



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2022/060092

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED: NO

SIGNATURE

DATE: 06 MAY 2024

In the matter between:

SUPREME POULTRY (PTY) LTD

First Applicant / First Defendant

NUTRI FEEDS (PTY) LTD

Second Applicant / Second Defendant

ARBOUR ACRES (PTY) LTD

Third Applicant / Third Defendant

and

SHAWN WILLIAMS N.O.

First Respondent / First Plaintiff

JANINE ADELE SNYDERS N.O.

Second Respondent / Second Plaintiff

ZIYAD SONPRANO N.O.

Third Respondent / Third Plaintiff

Summary:

- Rule 47 – Security for Costs against liquidators – abuse of process – Prescription*
- *Section 31 of the Insolvency Act – Collusive dealing before sequestration*

JUDGEMENT

Z KHAN AJ

BACKGROUND

- [1] The Applicants seek security for costs in terms of Uniform Rule 47. The Applicants request for security for costs is premised on the Respondents action against them being an abuse of Court. The Respondents refuse both the request for security and the amount of R1'500'000.00 demanded by Applicants, for security.

[2] Mike's Chicken (Pty) Ltd was placed under voluntary business rescue on 1 July 2016. The business rescue practitioner, who is cited as a Defendant in the principal litigation, later concluded that there was no reasonable prospect of rescuing the business. The business rescue proceedings were discontinued and the Company was placed in liquidation on 16 July 2019. The Respondents were appointed as joint liquidators on 13 November 2019.

[3] A summons was issued against the Applicants (and other parties not seeking security in this application) on 15 December 2022 and served on the Applicants on 19 January 2023. The relief sought in the summons is for, *inter alia*,

“

- i) To the extent necessary, for the Day-Old Chick agreement (...) to be set aside;
- ii) Against the fourth defendant, payment of the amount of R7,056,000.00;
- iii) Against the third defendant, payment of the amount of R21,2450,000.00

“

[4] The Respondents firstly seek the setting aside of an agreement dated 19 September 2016, concluded between the Applicants and the Business Rescue Practitioner of the now liquidated Company. The Respondents allege

that the agreement is the product of collusion,¹ to the detriment of the body of creditors of the liquidated Company. The further relief for the payment of monies is predicated upon the agreement to be expunged.

- [5] The Applicants retort by way of special plea that the claims against them have become prescribed in terms of section 11(d) of the Prescription Act, 68 of 1969. Applicants assert that the Respondents persistence with the prescribed claim is an abuse of the court process and warrants security for costs.
- [6] Applicants also refer to the report of the Respondents as liquidators, issued in terms of section 402 of the Companies Act, 1973, that the Company has no assets. It is concluded that the Respondents cannot satisfy any cost order that might be granted in favour of the Applicants, in the event that Applicants are finally successful in the main litigation.
- [7] The Respondents replicated by referring to section 32(3) of the Insolvency Act, 24 of 1936 which allows for the recovery of any property, including a debt, once a court sets aside an unlawful disposition. Hence, Respondents argue that prescription (for the claiming of the monies) will only commence in terms of section 12 of the Prescription Act, once a disposition is set aside by a court and not before.

¹ Finn's Trustee v Prior 1919 EDL 133 at 137 approved in Gert de Jager (Edms) Bpk v Jones NO en McHardy NO 1964 (3) SA 325 (A) 331A.

- [8] The setting aside of the agreement is the first prayer in the particulars of claim and this is the precursor for the remaining relief for payment of monies.
- [9] In the answering affidavit to the application for security, the Respondents take the view that the prayer for the setting aside of the agreement does not constitute a debt and is thus not susceptible to prescription. They say:
- '13. It is denied that a collusive disposition which requires this Court to declare such disposition to have occurred (as a declaration of rights) can prescribe.'
- [10] The Applicants, in addition to the prescription argument, also raise a complaint that there is no cause of action pleaded by the Respondents.

THE LAW

- [11] The power to grant security for costs is based on the residual discretion of courts, arising from their inherent jurisdiction to regulate their proceedings.² This discretion must be exercised sparingly and with due regard to Constitutional rights.
- [12] The inability to pay costs to a successful party in litigation is not, by itself, grounds for the granting of security. There has to be more, in that the litigation

² Ecker v Dean 1937 AD 254

must amount to abuse.³ An unsustainable action would constitute such an abuse. This consideration deters would-be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects of success are poor.

