

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

Case No.: 496/2005

In the case between:

MARIA VAZLADELIS

Applicant

and

CASTLE BRIDGE PRIMARY SCHOOL CC
HAYDEN LEWIS WROUGHTON

1st Respondent

2nd Respondent

JUDGEMENT:

HATTINGH, J

HEARD ON:

16 MARCH 2006

DELIVERED ON:

16 MARCH 2006

A resumé

[1] The parties to this application are *incolae* of this court. The respondents are also the first and second plaintiffs in the principal action. Applicant is a defendant in that action. In the principal action plaintiffs seek rectification of a Deed of Sale in order to incorporate an alleged option in favour of the second plaintiff (second respondent) to purchase the

property in question from the defendant (applicant).

- [2] Applicant is the mother-in-law of second respondent and as such the mother of his estranged wife with whom he is involved in protracted divorce proceedings.
- [3] At all times prior to the divorce proceedings the property in question was registered in the name of first respondent and thereafter, following the conclusion of a written agreement of sale, transferred into the name of applicant at a price equivalent to no more than the then outstanding balance in respect of the mortgage bond.
- [4] The respondents subsequently brought a successful urgent application to stay the transfer of the property to a third party pending the institution of the present action for rectification of the agreement of sale.
- [5] The present applicant brought a similar application seeking security from both respondents prior to the launching of the

then urgent application. (Application nr. 3664/05)

[6] The application for security was dismissed on the grounds, *inter alia* that second respondent was for all practical purposes the alter ego of first respondent and should the court order security in respect of first respondent this would effectively close the doors for the second respondent.

[7] In light of further information which has subsequently come to the applicant's attention, the application for the furnishing of security is now renewed in respect of the principal action.

The first respondent

[8] Where the application for security involves a Close Corporation the relevant provisions of the Company's Act will apply *mutatis mutandis* to the similar provisions contained in the Close Corporations Act (see section 8 of the Close Corporations Act 69 of 1984 and section 13 of the Companies Act 61 of 1973).

[9] In terms of section 8 of the Close Corporations Act the court may at any time during the proceedings, if it appears that there is reason to believe that the corporation will be unable to pay the costs of the defendant or the respondent if he is successful in his defence, require security to be given for those costs and may stay all proceedings until the security is given.

[10] Once the court is satisfied that such reason to believe exists, it has a discretion whether or not to order the respondent to furnish security; see **FRASER v LAMPERT, NO** 1951 (4) SA 110 (T) at 115 A – B.

[11] In exercising this discretion:

- (a) The court will lean towards ordering security to be furnished;
- (b) It will not deprive the applicant of the benefit of this section unless special circumstances are found to exist;

- (c) The court will consider what the respondent's financial position is and what it will be if and when it loses the action. In this regard its present financial position is relevant;
- (d) The court will not enquire fully into the merits of the action and form an opinion of the applicant's prospects of success, but the nature of the claim and the defence thereto are not irrelevant. The applicant ought to specify her defence. (See **TRUST BANK VAN AFRIKA BPK v LIEF AND ANOTHER** 1963 (4) SA 752 (P) at 754H – 755B and **HENRY v R E DESIGNS CC** 1998 (2) SA 502 (CPD) at 508 A – D).

[12] Whether or not there is an onus on the respondent to establish the existence of any special circumstances on which it may rely, is open to debate and have not been decided:

(Cf. **COMETAL - MONETAL SARL v CORLIANA ENTERPRISES (PTY) LTD** 1981 (4) SA 662 (W) at 664 E – F.) As was done in **HENRY v R E DESIGNS CC** (*supra*) at

510 B, I shall assume in the respondents' favour that there is no such onus resting upon it. However, there is authority that the respondent must be able "at least to point to such special circumstances as will justify this court in refusing the present application".

