FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1565/2008

In the matter between:-

FOURWAYS PRECINCT (PTY) LTD Applicant

and

SIGNAL CAPITAL AND SECURITIES (PTY) LTD Respondent

IN RE:

SIGNAL CAPITAL AND SECURITIES Plaintiff

and

FOURWAYS PRECINCT (PTY) LTD Defendant

HEARD ON: 10 FEBRUARY 2011

JUDGMENT BY: HANCKE, J

DELIVERED: 24 FEBRUARY 2011

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[1] The applicant (the defendant in the main proceedings pending in this court) has launched an application in terms of the provisions of section 13 of the Companies Act, 61 of 1973, as amended ("the said Act"), read together with Rule 47 of the Uniform Rules of Court, whereby the applicant seeks relief in terms of which the respondent (the plaintiff in the main

proceedings) is ordered to furnish security for the defendant's legal costs in the main proceedings.

[2] It appears from the papers that the respondent instituted a claim for damages in the amount of R1,2 billion, allegedly suffered as a result of breach of contract against the applicant. The summons was issued on 31 March 2008, the claim is defended and the main action has been enrolled for hearing during the period 9 - 27 May 2011.

[3] On 12 July 2010 a notice in terms of Rule 47(1) was served on the respondent's attorneys. The grounds, upon which the demand for security was based, were set out in the said notice. It was contended that there is reason to believe that the respondent will be unable to pay any adverse costs order, *inter alia*, on the following grounds:

1. A deeds search revealed that the respondent has no immovable property within the Republic of South Africa registered in its name;
2. The respondent does not conduct its business from the address chosen as *domicilium citandi et executandi*, to wit 9 Queen Street, Durbanville. This is also the

respondent's registered address.

3. The respondent has no other place of business.

4. The respondent does not have any employees in its employ.

5. The respondent does in fact not conduct any business.

6. Despite being so requested by the applicant, the respondent refuses to produce copies of its balance sheet and audited financial statements for the periods February 2004 until January 2010.

[4] The respondent's then attorneys of record, Messrs Bowman Gilfillan Incorporated, wrote a letter to the applicant's attorneys on 26 July 2010 and conceded the respondent's liability to furnish security. The attorneys stated, *inter alia*, the following in their letter:

> "2. Whilst our client concedes that it must furnish your client with security for costs in the above matter, our client contests the quantum of securities sought by your client. The amount sought in the sum of R7 233 902,60 is, in our view, excessive.
>
> 3. We propose that your client attempts to having a *pro forma*

bill of costs prepared for our consideration. Once we have had a reasonable opportunity to consider your client's *pro forma* bill of costs, our respective clients can try and reach agreement on the quantum of security to be furnished failing which the parties may request that the registrar determines the quantum of security to be furnished by our client.

4. In the circumstances, since our client has conceded the obligation to furnish security, an application to compel the giving of security would not need to be brought by your client."

[5] On 14 October 2010 the registrar determined that the respondent should provide security in the amount of R3,05 million. The applicant's attorney then demanded that security, as determined by the registrar, be furnished within ten days in terms of a letter which was addressed to the respondent's Bloemfontein attorneys, Messrs McIntyre & Van der Post, on 8 November 2010.

[6] There was no reply to the letter of demand within the stipulated period and the respondent alleges that the reason for this is that:

"it was during this time that the respondent was changing their

> attorney of record."

However, it appears that Messrs McIntyre & Van der Post had been on record since inception of the action.

[7] In its opposing affidavit the respondent raises various defences. In argument before this court, Mr. Ploos van Amstel SC, on behalf of the respondent, limited the defences to the following:

1. Section 13 of the Companies Act, 1973, is not applicable to the respondent, alternatively if applicable, it is unconstitutional;
2. The respondent was entitled to withdraw the said concession that it was liable to furnish security;
3. The respondent requests in a "counter application" that the amount of security be reviewed.

MERITS

[8] Rule 47(1) provides that:

> "A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed."

[9] It is clear that Rule 47 deals with procedural aspects. It does not set out upon what basis a party would be entitled to demand security. Apart from that, recourse must be had to the common law or statutory law.

[10] In this regard the wording of section 13 of the said Act is of importance, which reads as follows:

> "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 ..... 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."

[11] The crux of the matter is whether the applicant has contracted with a company or a partnership. The agreement of sale is therefore the foundation of the present action. The parties are described in clause 1 of the Deed of Sale as "Fourways Precinct (Pty) Ltd, ... a private company with limited liability ..." and "Signal Capital and Securities (Pty) Ltd, ... a private

company with limited liability (being the general partner of the Plexus Private Property Fund No 1 *En Commandite* partnership) ... herein represented by Prieur du Plessis (in his capacity as a director of a company duly authorised hereto by resolution of the directors)."