[13] The test to be applied is one of a 'preponderance of probabilities'.⁴ A court deciding upon security for costs walks a tightrope in that it must not finally decide the merits of the matter, whilst at the same time casting a view upon the prospects of success of the matter. As Streicher JA stated in *Zietsman v Electronic Media Network Ltd and Another*⁵

[21] I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party's prospects of success would depend on the nature of the dispute in each case.

[14] The Constitutional Court, in *Giddey NO v JC Barnard and Partners*, in considering the purpose of section 13 of Act 61 of 1973 (as it then was), with the view to clarify the proper application of the statutory provision, stated as follows:

³ *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A)

⁴ *Golden International Navigation SA v Zeba Maritime Company Limited, Zeba Maritime Company Limited v Visvliet* 2008 (3) SA 10 (C)

⁵ 2008 (4) SA 1 (SCA) para 21

“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 their 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 section 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.”

[15] A Court’s discretion ought not to be fettered by preconceived points of departure in an enquiry as to whether security should be awarded.⁶ The Court may take into consideration the nature of the claim and the defence; however, the ultimate merits of the parties’ cases are usually irrelevant in deciding whether a security should be ordered. The Court considering whether or not security should be ordered should also have regard to considerations of equity and fairness to both parties.⁷

[16] A claim by a liquidation to set aside an impeachable transaction ordinarily begins to run from the date of appointment of the liquidator.⁸ In the present

⁶ Cooper NNO v Mutual and Federal Versekeringsmaatskappy Bpk 2002 (2) SA 863 (O) 874B-C

⁷ Waste-Tech (Pty) Ltd v Van Zyl and Glanville 2000 (2) SA 400 (SE) at 404C 404G-H

⁸ Duet and Magnum Financial Services CC and Liquidation v Koster 2010 (4) SA 499 (SCA)

matter, the Respondents hold the view that the claim against the Applicants for the payment of the monies, will only begin running once the Court grants them relief in terms of their first prayer to set aside the implicated agreement due to collusion. The Respondents view the money portion of the claim as being the debt.

[17] The Applicants argued in accordance with *Duet*, where the Court stated:

‘[12] The sections of the Insolvency Act with which we are concerned are not merely a novel procedure for enforcing existing debts. They create for liquidators a remedy in addition to any remedies that might be available at common law. It might be that the liquidators have a claim against Mr Koster for recovery of a present debt under the common law remedies for fraud, or under the *actio Pauliana*, but they are not pursuing remedies of that kind. In addition to those remedies the Insolvency Act creates a different and wider remedy that is given to liquidators to recover assets that have been removed from an estate before insolvency. ‘

[18] Counsel for Respondent also made submissions relating to the Makate⁹ matter and when the ‘debt’ might begin to run. Jafta J referred to the decision of Desai NO v Desai¹⁰ and similar decisions holding that the word “debt” had a

⁹ Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)

¹⁰ 1996 (1) SA 141 (A)

wide meaning, extending even to a claim for the enforcement of an obligation to do something or refrain from doing something and the enforcement of a right.

[19] The Legislator creates a right, distinct from common law rights, for a liquidator that appear in section 31 and section 32 of the Insolvency Act. The effect of the successful exercise of the right is to create an indebtedness where none exists.¹¹

[20] It is the right to set aside the agreement that is being exercised by the Respondents, before any claim for monies. This right to set aside the agreement (or put differently when did the 'right of action' arise) is the subject matter of the prescription complaint and will in due course be determined. It is not for this Court to speculate upon the ultimate success of these arguments.

[21] I have considered the submissions and the papers before me and applied all the information placed before me as well as considered equity and fairness to both parties.¹² At this interim stage, I am of the view that the Applicants have satisfied the minimum requirement for the granting of security and must thus be successful in their application.

¹¹ AON South Africa (Pty) Ltd v Van den Heever NO (615/2016) 2017 ZASCA 66 (30 May 2017)

¹² Magida v Minister of Police 1987 (1) SA 1 (A) at 14E

NO CAUSE OF ACTION

[22] Applicants also say that the Respondents claim is an abuse because there is no cause of action. They say that the Respondents have alleged a collusion without saying more in the Applicants papers. Put differently, the Particulars of Claim and the affidavits do not lay bare the details of collusion. The act of a 'collusion' has been pleaded tersely without further detail.