- [13] The first respondent is as such a dormant Close Corporation, not earning any income. The applicant bears the onus of establishing, on a balance of probability, that there is reason to believe that the respondents will be unable to pay her costs if respondents fail in their action (ROSEVILLE BUILDINGS (PTY) LTD v POWIS AND CO (1923) LTD 1942 NPD 94 at 96). If applicant fails to discharge this onus the court will have no power to order security. However, that onus which the applicant bears is not to establish that the respondents will, as a fact, be unable to pay her costs. All that she must show, is that there is reason to believe that they will be unable to do so. That is in the nature of things much less difficult to establish on the probabilities (HENRY v R E DESIGNS CC (*supra*) at 510 H.)

[14] Mr. Fischer on behalf of respondents contended that there are special circumstances justifying the court not to order security by first respondent in favour of applicant even though, technically, first respondent might very well be unable to pay applicant's costs should she be successful. Those special circumstances are:

- (a) Prior to the transfer of the property into the name of applicant, the property was registered in the name of first respondent;
- (b) At all times the first respondent was represented by its sole member, the present second respondent;
- (c) It is the case of respondents that it was the intention of the parties that the property would only be transferred into the name of applicant until such time as second respondent had resolved his own financial problems;
- (d) Support for this contention is to be found in the following undisputed facts in the papers under application number 3616/05:
 - (aa) At all times prior to and subsequent to the

transfer of the property into the name of applicant, second respondent and thereafter second respondent and his new wife, stayed on the property.

- (bb) Second respondent paid all legal costs relating to the transfer of the property as well as the registration of the subsequent mortgage bond over it notwithstanding the fact that it was registered in the name of applicant.
- (cc) Second respondent and his now estranged wife continued to stay in the property and effected numerous expensive alterations and renovations thereto.
- (dd) The property was transferred in the name of the applicant at a totally unrealistic price, namely the then outstanding mortgage bond.
- (e) The second respondent, in seeking to amend the existing agreement of sale concluded between first respondent and the present applicant, has no alternative but to cite the first respondent Close

Corporation as a party to these proceedings as such Close Corporation, albeit represented by second respondent, was as such the owner and subsequent seller of the property in question.

[15] I am in agreement with the submission advanced by Mr. Fischer that the fact that the said Close Corporation (first respondent) has subsequently become dormant should not, in the circumstances, detract from its right, as represented by second respondent, to seek rectification of the agreement of sale so as the record second respondent's right therein. In any event, second respondent has at all material times placed on record that he will be carrying the costs occasioned by the necessary technical involvement of first respondent.

[16] The question to be determined is whether or not in the exercise of the discretion conferred upon the court in terms of section 8 of the Close Corporation's Act 69 of 1984 the court should come to the relief of the applicant. As stated by

Greenberg J, in **HUDSON AND SON v LONDON TRADING CO LTD** 1930 W.L.D at 288:

“The object of section 216 is to protect persons against liability for costs in regard to any action instituted by bankrupt companies.” (See now section 13 of the Companies Act 61 of 1973.)

I am of the opinion that the applicant should not be deprived of this benefit unless special circumstances exists. In the exercise of the discretion regard should be had to the nature of the claim and some enquiry should be directed to the merits of the dispute.

[17] In **HIGHLANDS NORTH INVESTMENT CO (PTY) LTD v LAND VALUES LTD** 1931 W.L.D. 102 at 105 Tindall J said (with reference to **LUCERN ASBESTES LTD v BECKER,** 1928 WLD 168):

“In that case it was quite clear that if the action failed the company would be unable to pay the costs and it was laid down that even if it was plain that the plaintiff’s claim was put

forward *bona fide*, there was a duty on the court to exercise its discretion in favour of the applicant and to order security to be given. I do not think that the learned Judge in that case intended to lay down that the court is bound to order security in every case where it is plain that if the action fails the company would be unable to pay the defendant's costs. In my opinion the court is entitled to consider the nature of the particular case. Of course it was not intended that in an application for security the court should enquire fully into the merits and form an opinion of the plaintiff's prospect of success, but it seems to me that the nature of the claim is not irrelevant."

(Cf. **FEDGEN INSURANCE CO LTD v BORDER BAG MANUFACTURING (PTY) LTD AND ANOTHER** 1995 (4) SA 355 (W)).

