

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Numbers: **55896/2021**
2023-007449

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

31 JULY 2024
DATE

In the matter between:

REDPATH AFRICA LIMITED

Applicant

and

**SIYAKHULA SONKE EMPOWERMENT
CORPORATION PROPRIETARY LIMITED**

First Respondent

FREDERICK SAM ARENDSE

Second Respondent

**REDPATH MINING (SOUTH AFRICA)
PROPRIETARY LIMITED**

Third Respondent

JUDGMENT

(Security for costs)

SENYATSI, J

- [1] The issue in this application is what scale of costs the Court should award in favour of the respondent, Redpath Africa Limited (“RAL”) following the tender for security made by it in favour of the applicants on 11 May 2023, the wasted costs for the application for security for costs against the respondent, a *peregrinus* incorporated and registered in Mauritius.
- [2] The applicant RAL in the main application under the same case number, seeks an order that it has validly cancelled the shareholders’ agreement in respect of Redpath Mining South Africa (Pty) Ltd (“RMSA”), cited as the second respondent, alternatively that the first respondent (“SSC”), the controlling mind of which is the third respondent (“Arendse”), is deemed to have offered its entire shareholding in RMSA for sale to RAL in terms of certain provisions of the shareholders’ agreement.
- [3] It is common cause that on 14 January 2022, SSC and Arendse filed a notice in terms of rule 47(1) requesting security for costs from RAL. SSC and Arendse were not satisfied with RAL’s response to the request and so launched this interlocutory application. They seek an order that RAL must furnish them with security for costs in an amount of R 1 200 000. The security for costs application was launched on 2 March 2022.
- [4] On 28 March 2022, RAL filed its answering affidavit. In that affidavit, RAL explained that:
 - a. It was common cause that RAL was the majority shareholder in RMSA and that its shareholding “constitutes an asset within the jurisdiction of this Court that would render its judgment effective against [Redpath] notwithstanding its status as a peregrinus”.

- b. Furthermore, Redpath owned movable assets to the value of \$3 577 365, which were set out in a schedule annexed to the answering affidavit. It was also explained that, despite technically being movable property, the assets constituted heavy mining equipment and machinery which could not easily be removed from the jurisdiction of the court – those assets therefore constituted excellent security.
- c. On 7 April 2022, SSC and Arendse filed their replying affidavit and persisted in the application for security for costs. They justified their refusal to accept that RAL owned adequate assets to satisfy any costs order made against it (and certainly far exceeding the R 1 200 000 sought in these proceedings) by raising the following complaints:
 - i. RAL “tenders none of the assets as security for the applicants’ costs”.
 - ii. RAL failed to disclose if any of the assets are encumbered or pledged “or the rights of third-parties in respect of these assets”.
 - iii. RAL was “deliberately vague in describing the assets”.
 - iv. RAL admits that it is not in possession of the assets mentioned in the answering affidavit.

[5] On 11 May 2022, Werksmans Attorneys, RAL’s attorneys of record, wrote to Cliffe Dekker Hofmeyr (“CDH”), the attorneys acting for SSC and Arendse. In that letter, Werksmans recorded the following:

- a. The value of the assets far exceeded the claim for security in the amount of R 1 200 000 sought by SSC and Arendse;
- b. The assets were not encumbered or pledged to third parties;
- c. The tendered assets were situated at Modikwa Mine;

- d. RAL would ensure that the tendered assets remained within South Africa until the main application was heard;
- e. The tendered assets were under RAL's control.

[6] RAL called upon SSC and Arendse immediately to withdraw their application for security. No response was received to this letter. On 27 July 2022, Werksmans sent a further letter to CDH. In short, the purpose of the letter was to record that:

- a. No response had been received to the 11 May 2022 letter;
- b. At a case-management meeting held in July, SSC and Arendse indicated that they intended to persist in their application for security for costs;
- c. CDH was called upon to explain why SSC and Arendse had refused and
- d. RAL's tender in its 11 May 2022 letter and why they were persisting in the security application.

