IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO:12929/2009

In the matter between:

BERNARD KEITH VIENINGS Applicant/ Defendant

and

PAINT AND LADDERS (PTY) LIMITED Respondent/ Plaintiff

JUDGMENT

Delivered :30 October 2012

M PILLEMER, AJ:

[1] The Plaintiff is a registered company. It instituted action against the Defendant in September 2009. That action is defended and a counterclaim has also been brought.

[2] On 28 October 2011 the Defendant gave notice in terms of Rule 47(1) that it required the Plaintiff to provide security for its costs but did no more than state that the Defendant had reason to believe that the Plaintiff was not in a position to satisfy an adverse order of costs against it. There was an objection to the first notice on the grounds that it was vague. The Defendant

then delivered a second revised notice on 21 November 2011 under the said rule in which it amplified its grounds. The grounds relied upon in the request were that in related proceedings the Plaintiff had failed to pay a costs order granted in April 2009, putting the Defendant to considerable effort and expense to try and execute without success, until eventually the costs of some R67,172.22 were settled, not by the Plaintiff, but rather by another company, Xpanda Security (Pty) Limited on 15 July 2011. This company was a stranger to the litigation.

[3] The Plaintiff's response to the Rule 47(1) Notice was set out in a letter. The bulk of the letter objects to the request and then states " We have advised and repeat this advice that our client has sufficient by way of attachable assets, balance sheet items, funds on hand and resources to meet any costs order which might be granted. After all it paid your costs order." The delay in making the request was also alluded to. The letter ended by recording " your notice calling for security lacks verisimilitude."

[4] To this the Defendant's attorney reacted by pointing out that the previous costs were paid not by the plaintiff but rather by an entity not related to the litigation and, that being so, asked for proof to show that the Plaintiff owns the assets mentioned in extract from the letter which is quoted above.

[5] There was no response from the Plaintiff's attorney to this request for proof.

[6] This led to the present application before me in which the Defendant seeks an order that the Plaintiff be directed to furnish security for costs to the satisfaction of the registrar in the amount of R150,000 within ten days of the grant of the order and that the proceedings in the action be stayed until such order is complied with and, if it is not complied with, for leave to apply on the same papers supplemented as necessary for the dismissal of the action.

[7] In the answering affidavit the Plaintiff again, this time though the mouth of a director, Marc Peter Allen, relies upon the delay in bringing the application as a basis for its opposition. With regard to its ability to pay the costs the Plaintiff intentionally elects not to put up evidence in support of its ability to pay, and simply contents itself by averring: " It is not necessary for the Respondent to make available to the Applicant a list of its assets. The Applicant was formerly a franchisee of the Respondent and is fully aware of the infrastructure of the company, in that the company is a wholly owned subsidiary of the Argent Steel Group (Pty) Ltd, which is owned by Argent Industrial Limited, a public company which is listed on the JSE. It would be preposterous for the applicant to suggest that the Respondent would not be in a position to meet any adverse costs order". It is not explained why it is not necessary to make available a list of assets, or provide the balance sheet or some other tangible evidence. In argument Mr De Beer SC, who appeared for the Plaintiff, contended that because there was no case to meet there was no need to provide evidence as to the Plaintiff's ability to pay the costs. He placed reliance on *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 (W) at paragraphs 9-11 where the court held where the allegation

that the plaintiff in those proceedings would not be able the pay the defendant's costs if successful in its defence had no foundation in fact and, that being so, no inference could be drawn from a failure to produce its balance sheet in answer to the case for security. The court held that each case has to be assessed on its merits.

[8] In the replying affidavit the point is made that the Plaintiff has still not furnished any details of the "attachable assets, balance sheet items, funds on hand and resources to meet any costs order which might be granted" that were mentioned in the initial response to the request for security and in respect of which proof was sought. It also points out that it is admitted that another company made payment of the previous costs order and that the Plaintiff has provided no explanation for that. It is also pointed out that Plaintiff has not asserted that it would be unable to furnish security or that being required to do so would create any undue hardship for the Plaintiff at all. Indeed on the contrary the tone of the response is that the Plaintiff is well able to pay the costs and the reason security is not being provided is because it is regarded as an insult to have requested it.

