



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. **113668/23**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

[REDACTED]

30 AUGUST 2024

SIGNATURE

DATE

In the matter between:

GAST SOUTH AFRICA (PTY) LTD

Applicant

And

CRYSTAL LAGOONS TECHNOLOGIES INC.

First Respondent

CRYSTAL LAGOONS B-V

Second Respondent

In re:

CRYSTAL LAGOONS TECHNOLOGIES INC.

First Plaintiff

CRYSTAL LAGOONS B-V

Second Plaintiff

And

GAST SOUTH AFRICA (PTY) LTD	First Defendant
METRUM PROJECT MANAGEMENT (PTY) LTD	Second Defendant
STEYN CITY PROPERTIES (PTY) LTD	Third Defendant
GAST INTERNATIONAL SA	Fourth Defendant
DR. KEVIN GAST	Fifth Defendant
KEVIN GAST	Sixth Defendant

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicant, Gast South Africa (Pty) Ltd [Gast SA], the first defendant in the main action, bring this application for security of costs in terms of uniform rule 47 and in terms of 17 South African Patents Act, 57 of 1978 [Patent Act] in respect of the form and amount, including a stay of the main application. Such relief sought from Crystal Lagoons Technologies Incorporated and Crystal Lagoons B-V, the plaintiffs in the main action [collectively ‘the Respondents’] [security relief].

[2] In the main action the Respondents seek *inter alia* interdictory relief as against Gast SA and the remaining defendants for the alleged infringement South African patent number 2007/10014 and South African patent number 2013/06553 [main action].

[3] It is common cause that the Respondents are both *peregrini*, do not own any immovable assets in South Africa and have accepted their liability to tender security for the Defendants’ costs in the main application.

[4] The acceptance of such liability has repeatedly been echoed in the papers and was initially recorded in their initial notice dated the 11 April 2023 in which they tender security as follows:

“TAKE NOTICE FURTHER that the plaintiffs herewith tender the requested amount of R2 000 000.00 (two million rand)(own emphasis) all defendants as total security for costs in the amount by way of deposit into the trust account of the plaintiff’s patent attorneys, Adams & Adams, to be held in trust by Adams & Adams pending the finalisation of the matter in favour of the plaintiffs (own emphasis). The payment of any tax agreed costs to the defendants following a cost order in favour of the defendants in this matter, or the release of the security for the defendants’ costs by written agreement between the parties or order of court.” [tender].

[5] This tender has set the cats amongst the pigeons. Gast SA argues that, at the material time, it did not accept the tender and in consequence, requested its present attorneys, Couzyn Hertzog & Horak [Couzyns], to cause a 47(1) request in August 2023 to be served. The August request, the reason for it launching this present application.

[6] The Respondents contend that the tender was for all the Defendants in the main action and that due to Gast SA’s inaction (failure to respond to the tender) and, for that matter, the remaining Defendants inaction by their 9 June 2023 notice, Gast SA had accepted the quantum and form of the tender and was now barred and estopped from launching its security relief.

[7] Furthermore, the Respondents argue that Gast SA’s security relief should be sought from the Registrar.

[8] The arguments, at first blush appear simple enough however, the procedural chronology and the attorneys who played their part in it must be dealt with to unpack Gast SA’s security relief.

MATERIAL PROCEDURAL CHRONOLOGY.

[9] At the inception of the main action, Gast SA, the fourth, fifth and sixth defendants were initially represented by Smit & Van Wyk Incorporated [Smit Inc.].

[10] However, on 31 July 2023, Smit Inc. withdrew as attorneys of record for Gast SA, the fourth and sixth Defendant. In terms of the filed notice it would appear then that Smit Inc. still acts for the fifth Defendant

[11] On 10 August 2023, Couzyns formally came on record and the fourth Defendant appointed DLBM Attorneys [DLBM], on the 8 August 2023.

[12] Both Couzyns and DLBM shortly after their appointments, caused respective requests for security for costs, in terms of rule 47(1) read with section 17 of the Patent Act notwithstanding the Respondents' tender. The Fourth Defendant too followed suit making a similar request from the Respondents on 10 August 2023.

[13] Werksmans attorneys [Werkmans] are on record for the Second and Third Defendants, and on the 26 April 2023, rejected the tender and set out their own request for, *inter alia*, security for costs in the amount of R3.7 million.