[7] RAL contends that no response was received to this letter either – at least not at first. Instead, SSC and Arendse filed their heads of argument on 1 August 2022. In the heads of argument, SSC and Arendse repeated, verbatim, the contentions advanced in the replying affidavit as if the letters sent above had never been written.

[8] It is common cause that on 8 August 2022, CDH finally responded to the letter dated 27 July 2022. The letter is, so contends RAL, important to the ultimate order which RAL seeks this Court to make.

- a. The letter begins by mapping out the history of the engagement between the parties on the issue of security – starting with the rule 47(1) notice, then Werksmans’s response to that notice (in a letter dated 28 February 2022), then the launching of this interlocutory application and then the filing of the parties of their answering and replying affidavits respectively;
- b. The letter then says that RAL “now wishes to introduce new facts by way of correspondence to address its shortcomings and demand that our client withdraws its application without any tender for the costs of the application. Accordingly, the approach being adopted by your client is extremely inappropriate.
- c. The letter concludes by saying that SSC and Arendse would only withdraw the application for security “based on the undertaking recorded in your letters dated 11 May 2022 and 27 July 2022, if your client tenders” the costs. RAL was warned that, if it did not do so, “our client will place the correspondence before the court in support of a punitive costs order against your client”.

[9] RAL has filed a supplementary affidavit in which all of the above-mentioned facts have been set out. It has accompanied that affidavit with a notice of motion, seeking leave for that affidavit to be admitted. RAL argues that it is in the interests of justice for the short supplementary affidavit to be admitted, because the facts set out above are essential to the proper determination of this matter. For reasons that follow below, I agree with the submission.

[10] The letter in which SSC and Arendse expressed a willingness to withdraw the application in exchange for an undertaking by RAL to pay their costs came after SSC and Arendse filed their heads of argument. In the heads of argument, the motivation for seeking an order providing for security is based

solely on the repetition of the complaints set out in the replying affidavit. No mention was made of the tender.

[11] RAL seeks a cost order from 11 May 2022 on a punitive scale which is opposed by SSC and Arendse. RAL also contends that up to 11 May 2022, each party should bear its own costs.

[12] In terms of Uniform Rule 47 and at common law a peregrinus plaintiff (or applicant) who does not own immovable property in the Republic with sufficient unburdened margin to satisfy costs that may arise, may be ordered to give security for the costs of his action.

[13] The historical approach to the principle on security for costs was expressed by the Supreme Court of Appeal in *Boost Sports Africa v South African Breweries (Pty) Ltd*,¹ as follows:

“The general rule of our law as laid down in *Witham v Venables* (1828) 1 Menz 291 is that an *incola* plaintiff cannot be compelled to furnish security for costs. As explained in *Lumsden v Kaffrarian Bank* (1884 – 1885) 3 SC 366 no inhabitant of the Colony can be compelled to give security for costs whether he be rich or poor, solvent or insolvent, but a peregrinus may be called upon to do so, unless he can prove that he is possessed of immovable property within the Colony of adequate value (*Lombard v Lombardy Hotel Co Ltd (in Liquidation)* 1911 TPD 866).”

[14] Once it is established that a plaintiff (or applicant) is a *peregrinus* and that they do not own unmortgaged immovable property in the Republic, an *incola* defendant is entitled, subject only to the discretion of the Court, to seek security for the costs of the action or as in this instance an opposition

¹ 2015 (5) SA 38 (SCA) par 5.

to the pending application.² The purpose of the rule is to ensure that if the peregrine plaintiff is unsuccessful, payment of an *incola* defendant's costs is secured.

