

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 6177/2008

In matter between:

COEN PELSER

1st Applicant

PRECISION CAR, TRUCK & TRAILOR

2nd Applicant

And

SILAS KHUMALO

Respondent

HEARD ON:

5 March 2009

JUDGMENT BY:

C.J. MUSI, J

DELIVERED ON:

12 March 2009

[1] This is an application for the provision of security for costs, in the amount of R50 000.00. The respondent contests his liability to furnish security.

- [2] On 1 November 2002 the respondent lodged an application in this court under case number 3924/2002 against both applicants for the delivery of two machines – a press brake Heli 250 ton 3m hydraulic machine and a quillotine 2m 500 Pearson machine. This application was opposed by both applicants and is still pending.
- [3] The respondent instructed his erstwhile attorneys Magunda and Moalusi to lodge the aforementioned application during 2002. He signed the founding affidavit in support of the application. He received no progress report from his attorneys. After several unfruitful attempts to enquire about the status of the application he ascertained that Magunda and Moalusi Attorneys closed down.
- [4] The respondent then approached another attorney, (apparently his current attorney), and explained his problem to this attorney. He did not have a copy of the application (3924/2002) nor did he have the case number. He could therefore not provide his new attorney with any details.

- [5] His new attorney did not advise him to proceed with the first application. On his attorney's advise he proceeded with the second application under case number 5229/2005 for the delivery of the same goods. This application was dismissed with costs, apparently because of the numerous factual disputes.
- [6] The respondent did not pay the costs of application 5229/2005. A warrant of execution was issued and some of his assets were attached by the Sheriff. He did not know that there was still money outstanding.
- [7] The respondent issued summons under case number 2645/2008 wherein he sued both applicants for the delivery of the same goods.
- [8] The applicants lodged this application and allege that the respondent is vexatious because the action proceedings are the third proceedings in relation to the same subject matter and cause of action.

- [9] Subsequent to lodging this application applicants' attorney intimated to the respondent's attorney that the outstanding balance in relation to the costs order was R26 577.07. The full outstanding amount was paid by the respondent because the applicants' attorney gave the impression that they would not proceed with this application if the full amount is settled.
- [10] Although the main ground for this application was that the respondent is vexatious this was jettisoned by Mr Fourie, on behalf of the applicants. Mr Fourie was of the view that the mere fact that he could not settle the costs order made in case 5229/2005 was sufficient to order the respondent to furnish security. Ms Bester on behalf of the respondent contended that the respondent would be able to pay any possible costs order and that there is therefore no need for an order that he should furnish security for costs.
- [11] A court has unfettered discretion to order a plaintiff or applicant, as the case may be, to furnish security for costs. In exercising its discretion a Court should not adopt a predisposition either in

favour of or against granting security; **Shepstone & Wylie and Others v Geyser NO** 1998 (3) SA 1036 (SCA) at 1045 I to 1046 A. In exercising its discretion a Court will have to be alive to the provisions of section 34 of The Constitution of the Republic of South Africa 1996 which reads as follows:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[12] Rule 47 should be read with the provisions of section 34 of the Constitution. A court should therefore balance the provisions of section 34 of the Constitution with the provisions of Rule 47. The provisions of section 34 and Rule 47 should be balanced in the light of the facts circumstances of the particular case. The balancing act should be done as follows:

“On one side of the scale must be weighed the potential prejudice to the plaintiff or applicant if it is prevented from pursuing a legitimate claim. This incorporates a recognition

of the importance of the right to access to courts. On the other side of the scale must be placed the potential prejudice 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 has 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."

Per O'Reagan J in **Giddey NO v JC Barnard and Partners** 2007 (2) BCLR 125 (CC) at paragraph [30]¹.

[13] Both applicants and the respondent are incolae. In **Ramsamy NO and Others v Maarman NO and Another** 2002 (6) SA 159 (C) at 1721 to 173 A Thring J, correctly in my view, said:

1. Although that matter dealt with security in terms of section 13 of the Companies Act 61 of 1973 the sentiments are also apposite in respect of security in terms of Rule 47.

“As a general rule then, the inability of a plaintiff or applicant as the case may be, who is an incola, to satisfy a potential costs order against him is insufficient in itself in a case of this kind to justify an order that he furnish security for his opponent’s costs. Something more than this is required before that can be done.

