

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

CASE NUMBER: 48493/12

In the matter between:

11/12/2012

TRIGGER REACTION SECURITY SERVICES (Pty) Ltd	APPLICANT
(Registration No. CK2007/252010/23)	DEED OF DONATION APPLICABLE
	(1) REPORTABLE: YES/NO.
	(2) OF INTEREST TO OTHER JUDGES: YES/NO.
	(3) REVISED.
and	11 Dec 12
	DATE
	SIGNATURE

CITY OF TSHWANE METROPOLITAN
MUNICIPALITY

FIRST RESPONDENT

GONDO SECURITY SERVICES (PTY) LTD

SECOND RESPONDENT

JUDGMENT

TLHAPI J

[1] This judgement deals with two applications.

The first application was launched on 12 October 2012 by the applicant in terms of Rule 49(11) of the Rules of Court, that the first respondent's application for leave to appeal to the Supreme Court of Appeal, shall not suspend the operation or execution of the interim portion of the order made by me on 7 September 2012.

The second application was launched by the first respondent in terms of Rule 47(3) of the Rules of Court, for security for costs. There was indication by counsel for the first respondent that security for costs would include security for costs in the contempt application. The contempt proceedings were not before me.

The application was brought on extreme urgency to be heard before me on the day I had set down the Rule 49(11) application to be argued. The practice manual relating to urgent applications had not been complied with by the applicant. I nevertheless heard the matter because it had bearing on the application in terms of Rule 49 (11).

Both applications were opposed.

- [2] The latter application was heard first and judgement was reserved. The Rule 49 (11) application was then set down by me on 27 November 2012 and, on that day the application for security of costs was dismissed with costs with reasons to be given in this judgment.

REASONS FOR JUDGMENT :THE RULE 47(1) APPLICATION

- [3] This application was preceded by a notice in terms of Rule 47(1) for security to be given in the amount of R300,000.00 and the applicants were notified that the entitlement to security for costs was contested. Mr K S Ngobeni deposed to the founding affidavit and averred that:

- "4.2 In terms of section 8 of the Close Corporations Act of 1984, and where a close corporation is an applicant such as in the aforesaid contempt proceedings and the Rule 49(11) application, a Court could at any stage order it to furnish security for costs if there is reason to believe that the close corporation would be unable to pay costs of the respondent if the respondent (the applicant in this case) is successful in its defence.*
- 4.3 There is reason to believe that the first respondent would not be able to pay the applicant's costs if the applicant is successful in opposing the aforesaid contempt proceedings and the Rule 49(11) application. This is based on the following:*
- 4.3.1 in its replying and supplementary affidavits in the contempt proceedings, the first respondent alleges that it is unable to pay salaries of its 276 employees. I attach as FA1 and FA2 copies of the relevant extracts from the first respondent's replying and supplementary affidavits in which the allegations are made.*
- 4.3.2 in paragraphs 6.13 and 7.2 of the first respondent's founding affidavit in the Rule 49(11) application it is again alleged that the first respondent is unable to pay the salaries of its 276 employee.....*
- 4.4I respectfully submit that it is clear that the first respondent is not in a sound financial position- it is insolvent or on the brink of insolvency. At best, the contents of the first respondent's affidavits create a reasonable basis for the belief that the first respondent should not be able to satisfy an adverse costs order if the applicant is successful in*

defending the aforesaid contempt proceedings and the Rule 49(11) application."

[4] In the answering affidavit Ms M L Mashimbye averred that:

"3.1 This is an application brought in terms of section 8 of the Close Corporations Act 69 of 1984(as amended) ("the Close Corporations Act"),.....I am advised that with effect 1 May 2011 the Companies Act 61 of 1973 ("the old Companies Act") was repealed and replaced with the Companies Act 71 of 2008 ("the new Companies Act"). The new Companies Act does not contain a provision similar to section 13 of the old Companies Act. Section 8 of the Close Corporations Act is now unconstitutional as its enforcement would lead to inequality before the law. For this reason alone this application should be dismissed with costs.

