



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED
2013.11.15 *[Signature]*
DATE SIGNATURE

CASE NUMBER: 45629/13

DATE: 15 November 2013

LEIGH-ANN NIELSON

APPLICANT

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ELSJE RAUTENBACH N.O.

(In her capacity as Liquidator of the liquidated estate of
DREAMWORLD INVESTMENTS 53 (PTY) LTD)

FIRST RESPONDENT

EPHRAIM MAKHESE N.O.

(In his capacity as Liquidator of the liquidated estate of
DREAMWORLD INVESTMENTS 53 (PTY) LTD)

SECOND RESPONDENT

CITY OF JOHANNESBURG

THIRD RESPONDENT

JUDGMENT

MABUSE J:

1. This is an application for an order to furnish security for costs. In this application, the applicant seeks an order for security for costs against the respondents because of an inordinate delay in settling a previous costs order which has recently been settled. This application is brought on the basis that the respondents' second eviction application against the applicant is vexatious, reckless and unmeritorious. Needless to say, the application is opposed by the respondents on grounds that I will turn to later in this judgement.
2. The applicant is an adult female who resides at 1819 Augustus Avenue, Dainfern Valley, Johannesburg. She is the first respondent in the second eviction application. The first and second respondents are joint liquidators of a company called Dreamworld 53 (Pty) Ltd. They were duly appointed as such by the Master of the High Court, Johannesburg by virtue of a Certificate of Appointment dated 26 March 2009 under no.G1556/08. Respectively they are the joint applicants in the second eviction application. The third respondent is the City of Johannesburg Municipality, a local municipality established and promulgated as such by virtue of s 12 of the Local Government Municipal Structures No. 117 of 1998. Its principle place of business is located at 158 Loveday Street, Braamfontein in Johannesburg. No order is sought against the third respondent in this application.
3. It is contended by the applicant that on 20 October 2010 and under case no. 27158/2010, by notice of motion, the respondents initiated eviction proceedings in

the South Gauteng High Court against the applicants and furthermore that for numerous reasons those proceedings were fatally defective. It is these proceedings that the applicant refers to as the first eviction application. (On realising such defective errors the then attorneys for the respondent withdrew the said application and tendered costs.

4. Subsequently the respondents commenced another application for the eviction of the applicant. This is the application that the applicant refers to as the second eviction application. Its purpose is still to evict the applicant and those who occupy through her and others from the property known as 1819 Dainfern, Ext. 16 Township, Registration Division IQ, in the province of Gauteng, in extent 1121 (one thousand one hundred and twenty one) square meters as unlawful occupiers. The application for eviction is brought under the provisions of the Prevention of Illegal Eviction of And Unlawful Occupation of Land Act 19 of 1998 (PIE). The applicant contends that this second application is inflicted with defects or imperfections. The applicant has set out numerous grounds on the bases of which she contends that the second application also has serious shortcomings. Both in respect of this application as well as the first one, I do not deem it necessary for the purposes of this judgment to list such shortcomings. Based on such perceived defects, the applicant, referring to the second application, contends that the respondents seemed to have undertaken vexatious, reckless and unmeritorious litigation.

5. A further reason furnished by the applicant for launching this application for security for costs arises from the inordinately long delay in settling the taxed costs arising

from the aborted first application. Although such costs were eventually paid, the applicant contends that the fact that the costs order was satisfied only after she had launched this application in terms of Rule 47(1) of the Uniform Rules of Court is emphatic of the obstructive nature of the respondents. She contends furthermore that it provides evidence of the fact that the first and second respondents are prepared to proceed to Court on a defective application. The applicant regards the inordinate delay to satisfy a costs order as indicative of vexatious and reckless conduct.

6. The applicant's application for security which had been scheduled to be heard on 10 March 2013 was postponed *sine die* by agreement between the parties as they were trying to resolve the matter. The respondents were then ordered to pay the costs of such postponement.
7. On 8 March 2013, the respondents had, by way of a letter under the heading of "Security in terms of Rule 47", attempted to provide security for the costs. The applicant was dissatisfied with this form of security and consequently expressed her dissatisfaction to the respondents. In direct contrast, the respondents then delivered their opposing affidavit in which they made it clear that they would not provide security and furthermore that legally they were not obliged to do so.
8. The respondent's view with regard to the applicant's contention that the application for eviction is defective is that the points raised by the applicant are merely of a technical nature; that they do not influence the merit of the application at all and

furthermore that they do not constitute a valid defence against the eviction application. They contend furthermore that they have effectively dealt with them in their replying affidavit. It is for the Court that will deal with the second application for eviction, and not for this Court, to decide whether or not such defences are in any manner meritorious. On those bases they deny that the said application is vexatious. With regard to the delay to pay the taxed costs they contend that the applicant has not suffered any prejudice as a result.

