

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU – NATAL, DURBAN**

CASE: 438/2010

In the matter between:

KARL FEIGNER

Plaintiff/Respondent

vs

**THE BODY CORPORATE
OF THE LIGHTHOUSE MALL**

First Defendant/Applicant

JUDGMENT

Delivered on 16 March 2011

Ntshangase J:

- [1] This is an application in terms of Uniform Rule 47(3) to compel the respondent (plaintiff), to provide security for costs in the amount of R300 000 in an action for damages in which \$1,646,896.56 (US dollars) or R11,763,546.85 is claimed as damages against the applicant (first defendant) and three other defendants. The application is brought on the ground that the respondent is a *peregrinus* in the jurisdiction of the court with no assets in this country from which to recover costs in the event of an adverse costs award being made against him. The respondent resides at 1904 – B Sunset Drive, Walla Walla, Washington, USA.
- [2] The action is a sequel to bodily injuries sustained by the respondent from falling down an elevator shaft in the common property of the sectional title scheme known as Lighthouse Mall. The claim is instituted against the first defendant, the body corporate of the Lighthouse Mall, Otis (Pty) Limited, Dave Brown Consultancy CC and Dave Brown, the second, third and fourth defendants respectively for an alleged breach of their duty of care to take all reasonable steps to prevent the elevator causing harm to persons.
- [3] In opposing the application the respondent submits that the fact that he is a *peregrinus* with no assets in this country, which he concedes, does not entitle the applicant as of right to security for costs. This does find support in *Magida v Minister of Police*¹. The court is to exercise a discretion in the light of all relevant facts and considerations of equity and fairness to both parties. In that regard, as stated by Gibson LJ in *Keary Developments Ltd v Tarmac*

¹ 1987 (1) SA 1 (A) at 12A-B

Construction Ltd and Another ² it is essential for the court to engage in a balancing exercise which weighs the potential injustice to the respondent if prevented by an order for security from pursuing his claim as well as the potential injustice to the applicant if, by reason of refusal of the order for security, he is unable to recover from the respondent the costs incurred, in the event of a successful defence to the respondent's claim. The Rule states no grounds upon which one party may claim security for costs from the other.

- [4] It is conceded that the respondent who, as a *peregrinus* with no assets in this country, can be called upon to give security for costs in the action against the applicant, an *incola*. The circumstances of this matter will be examined in the light of the object of this rule of practice which, in *Saker & Co Ltd v Grainger* and, as followed in all our courts, is the protection of an *incola* ³ in proceedings initiated by a *peregrinus* and, as is the object of s 13 of the Companies Act 61 of 1973, which relates to a body corporate or company, to ensure that plaintiffs or applicants not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation 'vexatiously or in circumstances where their prospects of success are poor.' ⁴ In *Keary Developments Ltd v Tarmac Construction Ltd and Another*, Gibson LJ stated that in considering all the circumstances the court will have regard to the plaintiff's prospects of success but it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of success or failure. ⁵ The matter also needs to be considered in the light of s 34 of the Constitution.
- [5] I turn now to consider whether the respondent is effectively at risk of an adverse costs order if unsuccessful in the action against the applicant and his co-defendants. I observe, in regard to one of several guiding principles to be derived from *Magida v Minister Police* ⁶ that the respondent is clearly not a vagabond without a fixed residence. An *incola* is entitled to protection from a foreign vagabond who litigates without risk of his assets being endangered by a successful defendant's claim for costs. The respondent is, in my view, an honourable man. He is a professional engineer with 33 years' experience. Even in the case of a vagabond though, the court would not readily be more disposed to ordering him to furnish security if he possessed fixed property in respect of which he could furnish a hypothec ⁷. Clearly therefore, whether a person is a vagabond or not is not necessarily decisive. It does not dispose of the question whether or not litigation is instituted effectively at risk of an adverse costs order.

² [1995] 3 All ER 534 (CA) at 540a-b

³ 1937 AD 223 at 227

⁴ See *Giddey NO v J C Barnard and Partners* 2005 (5) SA 525 (CC) para 7

⁵ Cited above n 2 at 540d-e

⁶ Cited above n 1 at 12E-13G

⁷ *Ibid* at 12E-F

- [6] One other principle laid down in *Magida v Minister of Police* is that no one should be required to furnish security beyond his means to an *incola*. In this matter the amount of security is not contested. The respondent has disclosed movable property to the approximate value of \$ 60 000. Although it is not in dispute that he resides in a place with a civilised legal system, where there would be nothing to prevent enforcement on the judgment on costs, a clear picture of his executable assets is not provided as he has not disclosed whether any of his assets, which include 'personal clothing' 'miscellaneous household furniture' and 'appliances' are immune from execution or not, and, if so, the value of such assets. In regard to immovable property, no more was stated by the attorney who deposed to the answering affidavit on behalf of the respondent than

‘I am still awaiting details on the plaintiff’s immovable property’

It was also not indicated whether the plaintiff has liabilities; nor was it indicated whether any of the plaintiff’s assets are encumbered.