[14] Against this current state of play, the chronology of what had transpired before that bears scrutiny. The trigger event which resulted in the tender relied on by the Respondents was indeed, the initial request for security served by Smit Inc. on 21 February 2023, at a time when it still acted for Gast SA [initial request]. Of significance is that Smit Inc. only caused the initial request to be served on the Respondents' attorneys Adams & Adams [Adams]. Werksmans who, at the time, were the only other patent attorney on record for the remaining defendants did not receive notice of the initial request.

[15] This would explain Werkman's reply to the Plaintiffs tender in which they correctly stated that they had not requested security to warrant the tender in its form and amount. To re-iterate the tender clearly stated: "*TAKE NOTICE FURTHER that*

the plaintiffs herewith tender the requested amount (own emphasis) of R2 000 000.00 (two million rand)”

[16] In fact, the content of their reply to the tender at paragraph 6 stated unequivocally that:

“6. The amount of security tendered by the plaintiffs, in the amount of R2 million:

- a) was tendered by the plaintiffs in response to a request for security for costs not emanating from the subject defendants (own emphasis);*
- b) was, despite the aforesaid, tendered to serve as a composite security for costs in respect of the costs to be incurred by all the defendants, including the subject of defendants;*
- c) is insufficient to serve as security for the costs to be incurred by all the defendants, and indeed even if only intended to serve as security for the costs of the subject defendants.”*

[17] A clear objection and rejection of the tender in so far as it may have been meant for them. In consequence, if one of the Defendants in the “*all defendants*” catch phrase rejected the tender, the Respondents have failed to explain how the tender factually, in its current form and, on its terms could apply to the remaining Defendants? Even if the tender was, as argued a counteroffer, it could never have been in respect of the Second and Third Defendants as they had not made a request at that material time to illicit a counteroffer. Performance by the Respondents of their tender rendered impossible. Furthermore, any argument centred around a tacit acceptance by Smit Inc on behalf of Gast SA in respect of the delivery of their discovery affidavit suffers the same conclusion fir the same reason.

[18] All of which would explain the necessity and reason for the new request by Gast SA and DLBM. But, notwithstanding the rejection, and on the 9 June 2023,

Adams caused a notice to be served that the R 2 000 000.00 had been paid into Adams trust account. How this could remedy the position is unknown.

[19] However, perhaps the answer lies in paragraph 2 of the Respondents' reply to the request for security served by DLBM, in which they state: "*Security for costs was provided on the 9th of June 2023 in the form of a deposit in the amount of R2 000 000.00 (two million rand) paid into the trust account of the plaintiffs' attorneys, and notice was given to the defendants of this fact.*" The defendants accepted that this constituted adequate security for all the defendants in this matter. (own emphasis). That statement and premise in the notice, is factually incorrect. In consequence no plausible answer for such acceptance by all defendants including Gast SA is rendered.

[20] It therefore appears that the tender has not been accepted by Gast SA or may not have been capable of acceptance in any event, in light of the Second and Third Defendants' rejection. It too, appears plausible that Gast SA could have accepted that the tender was meant in response to their and the other defendants, who Smit Inc. represented as no other prior request had been made at that time. The allegation of consensus and an agreement established of acceptance not plausible.

[21] As far as this Court's jurisdiction to entertain this application is concerned this Court possess jurisdiction to entertain it in terms of section 17 of the Patent Act and furthermore, nothing precludes this Court to, *inter alia*, deal with the dispute between the parties regarding the acceptance of the tender. This Court entertains the relief argued.

[22] There is no reason why costs should not follow the result.

The following order is made:

1. The First and Second Respondents, the First and Second Plaintiffs in the main action, are ordered to provide security for costs to the Applicant, the First Defendant in the main application.
2. The dispute between the parties relating to quantum of security and the manner in which it should be provided is referred to the Registrar.
3. The action is stayed pending compliance by the First and Second Respondents in providing of security in the amount and manner determined by the Registrar.
4. The First and Second Respondents are ordered to pay the costs of this application on scale B.



L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

For the applicant: Adv AJP Els
Cell: 087 092 5543 / 083 455 6579
Email: apjels@lawcircle.co.za

Instructed by attorneys: Couzyn Hertzog & Horak Inc
Tel: 012 460 5090
Email: Ferdie@couzyn.co.za

For the first & second respondent: Adv GD Marriott
Cell: 082 824 0616
Email: marriott@counsel.co.za

Instructed by attorneys: Adams & Adams
Tel: 012 432 6000
Email: danie.dohmen@adams.africa

Date of hearing: 28 August 2024
Date judgment delivered: 30 August 2024