[23] I do not speculate, and neither is this court allowed to, as to the manner in which the evidence in this matter may unfold at trial. Respondents argue that one would have expected the Applicants to complain of a lack of detail, by way of exception. Absent a determination of this step, the complaint that the claim against Applicants is vexatious or abusive cannot pass muster.

[24] The Respondents papers set out various transactions that the Business Rescue Practitioner concluded and these will be interrogated at trial. I therefore agree with Respondents in their submissions that this complaint by the Respondent has no merit for purposes of this application for security.

RESIDUAL DISCRETION

[25] Courts have a judicial discretion¹³ whether to order security be lodged, having regard to relevant facts and consideration of equity and fairness.

¹³ *Mystic River Investments 45 (Pty) Ltd and Another v Zayeed Paruk Incorporated and Others* 2023 (4) SA 500 (SCA)

[26] In considering factors that bear upon the exercise of a judicial discretion, attention is drawn to *Giddey NO v J C Barnard and Partners*,¹⁴ where the apex court discussed the prejudice to a litigant who wishes to pursue a legitimate claim against the prejudice to a successful opposing party who would not be able to recover costs.

[27] *Giddey*¹⁵ calls for a balance need be attained between the interests of parties:

‘[8]... (Courts) need to balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against the potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its own costs in the litigation. To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An applicant for security will therefore need to show that there is a probability that the plaintiff company will be unable to pay costs. The respondent company, on the other hand, must establish that the order for costs might well result in its being unable to pursue the litigation and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospects of success.’

¹⁴ 2007 (5) SA 525 (CC) at para [30]

¹⁵ citing with approval *Shepstone & Wylie & Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1046B and the English case of *Keary Developments v Tarmac Construction Ltd and Another* [1995] 3 All-ER 534 (CA) at 540a–b

[28] Such relevant considerations 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.

[29] The Applicants have demonstrated that the insolvent company owns no assets. The first requirement of a two-stage test is thus satisfied.¹⁶ Applicants point to the Respondents being funded in their litigation by a (presumably secured) creditor of the insolvent company in terms of section 32(1)(b) of the Insolvency Act. The Respondents did not engage these allegations meaningfully or fully.

[30] This Court can only consider the information presented before it and is not privy to all the information that will be placed before a trial Court, which will have the benefit of full discovery of documentation and cross examination.

[31] Having regard to what the Respondents have placed before me, I draw from the sentiments of *Boost Sports Africa (Pty) Limited v South Africa Breweries (Pty) Limited* 2015 (5) SA 38 (SCA) at [27]:

¹⁶ *Montcommerce d.o.o. vs Murray and Roberts Ltd* (020727/2023) [2024] ZAGPJHC 357 (12 April 2024)

[27] In the language of Lombard (at 877), when a company has everything to gain and nothing to lose, it would be putting a premium upon vexatious and speculative actions if such practice (namely, compelling security) were not adopted.

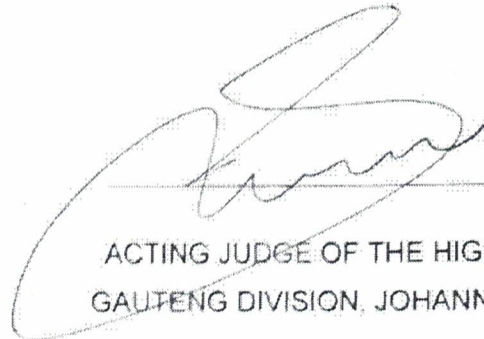
[32] In an alternative exercise of applying a discretion, I come to the same conclusion as I do above, that the Applicants are entitled to the relief that they seek.

[33] There is no cogent reason to deviate from the principle that costs follow the successful party.

[34] In the result the following order is made:

1. The Respondents are ordered to furnish security for the Applicants legal costs in the action instituted under the above case number;
2. The form, amount and manner of security to be provided by the Respondents shall be determined by the Registrar of this Court, on application by the Applicants;
3. In the event that the Respondents fail to provide security as determined by the Registrar within 90 days of the Registrars determination, the Respondents action shall be stayed and the Applicants are authorised to apply for the dismissal of the Respondents action;

4. The Respondents are to pay the costs of this application including the costs occasioned by the use of two Counsel.



Z KHAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to Caseline. The date and time for hand-down is deemed to as reflected on the Caseline computer system.

DATE OF HEARING : 23 FEBRUARY 2024

DATE OF JUDGMENT : 06 MAY 2024

APPEARANCES:

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