3.2 The CTMM relies exclusively on an allegation in affidavits filed by Trigger that as a result of the CTMM's failure to pay Trigger for the guarding services rendered and to be rendered during the months of August and September 2012 that it is unable to pay its 276 employees. Trigger's salary bill exceeds R1 million per month. The only security contract which Trigger has is the one which it concluded with the CTMM. It is solely as a result of CTMM's failure to pay that Trigger cannot pay its employees. I am advised that a court will not order security to be provided when the financial distress on the respondent in an application for security for costs is caused by the applicant."

- 3.3 *This application has been brought as a matter of extreme urgency in circumstances where an application for security for costs can never be urgent. Since the filing of Trigger's Founding affidavit in the main application the CTMM has been aware of all the facts upon which it bases its current application.*
- 3.6 *Trigger has assets and means to satisfy an adverse costs order. Trigger has had insufficient time to provide any form of financial documentation in order to substantiate this assertion.*
- 3.7 *Other than the allegation that Trigger alleges that it cannot pay its 276 employees who were specifically employed to render services provided for the SLA should the CTMM not make payment to it, there is not one jot of evidence advanced by the CTMM that Trigger would be unable to meet an adverse costs order. No allegations are made to the extent of Trigger's assets and/or liabilities. The application for security for costs is part of the stratagem to financially ruin Trigger and prevent Trigger from being heard."*

[5] In the unreported judgment of Mavundla J of this court, in the matter of **Tricor Signs SA (Pty) Ltd v Willco Manufacturing CC and Others, Case Number 24386/10**, which was an application similar to the present and where the applicant relied upon s 8 of the Close Corporations Act No.69 of 1984 at paragraph 6 of that judgement he said:

"The adjudication of this application must be seen in the backdrop of the Constitution in the country, which through s34 guarantees everyone

*the right of access to have their disputes adjudicated by the courts
....there should be no obstacle placed before any person ...due to
impecunious state or illiteracy or otherwise. However where there is a
legislation permitting the Court to debar a person's access to court it
requires the court, in my view, to be slow in barring such access".*

Mavundla J emphasized the need for **credible information** in engaging the two stage enquiry. (my emphasis)

[6] In the first stage of enquiry the applicant seeking security for costs, bears the onus to satisfy the court that indeed there was reason to believe that the respondent may be unable to satisfy an adverse costs order. If it fails to discharge the onus, that should be the end of the matter, the application is bound to be refused **MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd 2007 (6) SA 620 (SCA) at 622 I**. The second stage of the enquiry of the enquiry involves the 'balancing of factors and judicial discretion.

[7] In **Tricor Signs** *supra*, the court referred to 'the lighter burden of onus to place credible evidence' and considered the following:

- 'the first respondent is becoming a shell entity without any income or assets and or that it is not conducting any business anymore;
- the first respondent is no longer trading in its own name;
- the first respondent's business was now conducted by another company;
- the first respondent does not have regular income and does not

have a tax certificate from SARS as a result it is not attracting work from Government or parastatals;

[8] In **MTN** *supra* the financial statements revealed that Afro Call's liabilities exceeded its assets and that the business was being run at a substantial net loss.

[9] In **Talmera Trading CC v Aquandro NO and Others (14184/10) [2010] ZAWCHC 509 delivered 22 October 2010**, **Baartman J** considered the following factors:

- the franchise had ceased trading
- the applicants described their financial situation as 'penurious'
- the applicant owned no immovable property or assets
- the applicant had two members who were not able to fund the litigation
- the applicant failed to provide financials to wit:
 - applicant's tax returns for the years 2009 and 2010
 - applicant's bank statements
 - applicant's audited financial statements for the years 2009 and 2010

[10] The approach in dealing with the second part of the enquiry was aptly stated in **Giddey NO v J C Barnard and Partners 2007 (5) 525 (CC) paragraph**

30.