[9] The replying affidavit deals with the issue of the delay and explains that in response to the action the Defendant launched an application to obtain the release of some stock held by the plaintiff. He was successful, but the Plaintiff lodged an appeal with the application for leave to appeal only being heard some nine months later when it was dismissed. Then followed the difficulties in executing on the costs order, which were eventually paid by a company that

had no part in the litigation, one that is part of the same group of companies. It explains why two notices were issued and why the present application was only brought in February 2012. The payment by Xtrata Security was made in July 2011, the first Rule 47(1) Notice was delivered in October 2011 and the second in November of that year. The deponent makes the point that little happens over the December/January year end period and the application was launched in February. The affidavit also makes the submission that the delay occasioned no prejudice to the Plaintiff and none is complained of.

[10] So what emerges from the aforegoing is that the Defendant has a legitimate anxiety that if he is successful he may not be able to recover his costs from the Plaintiff, based on what occurred in relation to the costs order he had difficulty getting settled, with the strange feature that the costs were not paid by the plaintiff but by another company and no explanation is given. Absent an explanation the inference to be drawn is that the Plaintiff was itself unable to pay the costs and called upon another company in the group to do so on its behalf. The Plaintiff has chosen not to put up evidence to show that it is able to meet the costs that may be awarded other than vigorously asserting that it will be able to do so.

[11] At the date the summons was issued the Companies Act of 1973 was in force and had not yet been repealed, but by the time the Rule 47 (1) Notice was issued that Act had been repealed and replaced by the Companies Act 71 of 2008. Of significance for present purposes is the fact that s13 of the 1973 Act is not replicated in the 2008 Act. S13 is the section that confers the

right to seek security for costs against a company or corporation. The bar that has to be achieved by the party seeking security is much more easily met under s13, than under the common law under which the test is much more stringent. The court has an inherent power to order security in relation to unnecessary or vexatious proceedings by impecunious plaintiffs. It has also been held to have the power if it is in the interests of justice to make such an order in relation to vexatious, reckless and unmeritorious litigation bearing in mind the right of every litigant to have any dispute settled in a court of law (see *Haitas & Others v Port Wild Props 12 (Pty) Ltd* 2011 (5) SA 562 (ESJ) at 533H. It is therefore important to decide whether s13 applies to these proceedings or not to determine the appropriate test to be applied in exercising the discretion to grant or refuse an order for security for costs. It is clear that if s13 is not of application a case under the common law has not been made out.

[12] S13 confers the power on a court to require sufficient security to be given by a Plaintiff for the costs of the Defendant if successful in its defence in any legal proceedings if it appears by credible testimony that there is reason to believe at any stage that the company will be unable to pay those costs. It is implicit in the provision that a party to the litigation against a company may approach the court under s13 at any stage of the proceedings for an order for security and for a stay until such security is given.

[13] Schedule 5(11) of the 2008 Companies Act preserves any right or entitlement enjoyed by or obligation imposed on any person in terms of any

provision of the 1973 Act which is a valid right or entitlement of or obligation imposed on that person in terms of any comparable provision of the 2008 Act as from the date that right or entitlement first arose subject to the provisions of the 2008 Act. As mentioned earlier s13 does not have a comparable provision in the 2008 Act. The schedule is therefore of no assistance in determining whether s13 relief is available after the repeal of the 1973 Act since there is no comparable provision in the 2008 Act.

[14] The answer is to be found in s12(2)(c) of the Interpretation Act, 1957, which reads:

"(12)(2) Where a law repeals any other law, then unless the contrary intention appears the repeal shall not -

> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed."

[15] In *Chairman of the Board on Tariffs and Trade v Volkswagen of South Africa (Pty) Ltd and another* [2001] 1 All SA 519 (A) the Appellate Division considered s12(2)(c) of the Interpretation Act. It explained that "the provision, like many others in the Interpretation Act, is in conformity with the common law (cf *Bartman v Dempers* 1952 (2) SA 577 (A) at 582B–C). Repeal legislation is for the most part directed at matters future rather than matters past. Pre-repeal business must generally speaking be dealt with, unless a contrary legislative intention is apparent, as if no repeal had been enacted

(cf *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) at 483I–J; *Minister of Safety and Security v Molutsi and another* 1996 (4) SA 72 (A) at 88D; 97G–98B;*Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and others* 1999 (4) SA 1 (A) at 7A–E).