9. In her submissions that the respondents should be ordered to furnish security for the applicant's costs of the second application, counsel for the applicant placed reliance on the following authorities, *Ecker v Dean* 1938 AD 102 at page 110; *Western Assurance Co v. Caldwell's Trustees* 1918 AD 262 at page 274; *Haitas and Three Others v. Port Wild Props 12 (Pty) Ltd* 2011(5) SA 562 (GSJ).
10. The law with regards to the furnishing of security was, until 1 May 2011, determined by the provisions of s.13 of the Companies Act 61 of 1973("the 1973 Companies Act") and by the principles of common law. In terms of the provisions of the said s. 13 of the 1973 Companies Act where a limited company was the plaintiff or applicant in any legal proceedings, a Court could at any stage order it to furnish security for costs if there was reason to belief that the company, or, if the company was being wound up, its liquidator would be unable to pay the costs of the defendant or respondent if successful in its defence, and could stay all proceedings until security was given. The 1973 Companies Act or some substantial portions of it have since been repealed by the new Companies Act 71 of 2008 ("the 2008 Companies Act").

In terms of the provisions of s.13 of the 1973 Companies Act, the respondents would have been required to furnish security for the applicant's costs of this second eviction application. But s 13 of the 1973 Companies Act has now been repealed with the repeal of the said Act and nothing was legislated in its place.

11. In the absence of any legislative provisions that deal with the furnishing of security for costs, the principles of common law reign supreme in that regard. The general rule of our law with regards to furnishing security for the costs of an action was set out in the old authority of **Witham v Venable Mez 291**. In this authority the rule was stated as follows:

“No person, who is either a civis municeps or incola of this colony, can, as a plaintiff, be compelled to give security for costs, whether he be rich or poor, solvent or insolvent; and, on the other hand, that every person, who is neither civis municeps, nec incola, may, as plaintiff be called on to give security for costs, unless he prove that he is possessed of immovable property situated within the colony.”

This system was developed under Roman law in terms of which litigants were classified as either a Roman citizen or *civis municeps* and as such entitled to all legal rights or a *peregrinus* who as such enjoyed limited rights. A *peregrinus* was debarred from the enjoyment of full rights. An *incola* was a foreigner who took up domicile in some other region of Rome. He was actually a domiciled foreigner. Fabricius J. gave an erudite exposition of the history and development of this rule in paragraph 6 of **Siemens Telecommunications v Datagenics 2013(1) SA 65** at page

69. In *Hennochsberg on the Companies Act* Meskin stated on page 28-1 the following when he commented about the provisions of s. 13 of the 1973 Companies Act:

“At common law an impecunious or even insolvent company or other body corporate which is an incola of South Africa cannot be required to give security of the costs of proceedings instituted by it. However section 13 creates an exception to this rule by according the Court the discretion to order a plaintiff company to furnish security for its opponent’s costs, if there is a reason to believe that it will be unable to pay such costs, if ordered to do so. The policy underlining this section, as was the case in relation to section 216 of the 1926 Act, is that immunity accorded to an impecunious incola under common law should not exist....”

Accordingly because of the repeal of the provisions of s.13 of the 1973 Companies Act and furthermore because of the absence of similar provisions in the new Companies Act of 2008, in terms of common law, an impecunious litigant or even an insolvent company or other corporate body or entity which is an *incola* of South Africa may not be required to furnish security for costs in respect of proceedings which he or she or it has instituted. See also paragraph 9 of Fabricius J’s judgment where he states that:

“The Companies Act of 1973 was repealed by the new Companies Act 71 of 2008. This new Companies Act does not provide for security for costs by companies at all. In my view, this means that the common law must apply and I have said what it is in

the present context. Whether or not the omission to provide such security in the new Act was an oversight by parliament, or whether it was done because of the provisions of sec. 34 of the Constitution which reaffirms the common law relating to access to courts, may be an interesting debate, but it is of no consequence. The common law applies."

12. This principle of common law may be traced back to *Ecker v Dean* 1939 AD 102 at 110 where the Court had this to say:

"In my opinion a proper consideration of these cases does not justify the conclusion that the fact of the plaintiff being an insolvent per se entitles the defendant to demand security for costs nor that there is a presumption that the action is vexatious. Notwithstanding dicta to the contrary, it seems to me that the correct principle underlying these decisions is that every application for security must be decided on the merits of the particular case before the Court, bearing in mind that the basis of granting an order for security is that the action is reckless and vexatious."