"There can be no doubt that in exercising a discretion in terms of s13 (and similarly s8) a court must bear in mind the provisions of s34 (of the Constitution) and weigh them in the light of the other factors laid before itOn one side of the scale must be weighed the potential injustice to the plaintiff or the applicant if it is prevented from pursuing a legitimate claim. This incorporates a recognition of the importance of the right of access to courts. On the other side of the scale must be placed the potential injustice to the defendant if it succeeds in its defence but cannot recover its costs. Relevant considerations in performing this balancing exercise will include the likelihood that the effect of an order to furnish security will be to terminate the plaintiff's action; the attempts the plaintiff made to find financial assistance from its shareholders or creditors; the question whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff, as well as the nature of the plaintiff's action."

In **Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO 2000 (2) SA 400 (SEC)**, it was stated that the court, in exercising its discretion should consider equity and fairness to both parties, even in circumstances where there was reason to believe that a party would be unable to pay costs if unsuccessful. Furthermore the court could consider the conduct of the applicant in relation to the position in which the respondent finds itself.

[11] In **Tricor supra** the applicant had no reason to believe when the main application was launched that the respondent would not be in a position to meet any adverse costs order, hence its late application, which was mainly

motivated by changed circumstances in the circumstances of the respondent.

In addition to the factors mentioned in paragraph 7 above, in *Tricor supra* Mavundla J in paragraph [18] of his judgement, had the added advantage of having considered the financial position of the first respondent before exercising his discretion.

- [12] Unlike the cases mentioned in paragraphs [7], [8] and [9], the applicant in this matter relies exclusively on an allegation that the respondent was unable to pay its 276 employees. In the words of the respondent "there is not one jot of evidence advanced by CTMMno allegations are made to the extent of Trigger's assets and/or liabilities"

In my view, and on these allegations standing alone, it cannot be said that the respondent was insolvent, or on the brink of insolvency. I am in agreement with the submission that this application should never have been brought in circumstances of extreme urgency. The application by its nature entailed a different enquiry as already alluded to in the cases above. The respondent was afforded only two and a half hours to oppose the application and 24 hours within which to file an answering affidavit before the time set down to hear the Rule 49(11) application. According to the respondent it had assets and the means to satisfy an adverse costs order however as already mentioned and I must agree, it was given very little time to substantiate this claim.

- [13] Among the issues that were considered in *ICC Car Importers (Pty) Ltd v Harrodt SA (Pty) Ltd 2004 (4) SA 607 (WLD)* was the considerable delay in bringing the application for security for costs. The respondent has always

maintained that as a result of the conduct of the applicant's in terminating the Service Level Agreement as it did, it could not pay its employees despite having tendered the services and, lately despite the existence of an interim order. In my view, the applicant could have formulated a view or reasonable suspicion from the time when the main and subsequent applications were launched.

- [14] In considering dismissing this application I did not consider the issue of whether section 8 of the Close Corporation Act was unconstitutional because there were sufficient facts which enabled me to consider the application by engaging the two stage enquiry dealt with in the authorities mentioned above. In **Tricor and Giddey** *supra* reference is made to section 34 of the *Constitution*. Section 13 of the old Companies Act and section 8 of the Close Corporation Act served one purpose. I therefore agree with the submission for the respondent that the enforcement of section 8 would severely lead to inequality before the law, however as I already mentioned, this was not the basis upon which I dismissed the application.

RULE 49 (11)

- [15] I do not deem it necessary to summarize once more the facts in the main application because they are common cause and they are contained in my judgement which had been annexed to the founding affidavit as annexure "FA1. It is also common cause that the respondent's leave to appeal this judgment was dismissed and that they have now approached the Supreme Court of Appeal for leave to appeal the whole of my judgment of the 7 September 2007 despite the applicant's contention that the interim part of that

order was not appealable.

[16] The purpose of the interim order was to retain the status *quo ante* in that the applicant had rendered security services in terms of the Service Level Agreement for a period of almost two years prior to the launch of the urgent applications in February and August of 2012. I gave reasons why I was satisfied that there were *prima facie* prospects of success and these were also contained in the judgement. It was also common cause that the applicant launched by way of urgency contempt proceedings against the first respondent seeking to implement the interim order. These proceedings were preceded by correspondence seeking compliance with the order and the first respondents failed to respond to such correspondence nor to an offer for settlement communicated to them.