[12] In the particulars of claim the citation as pleaded in paragraph [1] reads as follows:

> "The plaintiff is Signal Capital & Securities (Proprietary) Ltd, a company duly registered with limited liability according to South African law (being the General Partner of the Plexus Private Property Fund No 1 *En Commandite* Partnership) with chosen *domicilium citandi et executandi* in terms of the Deed of Sale referred to below at 9 Queen Street, Durbanville, Western Cape."

[13] The parties to the Deed of Sale are similarly described, for example, respondent is "represented by Prieur du Plessis (in his capacity as a director of the company duly authorised hereto by resolution of the directors)."

[14] It also appears that the applicant, in its request for further

particulars in terms of Rule 21(2), asks the respondent the following:

> "Who are the other partners of the Plexis Private Property No 1 *En Commandite* Partnership ("the Partnership")? "

In reply thereto the respondent stated the following:

> "This paragraph does not contain enough particularity to enable the Plaintiff to respond."

[15] As far as the partner of a *commanditarian* partnership is concerned, it was known to the Roman Dutch Law and still forms part of our law. The medieval *commenda* was in substance an arrangement by which a capitalist (*commendator*) entrusted capital to a trader (*commendatarius*) for employment in merchantile enterprises on the understanding that the *commendator*, while not in name a party to the enterprise and though entitled to a share of the profits, would not be liable for losses beyond the amount of his contribution. This concept of limiting the liability of non-managing investors spread from Italy into French commercial law, emerging as a *société en*

commandite, the predecessor of the present day limited or *commandatirian* partnership. From French it was incorporated into Roman Dutch Law under its French name.

Compare: **<u>LAWSA</u>**, Volume 19, Second Edition, paragraphs 253 – 258, 547.

[16] A partnership *en commandite* is a commercial or trading partnership, which is to be carried on in the name of one or some of the partners (*in casu* the respondent) and to which every partner whose name is not disclosed, called a *commanditarian* partner or partner *en commendite*, contributes a fixed sum of money on condition that he receives a certain share of the profit, if there is any, but that in the event of loss is liable to his co-partners to the extent of the fixed amount of his agreed capital contribution only.

<u>WATERMEYER v KERDEL'S TRUSTEES</u> (1834) 3 **MENZIE** 424 at 433

<u>LAMB BROS. v BRENNER & CO</u>, (1886) 5 EDC 152 at 161

COMMISSIONER FOR SARS v HAWKER AIR SERVICES (PTY) LTD; IN RE COMMISSIONER FOR SARS v HAWKER AVIATION SERVICES PARTNERSHIP AND OTHERS [2005] 1 ALL SA 715 (T); [2006] 2 All SA 565 (SCA) at 572 -575.

See also J J Henning, **Law of Partnership**, **Transactions of the Centre for Business Law** (45) p. 34 – 36.

[17] De Wet and Yeats, **KONTRAKTEREG EN HANDELSREG**, (Fourth Edition) stated the following in this regard on p. 417 – 418:

> "Hierdie buitengewone vennootskappe het een gemeenskaplike kenmerk, nl. dat sekere van die vennote alleen teenoor hulle mede-vennote, en nie teenoor buitestaanders nie, die posisie van vennote beklee. Teenoor buitestaanders is hulle nie saam met die res van die vennote gesamentlike mede-skuldeisers en mede-skuldenare nie, m.a.w. daar bestaan geen regsband tussen hulle en die skuldeisers en skuldenare van die vennootskap nie."

[18] Henning, *op cit* stated the following on p. 35:

> "*Commanditarian* partners are not liable to creditors of the partnership, but only to their partners ... It should be noted that the doctrine of the undisclosed principle does not apply to this type of partnership and thus cannot be utilised by a partnership creditor to render a *commanditarian* partner liable for partnership debts.
>
> *Commanditarian* partners may not participate actively in the business of the partnership. It is clear that mere interference *per se* in a partnership business, not amounting to holding out or acting as ordinary partners, does not render them liable to partnership creditors."

[19] I agree with the aforesaid quotation. It is therefore clear that there is no nexus between the so-called silent partners and the applicant. The *commanditarian* partners are not liable for debts (and for that matter costs) to creditors, but only to their co-partners. It is clear that, on the assumption that a *commanditarian* partnership exists, the applicant, if successful in the main action, can *only* recover its costs from the respondent, being a company, and not from its *commanditarian* partners. As far as the applicant is concerned the reference to the said partnership in either the agreement or the particulars of claim is therefore superfluous and irrelevant. It follows therefore that the applicant was entitled to make use of section

13 of the said Act.