- [7] What also exacerbates the problem of determining the respondent’s ability to pursue the action, should he be required to give security, is whether the respondent is ‘... clearly not a man of straw’ or whether his ‘current cash flow is precarious’ as his position is ambivalently described in his affidavit’s paragraphs 13 and 8 respectively. There is, in the light of the foregoing, no clear evidence as to the effect of an order to give security on the respondent’s ability to pursue the action should he be required to provide security. In *Keary Developments Ltd v Tarmac Construction Ltd and Another*⁸ the court held that before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. In this matter there is no evidence to so satisfy the court.
- [8] It was also submitted on behalf of the respondent that litigation would have been obviated if the applicant had responded to his request for certain information. The respondent did not furnish the detail of the information requested. The applicant has appended annexure “C” to his replying affidavit as reflecting the requested information. It is not clear as to how the response to information as sought in annexure “C”, would have obviated litigation when viewed in the light of the respondent’s claim and the defence thereto. It is however clear from what reflects in the answering affidavit deposed to on behalf of the respondent that the respondent had, up to the time of institution of the action, not determined which defendant was responsible for the malfunctioning of the elevator and the actual basis of liability of any particular defendant to sustain his claim. In paragraph 9 he states:

⁸ Cited above n 2 at 540f-g

‘The first defendant could have avoided this litigation had it responded to the plaintiff’s request for information. It did not do so. In the result, the plaintiff has been unable to determine which of the defendants is responsible for the malfunctioning elevator which caused his severe injuries.’

Without going into the merits of the case, it is fair to state that this evinces a negative bearing on the respondent’s prospects of success in the action.

- [9] I deal now with the respondent’s submission that if he be compelled to provide security, it would severely impact on his ability to continue with the litigation against the applicant and the other defendants, and consequently constitute an unreasonable limitation of a right in terms of s 34 of the Constitution which entitles everyone to have any dispute that can be resolved by the application of the law decided in a fair public hearing before the court. The constitutionality of Uniform Rule 47 is not in issue in these proceedings. The Rule itself cannot be properly perceived as operating to defy the provisions of s 34 of the Constitution. It is, as was stated by O’Regan J in *Giddey N O v J C Barnard and Partners* ⁹ with reference to s 13 of the Companies Act 61 of 1973, ‘not capable of being read, in light of the Constitution or otherwise, to mean that a court has no discretion to order security to be furnished where the effect of that order will be to terminate litigation’. As the court enjoined in that case, this court in the present matter, has borne in mind the provisions of s 34 of the Constitution and weighed them in the light of other facts placed before it and the potential injustice to the respondent if he be prevented from pursuing a legitimate claim, as well as the potential injustice to the applicant, if it succeeds in its defence but cannot recover its costs, bearing in mind the salutary effect of the ordinary rule of costs that unsuccessful litigants must pay the costs of their opponents.

In *Giddey NO v J C Barnard and Partners* ¹⁰ the court rejected the following criticism of the reasoning of the court in *Shepstone & Wylie and Others v Geyser N O* ¹¹

“Let me say at the outset 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. It is a possibility inherent in the very concept of a provision like s 13 which comes into operation whenever it appears to the Court that the plaintiff or applicant will not be able to pay the defendant or respondent’s costs in the event of the latter being successful in his defence. If there is no evidence either way, the mere possibility that the order will effectively terminate the litigation can plainly not affect the Court’s decision. It only becomes a factor once it is established, it remains no more than a factor to be taken into account; by itself it does not provide sufficient reason for refusing an order.”

⁹ 2007 (5) SA 525 (CC) para 29

¹⁰ Cited above n 4 para 27

¹¹ 1998 (3) SA 1036 (SCA)

[10] I accordingly make the following order:

- a) That the respondent (plaintiff) be and is hereby ordered to furnish security to the applicant (first defendant) in the amount of R300,000 within seven (7) days of the date of this order;
- b) that in the event that the respondent (plaintiff) does not comply with paragraph (a) above, the applicant (first defendant) shall be entitled to apply on these papers supplemented in so far as it may be necessary, for an order dismissing the respondent's (plaintiff's) claim;
- c) that the costs of this application be paid by the respondent (plaintiff).

Appearances:

For Applicant (First Defendant): Adv A J Boulle,
instructed by Deneys Reitz Inc, Durban.

For Respondent (Plaintiff): Adv A A Gabriel,
instructed by Malcolm Lyons & Brivik Inc, Cape
Town.