[17] The Applicant averred that the conduct displayed was a stratagem to financially ruin the, by causing 276 employees to loose their jobs and that they face labour unrest. Consequently it contended that the relief claimed remained urgent. The applicant averred that it had not been paid for the security guarding services which it rendered in terms of the Service Level Agreement since 1 August 2012, and that it had failed to pay for the services rendered for the months of August and September 2012.

The first respondent was currently indebted to the Applicant in the sum of R2 867 279.12 and that 'the longer the first respondent can frustrate the operation of the interim order Order, the more likely the first respondent is to succeed with this stratagem.'

[18] The first respondent averred that the court was not in a position to balance the competing interests of the applicant and first respondent because the applicant had failed to demonstrate that it stood to suffer greater irreparable harm. Furthermore the first respondent contended that its right to have the whole dispute decided on appeal would be rendered academic if leave to execute was granted. According to it the fact that applicant could not afford to pay its employees did not justify the grant of the relief contemplated in Rule 49(11)

[19] The first respondent averred that the applicant had demonstrated its inability to perform in the founding affidavit and that unless it was paid by the first respondent it could not render the required services. The first respondent denied that it owed the applicant because no proof has been placed before the court. Furthermore it contended that the applicant had other available remedies; that the applicant has a right to claim damages, it had suffered as a result of the first respondent's conduct, so far, the applicant had not initiated any action against the first respondent. The applicant could further invoke the provisions of section 189 of the Labour Relations Act 66 of 1995 to resolve any disputes that may arise with its employees.

[20] The court has a wide discretion 'to grant or refuse the application.' In **Airy v Cross-Border Road Transport Agency 2001 (1) SA 737 (T) at 741** I Tuchten AJ stated:

"I must do what is just and equitable in all circumstances. In this regard the potentiality of harm or prejudice and the balance of convenience in regard to such harm or prejudice may, and usually will carry considerable weight"

[21] When an appeal is noted the execution of the judgment is suspended in order to avoid irreparable damage to the intending appellant. The respondent posed a question: How was the court going to balance the competing interests because it also would suffer irreparable harm. In determining this issue I am entitled to take into account once more again the entire circumstances surrounding the case and for completeness sake I reiterate the facts considered and which satisfied me that there were reasonable prospects for of success for the applicant in future proceedings:

1. the first respondent participated in the service level agreement by accepting security services rendered by the applicant and also made payment to the applicant since about August 2010;
2. the first respondent continued to honour the arrangement after the launch of an urgent application by the applicants in January 2012 until the first respondent purported to terminate the service level agreement concluded with second respondent in the main application;

[22] The first respondent has held close to its chest information relating to contracts entered into with new service providers who replaced the applicant. The answering affidavit lacked information on the duration of such contracts; how much the first respondent was presently paying such service providers; when and how are those contracts are going to terminate.

Furthermore in relation to the applicant and them, why does the first respondent believe it will suffer irreparable harm; what are the financial implications for the first respondent should the application be granted. How am I supposed to do the balancing exercise in the absence of such information? According to the applicants, this was the only security contract it had, it had employees who had performed a service for almost two years without interruption. Furthermore the applicant had tendered its services and the first respondent had refused to accept such tender. It is my view that in as far as the interim order was concerned there were no prospects on appeal, and I see no reason why this application should not be granted.

[23] In the result the following order is given:

"The application as contained in paragraph 2 of the Notice of Motion is granted with costs"



TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	27 NOVEMBER 2012
JUDGMENT RESERVED ON	:	27 NOVEMBER 2012
ATTORNEYS FOR THE APPLICANT	:	T. G MOTSETO ATT.
ATTORNEYS FOR THE RESPONDENT	:	GILDENHUYS MALATJI ATT.