[15] The Court has a discretion to exercise whether to absolve the *peregrinus* from being ordered to provide security.³ The Court will exercise its judicial discretion—“by having due regard to the particular circumstances of the case as well as the consideration of equality and fairness to both the *incola* and the *peregrinus* to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs. Nor is there any justification for requiring the Court to exercise its discretion in favour of a *peregrinus* only sparingly.”⁴

[16] In *Browns The Diamond Store CC v Van Zyl*,⁵ Kathree-Setiloane J embarked on a comprehensive consideration of the law on security for cost and she said the following: -

“An *incola* defendant does not, however, have a *prima facie* right to be furnished with security for costs by a peregrine plaintiff. Whether or not the latter should furnish an *incola* with security for its costs lies within the discretion of the court. In exercising its discretion, the court must have regard to the particular circumstances of the case as well as considerations of equity and fairness to both the *incola* and the peregrine. Factors that our courts have taken into account when deciding whether or not to order a peregrine to provide security are his impecuniosity and whether an order compelling him to furnish security would deprive him of the right to litigate against an *incola*; whether he is economically active within the

² *Brearley v Faure, Van Eyk and Moore* (1905) 22 SC 2; *Lowndes v Rothschild* 1908 TH 49; *Kachelnik v Afrimeric Distributors (Pty) Ltd* 1948 (4) SA 279 (C).

³ *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14E-G.

⁴ *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14E.

⁵ 2017 JDR 0583 (GJ) at para 5.

jurisdiction of the court; and whether execution of the court's judgment is possible in the jurisdiction in which he resides. None of these factors are, however, decisive."

[17] SSC and Arendse argue that once it is established that the respondent is a peregrinus, an appropriate security for costs order should be made. However, this argument misses the fact that indeed on 11 May 2022, a tender was made to them on the security for costs. The tender was rejected on the basis that it was vague despite the fact that the movable heavy equipment was identified as well as its value which is in excess of \$ 3 500 000 and its location and the undertaking that it would not be removed from its location which is a mining site.

[18] The offer was only accepted on 27 July 2022 and despite the acceptance, when the heads of arguments were prepared 1 August 2022, which is 5 days after the acceptance of the offer, on behalf of SSC and Arendse, there was no reference to the acceptance of the offer. In other words, in the absence of any reference to the acceptance of the offer for tender on security for costs, the heads of arguments are misleading to this Court as it no longer necessary to make an appropriate order on the security for costs. In the light of the tender made by RAL on 11 May 2022, there is simply no basis for this Court to make any order in this application. On the facts of this matter, it is quite clear that SSC and Arendse have been given an adequate indication that any costs order made in their favour in the main application will be satisfied. This is now common cause.

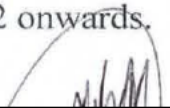
[19] There is no suggestion that the letter of 11 May 2022 was not received – indeed, in their letter of 8 August, SSC and Arendse implicitly accept that it was received. So, the question before this Court now, when considering whether the stance of SSC and Arendse is an abuse of process, is: why did SSC and Arendse not accept the tender and instead give the instruction to

persist in the application and file heads of argument ignoring the letter of 11 May 2022 entirely? I am of the view that by doing so, SSC and Arendse were abusing the Court process because there were no justifiable reasons to persist with the application for security for costs post 11 May 2022. Consequently, and under the circumstances, an appropriate punitive cost order from the 11 May 2022 to 29 July 2022 should be favourably considered.

Order

[20] The following order is made: -

- a. The application for security for costs is dismissed;
- b. The parties are ordered to pay their own costs up to 11 May 2022;
- c. SSC and Arendse are order to pay the costs on the scale as between the Attorney and client from 11 May 2022 onwards.



M.L. SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **31 July 2024**.

Appearances:

For the applicants: Adv IV Maleka SC

Adv T Scott

Adv T Poee

Instructed by Cliffe Dekker Hofmeyer Inc

For the first respondent: Adv S Symon SC

Adv D Watson

Instructed by Kampel Kaufmann Attorneys

For the second respondent: Adv J Blou SC

Adv A Friedman

Instructed by Werksmans Attorneys

Date of Hearing: 06 November 2023

Date of Judgment: 31 July 2024

