. It follows that the following dictum in Saker & Co Ltd v Grainger 1937 AD 223 per De Wet JA at 227, viz:

'The principle underlying this practice is that in proceedings initiated by a peregrinus the Court is entitled to protect an incola to the fullest extent,'

should be read subject to the qualification that it is only applicable after the Court, in the exercise of its judicial discretion in accordance with the principles hereinbefore stated, had come to the conclusion that the peregrinus should not be absolved from furnishing security for costs."

25. For the most part the plaintiff's argument revolved around the merits of the principal action and their prospects of success at the trial in due course. Mr Miltz argued, inter alia, that the plaintiff previously held substantial assets in the Republic through its investment in NAM and Meepo; that it lost its assets directly as a result of the acts and omissions of the defendants; that this absolves it from furnishing security for costs; that the defendants, as the directors of these companies, had statutory and fiduciary obligations of accounting and reporting to the shareholders; that it was therefore not up to the defendants simply to shift their stewardship to Ekon or Chweidan who held no positions as directors in the companies and that, regard being had to the facts, the costs order in favour of the defendants in the action is unlikely to materialise.

26. It is largely disputed by the defendants that they are responsible for the destruction of the substratum of the companies. They maintain that they appointed experts, Chweidan and Ekon, to manage Meepo and/or NAM; to advise the companies and its directors on all the financial aspects. They further state that the two made decisions and gave them instructions, I assume, to implement those decisions. To this end Garcao attached some

e-mails to his answering affidavit in the summary judgment proceedings from Ekon to demonstrate that Ekon was giving instructions and made a commitment on behalf of the companies which the defendants as directors were not consulted on. The alleged instructions and decisions made by Ekon and Chweidan are gainsaid by the plaintiff.

27. In Exploitatie-en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig 2012 (1) SA 247 (SCA) at 255 para 20 the Court remarked:

"[20]….Although there are authorities to the effect that a court will not enquire into the merits of the main dispute in the exercise of its discretion as to security for costs, like all rules of practice that rule should not be seen to be wholly inflexible."

28. It is not necessary for present purposes to grapple with the issue of what led to the demise of Meepo and NAM. On perusal of the summons and several affidavits filed thus far this enquiry appears to be one of the principal issues to be determined by the trial court. However, I do not think for a moment that the plaintiff instituted vexatious litigation. Its claim appears to be legitimate and is certainly one of public importance. It would also appear that some of the defendants are not as unblemished as they profess to be. This is so because Mr Miltz referred me to a Judgment of this Court, Garcao v The Master of the Northern Cape High Court and Others Case No: 185/2013 handed down on 08/08/2014 which concerned, inter alia, the review and setting aside of the authorization of the Master, Kimberley, of an enquiry in terms of s 417 of the old Companies Act, 61 of 1973, by the first defendant in the proceedings before me. In that case my brother Kgomo JP sounded the following warning:

"The approach of the first applicant (Mr Garcao) is incomprehensible. He had not filed opposing papers in respect of the Principal or the Main Application (Case No: 1559/2012). Mr Zietsman makes a meritorious submission that in addition the applicant had failed both in the interlocutory and the current application to address the core or principal allegation of the Liquidators viz. that he was the recipient of a disposition not made for value from Meepo Investment when it was commercially insolvent in twelve (12) months prior to the presentation of the application for its liquidation. I am therefore persuaded that whereas Garcao, the applicant, has not formally admitted the unlawful disposition the conclusion is inescapable that it happened. See Stellenbosch

Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E-G; Pitelli v Everton Gardens Projects CC 2010 (5) SA 171 (SCA) at para 22-24 (pp 175G-176C)."