[20] The next question is whether section 13 is unconstitutional? Mr. Ploos van Amstel submitted that it would constitute an unreasonable and unjustifiable limitation on the rights conferred by section 34 of the Constitution and would therefore be unconstitutional, because the injustice to the respondent, if ordered to provide security in terms of section 13 of the said Act, or if prevented from pursuing its claim by an order of security, far outweighs any injustice to the applicant if no security is ordered.

[21] In **GIDDEY NO v J C BARNARD AND PARTNERS** 2007 (2) SA 125 (CC) O'Regan J referred to the fact that section 13 of the said Act constitutes an exception to the ordinary common law rule that plaintiffs who reside in South Africa may institute actions in our courts without furnishing security for costs. Compare: Section 29 of the Supreme Court Act, 59 of 1959. In par. 7 of the said judgment, the following is stated:

> "A salutary effect of the ordinary rule of costs – that unsuccessful litigants must pay the costs of their opponents – is to deter would

be plaintiffs from instituting proceedings vexatiously or in circumstances where the prospects of success are poor. Where a limited liability company will be unable to pay its debts, that salutary effect may well be attenuated. Thus the main purpose of s 13 is to ensure that companies, who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense."

[22] It is important to note what Brand JA stated in **MTN SERVICE PROVIDER (PTY) LTD v AFRO CALL (PTY) LTD** 2007 (6) SA 620 (SCA) at par. [20]:

"One of the very mischiefs s 13 is intended to curb, is that those who stand to benefit from successful litigation by a plaintiff company will be prepared to finance the company's own litigation, but will shield behind its corporate identity when it is ordered to pay the successful defendant's costs. A plaintiff company that seeks to rely on the probability that a security order will exclude it from the Court, must therefore adduce evidence that it will be unable to furnish security; not only from its own resources, but also from outside sources such as shareholders or creditors."

[23] In its opposing affidavit, the respondent alleges the following in this regard:

> "The respondent, in order to comply with an order to supply security for costs, will have to call on the partners of the respondent to fund same."

The effect of this is that the doors of the court will not necessarily be closed when the respondent is ordered to furnish security, because it can always call upon its partners to assist the respondent.

[24] It is important to note what was stated in **GIDDEY NO**'s case at par. 6:

> "As stated above, sec 13 of the Companies Act confers a discretion upon courts to order the payment of security for costs by a plaintiff company if there is reason to believe that the company will be unable to pay the costs of its opponent. It is a long standing provision in our law, and indeed, mirrors provisions in other countries."

[25] It follows from the aforegoing that the cases relied on by the respondent are not authority for the submission that section 13 of the said Act is unconstitutional.

[26] As far as the counter application is concerned, the registrar's determination of the amount of security is subject to review by the court only if it is satisfied that the registrar was clearly wrong - **TRAKMAN NO v LIVSHITZ AND OTHERS** 1995 (1) SA 282 (A) at 289 G.

[27] In **LEGAL AND GENERAL ASSURANCE SOCIETY LTD v LIEBERUM, NO AND ANOTHER** 1968 (1) SA 473 (A) Potgieter JA stated the following at 478 H:

> "The Court, therefore, has the power to correct the Taxing Master's ruling not only on the grounds stated in *Shidiack's* case but also when it is clearly satisfied that he was wrong. Of course, the Court will interfere on this ground only when it is in the same or in a better position than the Taxing Master to determine the point in issue."

[28] It is clear that none of the grounds for review are present in this application. In determining the amount of security the registrar

had the benefit of an extensive and detailed *pro forma* bill of costs. The parties were represented at the proceedings and made submissions.

[29] It follows that no case has been made out for the reviewing and setting aside of the registrar's determination. In any event, the registrar was not even been joined as a party to the review application.

[30] In view of the conclusion reached by me, it is not necessary to deal with the other points raised by Mr. Ploos van Amstel.

[31] Consequently the following orders are issued:

1. The respondent is ordered to furnish security for the applicant's costs in the pending proceedings between the parties instituted under case 1565/2008, in the amount of R3 050 000,00 (three million and fifty thousand rand) by way of a bank guaranteed cheque valid for two years to the applicant's attorneys.
2. The respondent is ordered to furnish such security within one month of the granting of this order.
3. Leave is given to the applicant to approach this court on

the same papers, duly amplified if necessary, for the dismissal of the respondent's claim under the aforementioned case number against the applicant, should the respondent fail to timeously furnish the security so ordered.

4. The counter application is dismissed.

5. The respondent is ordered to pay the costs of both applications, including the costs consequent upon the employment of two counsel.

S.P.B. HANCKE, J

On behalf of applicant: Adv. P.F. Rossouw SC
Assisted by:
Adv. S. Tsangarakis
Instructed by:
E G Cooper Majiedt Inc.
BLOEMFONTEIN

On behalf of respondent: Adv. C. Ploos van Amstel SC
Instructed by:
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