[16] S 12(2)(c) uses the phrase "acquired, accrued or incurred under any law so repealed" to qualify the right that remains unaffected by the repeal. The court in the *Volkswagen* case supra in paragraph 13 of the judgment deals with this and explains how to interpret and apply the section in the following terms:

> "[13] The Interpretation Act speaks of "accrue" and of "acquire". Different words in a statute when juxtaposed would normally connote different concepts. "Accrue" has been held to bear a narrower meaning than "acquire" (*Mahomed NO v Union Government (Minister of Interior)* 1911 AD 1 at 11). A right "accrues" when all the conditions for its existence in relation to the particular beneficiary are met (cf *Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A) at 551E–F; 552E–G); a right is "acquired" when all the conditions for its existence are met and the particular beneficiary in addition avails himself of the statutory provision concerned by some individual action or effort on his part (*Mahomed NO v Union Government* (*supra*), at 9–11; *Rustenburg Platinum Mines Ltd v Motletlegi NO and another* 1954 (2) SA 597 (T) at 603C–H; *Dys v Dys* 1979 (3) SA 1170 (O) at 1173H–1175A); *Minister of Public Works v Haffejee NO*3 1996 (3) SA 745 (A) at 754D–G). The

section envisages a prior entitlement which was specific and not general, actual and not abstract, live and not hypothetical."

[17] At the time when the summons was served on the defendant the company became the plaintiff in legal proceedings as contemplated by s13 of the 1973 Companies Act. From that date a court could at any stage in the proceedings require sufficient security to be given for the costs of the defendant if he is successful in his defence, if it appears by credible testimony that there is reason to believe that the plaintiff company will not be able to pay those costs. It is implicit that the defendant in the action has the right to approach the court for relief under s13 at any stage of the proceedings..

[18] Applying the distinction between the words acquire and accrue as explained above, the defendant only acquires the right to demand security once it has provided credible testimony, but the right to be able to provide credible testimony at any stage of the proceedings accrued once the summons was served. All the conditions for this right were met simply by service of the summons.

[19] It is this accrued right is that is preserved under s12(2)(c) of the Interpretation Act and, that being so, I consider that the application has to be dealt with in terms of the repealed s13 of the 1973 Companies Act.

[20] After the matter was argued I received an email from counsel for the Defendant drawing to my attention the case of *Kings Rest Container Park*

(Pty) Limited v Nzenga Junction (Pty) Limited Case No. 2168/2010. He had been informed that Van Zyl J had delivered an *ex tempore* judgment in which he had held that s13 of the 1973 Act had not survived its repeal in a factual situation identical to the one before me. The judgment has not been transcribed. I managed to locate the court file and I have had an opportunity of listening to the judgment. The facts are similar and the court did find that s13 could not be relied upon following the repeal of the section in the 2008 Act in May 2011. Unfortunately the court was not referred to and did not consider the Interpretation Act at all. The judgment was based upon the interpretation of schedule 5(10) and 5(11) of the 2008 Companies Act, which were found to be not applicable and of no assistance to the applicant before him. I agree with van Zÿl J on that score, but find that s12(2)(c) of the Interpretation Act produces a different result to the one he came to. Since the Interpretation Act was not considered by Van Zÿl J, I am not bound by his judgment, and I respectfully disagree with the conclusion to which he came.

[21] In exercising my discretion under s13 of the 1973 Act I have weighed the following:

(a) The Defendant was given the run around in relation to an earlier costs order eventually paid by another company, a stranger to the litigation, which is in the same group of companies. This prima facie at least is credible evidence that there is reason to believe that the Defendant will not be able to recover its costs from the Plaintiff if its defence succeeds.

(b) The Plaintiff in answer to this evidence relies strongly on the fact that it is a company in a group of companies where the holding company is a public company listed on the JSE. This is cold comfort to a defendant with a costs order against the plaintiff and not the other companies in the group since it cannot look to them or the holding company for payment of its costs, but it does show that the Plaintiff is able to look to the group so should have no difficulty providing security.