- [18] The question of security is one of practice and not of substantive law. (**MAGIDA v MINISTER OF POLICE** 1987 (1) SA 1 (A) 12 A – C). Having regard to the relevant facts of the case and paying due regard to the particular circumstances of the case and considerations of equity and fairness to both parties and in the exercise of my discretion, I

do not think it just to order that security should be given as far as first respondent is concerned.

The second respondent

[19] In the case of individual plaintiffs such as second respondent, the general rule of our law prevails, namely that:

“[N]o person, who is either *civis municeps* or *incola* of this colony, can, as plaintiff, be compelled to give security for costs, whether he be rich or poor, solvent or insolvent....”

(See **WITHAM v VENABLES** (1828) 1 Menz 291 and **HERBSTEIN AND VAN WINSEN: THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA**, 4th Edition, Page 321.)

[20] In **CREST ENTERPRISES (PTY) LTD AND ANOTHER v BARNETT AND SCHLOSBERG NNO** 1986 (4) SA 19 (C) Berman J, stated the general principle thus at 20 B – D:

“The law, however, relating to the provision by a plaintiff (or applicant) of security for the costs of the opposing party is well-settled in our law and may be succinctly stated as follows, viz no hurdle should be permitted to stand in the way of any person's access to a court in seeking relief at its hands, and no court should - in the case of an impecunious litigant - by requiring him as plaintiff, or applicant, to provide security for his opponent's costs, lend support to the canard which likens its doors to those of the Ritz Hotel.”

[21] In **RAMSAMY NO AND OTHERS v MAARMAN NO AND ANOTHER** 2002 (6) SA 159 (C) at 172B Thring J, stated the general rule thus:

“... mere inability of a plaintiff or applicant, who was an incola, to satisfy a potential costs order against him was insufficient in itself to justify an order that he furnish security for his opponent's costs. Something more was required before this could be done.”

The learned Judge went on to discuss what this “something”

is and referring to **ECKER v DEAN** 1938 AD 102 at 110 held that the basis of granting an order for security was that the action was “reckless and vexatious”.

- [22] Even on the assumption that applicant may never be able to recover any part of her costs if she succeeds in the action brought against her by respondents, that cannot in my view, outweigh the inalienable right of an *incola* to call in aid the due process of the law pursuing his claim and neither should he be effectively deprived of the right to access to this court (or have any impediment placed in the way of the exercise of that right) upon the basis solely of an inability to pay the costs of the opposing party should he be subsequently fail in the prospective proceedings (**ECKER v DEAN** (*supra*) at 22 A – E). In **RAMSAMY NO AND OTHERS v MAARMAN NO AND ANOTHER** (*supra*) at 173 it was held that to furnish security for costs can only be ordered if the court is satisfied that the principal action:
- (a) is vexatious; or
 - (b) is reckless; or

(c) amounts to an abuse of the process of the court.

I respectfully agree.

[23] An action is vexatious if it is obviously unsustainable. While this must appear as a certainty in an application to dismiss or strike-out a claim, in an application for the furnishing of security for costs the test is less stringent and other factors, which are irrelevant in an application for the dismissal of a claim, should be taken into consideration. However, the onus remains on the applicant to satisfy the court that the principle action is one of those mentioned in paragraph 22 (a) or (b) or (c) (**FITCHET v FITCHET** 1987 (1) SA 450 (E) at 454 F.)

[24] However, the court has inherent jurisdiction to order a litigant to furnish security for the costs of the other side when it is satisfied that the litigation is vexatious. The power of the court to order security for costs on the basis of vexatiousness is, however, exercised sparingly and only in exceptional circumstances (cf. **WESTERN ASSURANCE**

COMPANY v CALDWELL'S TRUSTEE 1918 AD 262 at
274.)

[25] Applicant has failed on her own papers, alternatively those
deposed to on her behalf, to even suggest that the principal
case is vexatious or reckless or amounts to an abuse of the
process of court.

[26] The application is dismissed with costs.

G.A. HATTINGH, J

On behalf of the applicant: Adv. A. Williams
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of the respondents: Adv. P.U. Fisher
Instructed by:

Bezuidenhout Inc.
BLOEMFONTEIN

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