When the applicant contended that the respondent should be ordered to furnish security she relied on the latter part of the above paragraph which states that:

"Notwithstanding dicta to the contrary it seems to me that the correct principle underlying these decisions is that every application for security must be decided on the merits of the particular case before the Court, bearing in mind that the basis of granting an order for security is that the action is reckless and vexatious."

13. It should, however, be noted that the question of security is one of practice and not of substantive law. See the old authority of **Mears v. Pretoria Estate and Market Co. Ltd** 1907 T.S. 951 at p. 954 where Innes CJ, as he then was, stated that:

“But, after all, this is a question of practice, which this Court is justified in settling for itself.”

See also **Alexander v Jokl** 1948 (3) SA 269 at p. 274 where Williams A.J. stated the following:

“The lodging of security by any party to legal proceedings is generally a question of the rules of practice operating in the Court in which the proceedings are instituted.”

Accordingly notwithstanding the approach in terms of common law, a Court has an inherent power to order a litigant to furnish security for the costs of its opponents, if it is satisfied that the litigation is vexatious. The effect hereof is that the common law rule is not absolute. It remains the touchstone for as long as the proceedings are not regarded as vexatious. The test in such a situation seems to be not whether or not a litigant is an *incola* or not but whether or not the proceedings that an *incola* has instituted against its opponents are vexatious. This seems to be the exception rather than the general rule. This rule find its genesis in **Western Assurance Company v Caldwell’s Trustee** 1918 A.D. 262 where the Court laid down that a Court of law has inherent power to stop or prevent a vexatious action if it is satisfied that such an action constitutes an abuse of the Court processes. A court will prevent vexatious proceedings by making an order that the vexatious litigant should provide security for

the costs of the other side. It is crucial, though to emphasize that this rule is not a general rule and that a Court should exercise its power to order a party to provide security for the costs of the other side sparingly and even then if it is satisfied that exceptional circumstances do exist. I have not been persuaded that exceptional circumstances do exist in this matter and therefore am disinclined to order the respondents to furnish security for the applicant's costs on that basis.

14. A case of *Haitas and Others v Port Wild Props 12 (Pty) Ltd* 2001(5) SA 562 GSJ, on which counsel for the applicant relied and which was criticized by Fabricius J. in his aforementioned reported matter, simply have created another ground on the basis of which a Court may order a litigant, irrespective of whether the litigant is an *incola* or *peregrinus*, or whether the proceedings are vexatious, when it referred to s. 173 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"). In paragraph 7 at 563h-i Tsoka J. stated that:

"In terms of s 173 of the Constitution of the Republic of South Africa of 1996, the court's inherent power to protect and regulate its process and to develop the common law, taking into account the interest of justice, is recognised."

15. Fabricius J. opined that in its constitutional powers to regulate its own process, a high court does not have the power to create substantive law. The creation of substantive law is reserved for its inherent power to develop common law. He continued and stated that:

“Section 173 of the Constitution does not enable a court, under the mantle of regulating its own process, to impair the existing substantive rights of a litigant. Under common law, as I have said, an incola company has an unimpaired substantive right to pursue legal proceedings.”

Perhaps the reference to section 173 of the Constitution and to “develop a common law” by Tsoka J. was unfortunate. The nub of what paragraph 7 of his judgment was intended to convey is contained in paragraph 8 of the same authority in which he posed the following question:

“Do the facts in the present matter require the Court to exercise its inherent power to demand the furnishing of security by an insolvent incola?”

16. It must be recalled, as I already have pointed out somewhere above, that the question of security is one of practice and not of substantial law. In making a statement contained in paragraph 8 of this judgment, I understood Tsoka J. to be emphasizing the fact that no matter the principles of common law or the provisions of any legislation dealing with the provisions of security, Courts have an inherent discretion to grant or refuse an order of security and in coming to such a decision will consider all the relevant circumstances of a particular case.

17. With regard to the present matter I have not been moved that there are exceptional circumstances on the basis of which I would digress from common law and make an order based on vexatious proceedings.

18. Accordingly, the application by the applicant that the respondents should provide security for her costs of the proceedings in respect of the second eviction is hereby dismissed, with costs.



P M MABUSE

JUDGE OF THE HIGH COURT

Appearances:*Counsel for the applicant:**Adv. S Maritz**Instructed by:**VFV Attorneys**Counsel for the respondents:**Adv. P I Oosthuizen**Instructed by:**S Roux Incorporated**Date Heard:**13 November 2013**Date of Judgment:**15 November 2013*