(c) The Plaintiff has put up no proof at all of its assets and has not even provided a balance sheet. It did not respond to the request for proof of the assets and funds it said it had in response to the original notice under Rule 47(1). In *Exploitatie–en Beleggingsmaatschappij v Honig* 2012 (1) SA 247 (SCA) at 254H-255A: the court said the following in relation to an application for additional security: "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." See also *Henry v R E Designs CC* 1998 (2) SA 502 (C) at 512 E-F and the very recently reported case of *Joytech v Tetraful* 2012 (5) SA 215 (KZN).

(d) The Plaintiff has not taken the court into its confidence and all that it has provided is its say-so that it has sufficient assets to meet an adverse costs order.

(e) There is no suggestion let alone evidence that the Plaintiff will suffer any hardship if security is ordered or that it will not be in a position by reason of its relationship within the group of companies to provide such security.

[21] There has been a considerable delay and the question that arises is whether the delay is such that relief should be denied on that ground. S 13 makes no mention of delay and allows for the court to require security to be provided "at any stage". Against that Rule 47(1) provides that a party entitled to and desiring to demand security for costs from another shall as soon as practicable after the commencement of the proceedings deliver a notice setting forth the grounds upon which security is claimed and the amount demanded.

[22] The conflict between the Act and Rule 47(1) is dealt with in the judgment of *Agro Drip (Pty) Limited v Fedgen Insurance Co Ltd* 1998 (1) SA 182 (W) at 189F-190C. The court held that the rule does not deprive a party who in terms of s13 is entitled to security of its entitlement to security if the application is not brought as soon as practicable. Delay and any prejudice caused by the delay will be one of the factors weighed in the exercise of the discretion. The Plaintiff does not rely upon any prejudice caused by the delay.

[23] Mr Boulle, who appeared for the Defendant, relied strongly on the recently reported case of *Joytech SA (Pty) Limited v Tetraful 1060 CC* 2012 (5) SA 215 (KZD), where in similar circumstances, namely difficulty in having

an existing costs order paid (in that case it was unpaid at the time of the hearing) and a failure to put up some sort of financial records to support the contention that the Plaintiff was able to pay the costs if it proved to unsuccessful in the action were held to be enough for the court to exercise its discretion in requiring security to be given.

[24] The nature of the discretion is explained in the case of *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at paragraph 8. The court must decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security. It is a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim is unsuccessful. One must also bear in mind the considerations of equity and fairness that would apply in relation to an application for security for costs against a perigrinus and these are also applicable in an application under s13.

[25] The balance in my assessment is firmly in favour of granting the order rather than refusing it. There is credible evidence that the Plaintiff itself did not pay the costs order against it for some considerable time and eventually when under pressure the amount was paid by another company in the group of companies and the reason why this occurred is not explained. In the absence of an explanation there was a case to answer and in electing not to do that and rely on bluster and hyperbole I gained the impression that there is indeed

reason to believe that unless it has the assistance of other companies in the group the plaintiff will not be able to pay the costs. If this was not so, why not place information before the court and take it into its confidence and why refer to the group and the group structure as an answer as to why it will be able to pay. The whole tone of the plaintiff's response to the application suggests strongly that by reason of its position in the group of companies it will be able to provide security so it is not as if a meritorious claim would not be able to be pursued because the plaintiff was unable to provide security and would be shut out of court. There is no aspect of equity or fairness which militates against ordering security. The delay was not such that it caused prejudice and was adequately explained.

[26] In the result the Defendant is entitled to the relief it seeks, apart from the amount of the security which is customarily fixed by the registrar and in any event insufficient information was placed before the court for it to determine what amount of security would be fair and appropriate.

{27] I make the following order:

(a) The Plaintiff is required to give security for the costs of the Defendant if successful in its defence of the action, in a form and amount as determined by the registrar of this court.

(b) The proceedings in the action are stayed till the security is given.

(c) The Plaintiff is ordered to pay the Defendant's costs of the application for security for costs.

M PILLEMER, AJ

Counsel for the Defendant/Applicant :	A J Boulle
Defendant's/Applicant's Attorneys:	Garlicke and Bousfield
Counsel for the Plaintiff/ Respondent:	H A De Beer SC
Plaintiff's/Respondent's Attorneys:	John Dua Attorneys

Date of hearing	:	26 October 2012
Date of Judgment	:	30 October 2012