29. The plaintiff argued that the defendants failed to adduce credible evidence to show that it will be unable to pay the defendants' costs if they are successful. In terms of the s 13 of the repealed Companies Act, 61 of 1973,[3] and s 8 of the Close Corporation Act, 69 of 1984[4], the onus reposes on the defendant demanding security to adduce credible testimony on affidavit that there is reason to believe that a limited company or a close corporation will be unable to pay the costs. See Vumba Intertrade CC v Geometric Intertrade CC 2001 (2) SA 1068 (W) at 1071H; FirstRand Bank Ltd v Pather 2005 (4) SA 429 (N) at 432F-G. The new Companies Act, 71 of 2008, has no similar provision as its precursor. Be that as it may, the common law prevails. While this application was not brought in terms of s13 of Act 61 of 1973, the following remarks in Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC) at 530 para 8 by the ConCourt pertaining to the security for costs generally remains pertinent:

"[8] The Courts have accordingly recognised that in applying s 13, they need to balance the potential injustice to a 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

[3] Section 13 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.

[4] 'When a corporation in any legal proceedings is a plaintiff or applicant or brings a counterclaim or counterapplication, the court concerned may at any time during the proceedings if it appears that there is reason to believe that the corporation or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent, or the defendant or respondent in reconvention, if he is successful in his defence, require security to be given for those costs, and may stay all proceedings till the security is given.'

order for costs might well result in its 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 risks to the defendant of an unrealisable costs order."

30. In Kini Bay Village Association v Nelson Mandela Metropolitan Municipality and Others 2009 (2) SA 166 (SCA) the Court also dealt with s 13 of Act 61 of 1973. In that case the respondents demanding security had in the course of such proceedings, chanced upon a copy of the appellant's Annual General Meeting minutes which showed that its subscription levies which appeared to have been the main source of revenue amounted to R880; its budget for the relevant fiscal year was R5 480 and made no provision for litigation; its banking account balance as at 30 September 2005 was R3 792,68 and it had no other assets. When confronted with this discovery, the appellant readily admitted that it would be unable to meet an adverse costs order. At 173 para 15 the Court made the following pronouncement:

"[15] Needless to say in the circumstances of this case, in the absence of any evidence relating to the appellant's source of funds and whether it solicited its members' financial assistance or made any other attempts to raise funds to continue the litigation, the appellant dismally failed to establish that a security order will halt its case. Its reticence, which is clearly deliberate, inexorably leads to an inference that its wealthy members who authorised it to conduct the litigation in the first place, impecunious as it was, are using it merely as a front and are shielding behind an empty shell simply to avoid liability for costs."

31. The plaintiff's argument to the effect that its assets and liabilities are not germane to the determination of the application is by no means helpful. It further states that when it was solicited for an investment in NAM by the defendants they had no qualms about its ability to pay. It goes on to state that the defendants have lost their investment and now claim to fear that they would not be able to recover their cost. It argued that this aspect should militate against security being ordered.

32. In Exploitatie-en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig (supra) at 254-255 paras 18-19 the Court pronounced as follows:

"[18] The appellants sought to avoid the general rule of practice that a peregrinus should provide security for an incola's costs by relying on the judgment in this court in Magida v Minister of Police, in which an impecunious peregrinus was excused from providing security, and making the bald and unsubstantiated averment that the appellants —

'. . . will be unable to furnish security for costs, due to the (respondent) failing to honour his debts towards them the (appellants) are hardly in a position to finance their own costs . . .'.

However, the appellants' case on this issue was ambivalent. While pleading poverty, on the one hand, they alleged, on the other, that the respondent would have no difficulty in recovering a costs order by suing them in Europe. Of course the appellants cannot have it both ways. If their financial status was relevant to the question of security it was incumbent upon them to take the court into their confidence and make sufficient disclosure of their assets and liabilities to enable the court to make a proper assessment thereof in the exercise of its discretion. In the case of the first appellant, a private company, this is generally done by disclosing its current balance sheet. This the appellants did not do. In these circumstances and in the light of the appellants' allegation that any costs order would be recoverable by way of litigation abroad, it must be accepted that the financial status of the appellants is in itself no reason to refuse security. This distinguishes this case from the decision in Magida relied upon by the appellants in which the fact that the peregrinus was indigent was a material consideration taken into account.