What this “something” is has been variously described in a number of decisions. Thus in *Ecker v Dean* (supra) it was said... that the basis of granting an order for security was that the action was ‘reckless and vexatious’.”²

[14] Thring J went on to say that irrespective of the respondent’s poor prospects of recovering its costs the applicants could only be ordered to furnish security if the Court was satisfied that the main application was (a) vexatious or (b) reckless or (c) amounted to an abuse of Court process.³

2. See *Ecker v Dean* 1938 AD 102 at 110.

3. At 173 F – G.

[15] Having abandoned the argument that the respondent is vexatious, Mr Fourie argued that the mere fact that he (respondent) did not pay a previous costs order in the same matter was sufficient reason to order the respondent to furnish security. He relied on **Vanda v Mbuqe & Mbuqe** 1993 (4) SA 93 (TK) for his argument.

[16] In **Vanda** the Court found that the fact that the plaintiff, Ben Nomoyi, knowingly ignored to pay a debt owed to the respondents for legal services rendered and his being a peregrinus is sufficient reason to order him to pay security for costs (my underlining). That case is distinguishable from this matter. The respondent in this matter is an incola; not a peregrinus. The debt in this matter has been paid in full, *albeit* only after this application was lodged.

[17] The respondent's financial ability to comply with an order to pay the applicants' cost should the action be unsuccessful is also a relevant factor that should be considered. See **Fitchet v Fitchet** 1987 (1) SA 450 at 454 G – H. The respondent states

that he is in a position to pay any costs order made against him. The mere fact that the Sheriff was unable to attach sufficient assets to satisfy the costs order, in the past, does not *per se* mean that the respondent is not in a position now, and will not be in future, to pay a costs order against him. The fact that he paid an amount of R26 577.07 immediately when he became aware of the balance outstanding on the previous costs order is in my view an indication that he has sufficient funds to pay a costs order against him should his action against the applicants be unsuccessful.

- [18] Mr Fourie also argued that the respondent is reckless in that he has not yet withdrawn the first application. The respondent puts this issue beyond doubt in his answering affidavit. He states clearly in relation to the first application that:

“it is therefore respectfully contended that it would be in the best interest of all parties and more convenient to rather proceed with the action where the necessary evidence can be led regarding the factual disputes.”

This is a clear indication that he would not proceed with the first application. He will in all probability have to pay the applicants' costs with regard to that application too.

[19] It was not contended by the applicants that the respondent's prospects of success are dim. I don't deem it necessary to deal therewith although Ms Bester has dealt with this issue at length in her heads of argument. It is a relevant factor but it need not be considered in this matter because it has not been put in issue by the applicants. See **Davidson's Bakery (Pty) Ltd v Burger** 1961 (1) SA 589 (o) at 593 E. I must accept in the respondent's favour that the prospects of success are indeed good or at worse neutral.

[20] To conclude, the applicants did not allege that the respondent was vexatious, reckless or that he abused the process of this Court. The respondent's *bona fides* are therefore not in issue. The only factor that the applicants relied upon was the respondent's inability to pay their costs should they defend the action successfully. As has been pointed out above, this,

alone, is not sufficient grounds. The mere fact that a party suing is insolvent is no ground for obliging him to provide security for his opponents costs. See **Crest Enterprises v Barnett and Schlosberg** 1986 (4) SA 19 (C) at 20 E – F. In **Crest Enterprises** *supra* at 22 A – B Berman J concluded as follows:

“That applicants in this case may never be able to recover any part of their costs if they succeed in the action brought against them by or on behalf of the trust cannot in my view outweigh in the balance the inalienable right of an incola to call in aid the due process of the law in pursuing his (or its) claim and neither he (nor it) should be effectively deprived of the right to access to this Court (or have any impediment placed in the way of the exercise of the right) upon the basis solely of an inability to pay the costs of the opposing party should he or it subsequently fail in the prospective proceedings.” I agree.

[21] After due consideration of all the facts I am not satisfied that I should exercise my discretion against the respondent.

[22] The respondent was successful in defending this application.

There is no reason why the applicants should not be ordered to pay the costs of this application.

[23] I accordingly make the following order.

23.1 The application is dismissed.

23.2 The applicants are ordered to pay the respondent's cost jointly and severally, the one paying the other to be absolved.

C.J. MUSI, J

On behalf of the Applicants:

Adv. J.A. Fourie
Instructed by:
Vermaak & Dennis
BLOEMFONTEIN

On behalf of the Respondent:

Adv. A. Bester
Instructed by:
Naudes
BLOEMFONTEIN

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