[19] As against that, the fact that the respondent will have to proceed against the appellants abroad if he obtains a costs order in his favour, with the associated uncertainty and inconvenience that would entail — and it is his undisputed allegation that it would be substantially more expensive to do so than litigating in this country — is one of the fundamental reasons why a peregrinus should provide security. (my emphasis).

33. The highly contested issue that the plaintiff be absolved from furnishing security because the defendants brought about the demise of Meepo and NAM and its material

financial loss cannot be solely decisive. Shepstone & Wylie and Others v Geyser NO 1998 (3) SA 1036 (SCA), although decided in the context of s 13 of Act 61 of 1973, is a case in point. At 1047I - 1048A the Court pronounced as follows:

"That they [the appellants] allegedly neglected or breached their duties as directors and managers and thus contributed to the collapse of the company is certainly something to be taken into account. But I do not regard it as decisive. Weighed against factors such as the admitted difficulty which the respondent will have to prove his allegations and the enormity of the costs which the appellants will not be able to recover should the action fail (see at 363G--I of Hugo J's judgment), it pales into insignificance. In all the circumstances of the case an order for security should, in my judgment, have been granted."

34. Clearly, the plaintiff did not vindicate itself by disclosing its financial statements or enlighten the Court that it indeed possesses funds to safeguard the interest of the defendants. How it could be expected of the defendants to place information before this Court concerning the financial records of a peregrine company so as to demonstrate that it would be unable to pay their costs, as the plaintiff sought to indirectly argue, escapes me.

35. Nothing was placed before me pointing to the possible retardation of the plaintiff's claim or any hardship it stands to be put through in pursuing the litigation should it be required to secure the defendants' costs. It has been held that the fact that an order of security will put an end to the litigation does not by itself provide sufficient reason for refusing it but one of an unlimited number of factors a court could consider in the exercise, which involved weighing up the potential injustice to the plaintiff or applicant if it were prevented from pursuing a legitimate claim, against the potential injustice to the opposing party if it succeeded in its defence but could not recover its costs. See Kini Bay Village Association v Nelson Mandela Metropolitan Municipality and Others (supra) at 172B – D para 12.

36. On the whole I am satisfied that the defendants have made out a proper case upon which the Court should exercise its discretion in their favour on the question of security for costs.

37. What finally remains is the amount of security to be furnished. Counsel differed on this aspect. Mr Miltz argued that the amount of R1.2 million sought by the defendants is disproportionate to the complexity of the issues while Mr Snellenburg argued the converse. The best evidence the Court can utilize is ordinarily derived from the legal experts who have brought their minds to bear upon the matter and have given an estimate of what the costs are likely to run into. See Nederlandsche Z.A. Hypotheek Bank v Mears 1913 TPD 704 at 706; Avenue Shipping Co Ltd v SA Railways and Harbours 1936 CPD 486. Save for the disputed rough estimate of costs made by the defendants' attorneys no best evidence has been placed before me. However, I am of the view that the Registrar of this Court is in a position to determine what the reasonable amount of security is to be furnished by the plaintiff.

38. In conclusion. The application for summary judgment fails and the defendants are granted leave to defend the matter. The application for security for costs succeeds with costs.

39. I make the following order:

Order:

1. The application for summary judgment is dismissed with costs on a party and party scale.

2. The defendants are granted leave to defend the matter.

3. Further pleadings are to be served and filed as if appearance to defend was entered from date of this order.

4. The plaintiff is ordered to furnish security for the defendants' legal costs in the action.

5. The form, amount and manner of security to be provided by the plaintiff are to be determined by the Registrar on application by the defendants to that office.

6. The trial proceedings under the above case number are forthwith stayed pending the furnishing of security to the satisfaction of the Registrar.

7. The plaintiff is ordered to pay the costs of the Rule 47(3) application.

MV PHATSHOANE
JUDGE
NORTHERN CAPE DIVISION

Appearance for the plaintiff : Adv I. Miltz SC Instructed by Adrian B Horwitz & Associates
Appearance for the defendants: Adv. N Snellenburg Instructed by De Jager Attorneys