

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 3706/2024

In the matter between:

MEYNELL INVESTMENTS LIMITED

Applicant

and

AZARENKA (PTY) LTD

Respondent

Coram: Acting Justice P Farlam

Heard: 21 August 2024

Delivered electronically: 22 August 2024

JUDGMENT

FARLAM AJ:

Introduction

[1] The applicant (**Meynell**) has applied to wind up the respondent (**Azarenka**), which it alleges is unable its debts, and more especially unable to make payments due under a £4 million loan facility agreement concluded between the parties in January 2018.

[2] The winding-up application is not yet ready to be heard, despite having been set down for hearing on 21 August 2024 by virtue of an agreed order between

the parties back on 25 March 2024, which also contained a timetable regulating the delivery of affidavits and heads of argument to facilitate that hearing. This is in part because of an interlocutory application brought by Azarenka for discovery, security for costs and a postponement pending the provision of security, and also because Azarenka anyway failed to comply with the timetable and, more particularly, only delivered its answering affidavit on 19 August (two days before the set-down date), instead of by 9 May, as required by the court order.

- [3] What accordingly falls to be considered at this stage is (i) Azarenka's interlocutory application and the appropriate costs order in respect thereof; and (ii) the consequences of Azarenka's non-compliance with the 25 March court order. These issues will be addressed in turn.

Azarenka's interlocutory application

- [4] Azarenka's interlocutory application, launched on 16 July 2024, essentially sought orders (a) that Meynell, as a foreign *peregrinus* incorporated in the Bahamas, provide security in the amount of R500,000 within ten days of the court's order; (b) that Meynell "properly respond" to Azarenka's notice in terms of Uniform Rules 35(12) and (14) within ten days; and (c) that the winding-up application set down for 21 August 2024 be postponed pending Meynell's compliance with the security and discovery orders.

- [5] At the hearing of the matter, Azarenka's counsel informed the court that Azarenka was not persisting with its discovery application. The withdrawal of that portion of the interlocutory application was understandable. For Azarenka was not entitled to the documentation it sought – bank statements of Meynell for an unspecified period – under either rule 35(12) or rule 35(14).

5.1. Rule 35(12) was not applicable because there was no suggestion that Meynell had referred to, or relied upon, the requested bank statements in its founding affidavit in the winding-up application, and rule 35(12) is

only potentially applicable when “reference is made to any document” in a pleading or affidavit of the other party.¹

- 5.2. Rule 35(14) could not be relied upon as: (i) it can only be utilised by “any party to any action” [emphasis added], unless the court has made the rule applicable in a particular application under rule 35(13),² and Azarenka had not sought any such order under rule 35(13), nor sought to contend that this was an exceptional case in which discovery should be ordered;³ and (ii) rule 35(14) anyway only applies to “clearly specified” documents which are needed “for purposes of pleading”⁴ and in this case the requested bank statements were not only vaguely described but could not plausibly be said to be required for Azarenka to deliver its answering affidavit. Azarenka had earlier contended in this regard that it should be allowed to inspect Meynell’s bank statements to ascertain whether they reflected repayments allegedly made by Azarenka which were not recorded in the schedules attached to Meynell’s founding affidavit. However, Azarenka plainly did not require sight of the bank statements in order to aver in answer, with reference to its own records, that additional repayments had been made. That was in fact demonstrated by Azarenka’s belated answering affidavit, as well as its earlier replying affidavit in the interlocutory application, both of which contained a list of the further payments which, according to Azarenka, had been made between 2 August 2018 and 5 May 2023.

¹ For a recent analysis of this requirement, see *Democratic Alliance and Others v Mkhwebane and Another* 2021 (3) SA 403 (SCA) paras [24] to [37].

² That is a peremptory requirement: see e.g., *Loretz v MacKenzie* 1999 (2) SA 72 (T) at 74B-75C.

³ It is well-established that an order in terms of rule 35(13), making discovery applicable to an application, should not easily be granted: see e.g., *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 470D-E, *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003 (6) SA 190 (SE) paras [9] to [13], *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and others* 1999 (3) SA 500 (C) at 513, and *Lewis Group Ltd v Woollam and others* (2) [2017] 1 All SA 231 (WCC) paras [4] to [7].

⁴ *Cullinan Holdings Limited v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 647E-648G; *Quayside Fish Supplies CC v Irvin & Johnson Ltd* 2000 (2) SA 529 (C) paras [11] to [16]; *Business Partners Ltd v Trustees, Riaan Botes Family Trust and Another* 2013 (5) SA 514 (WCC) para 11. Cf., too, *Capricorn Makelaars (Edms) Bpk and others v EB Shelf Investment No. 79 (Pty) Ltd and others* (ECJ 050/2005) [2005] ZAECHC 25 (10 June 2005) paras [10] to [11], where the test was stated to involve an enquiry into what is “reasonably required in the circumstances”.

[6] Azarenka did however still press its claim for security for costs against Meynell. It argued that Meynell, a foreign company, owns no property in South Africa against which a costs order could be executed,⁵ and Azarenka should not have to seek to enforce any costs order in its favour in the Bahamas. It also contended that there would be no real prejudice to Meynell in being required to provide security, as it is not suggested that Meynell is impecunious (and could thus not come up with the security demanded) and that a balance of prejudice enquiry would consequently favour Azarenka. The latter contention was a departure from the stance taken in Azarenka's replying affidavit in the interlocutory application, where it was alleged that Meynell was "an 'entity' of straw ... not having the funds to satisfy any costs order"; but the new contention was clearly justified, given that Meynell had after all loaned Azarenka £4 million and Azarenka had also earlier in its replying affidavit stated that "Meynell is a boutique financial operations company".

[7] Meynell raised various arguments in opposition to the security claim.

7.1. It pointed out at the outset that the court must investigate all circumstances and consider whether equity and fairness to both litigants dictate that security be ordered;⁶ and that it would also be wrong to approach the inquiry on the basis that a court should exercise its discretion in favour of a peregrinus only sparingly.⁷

7.2. As to its grounds for opposing the security sought:

7.2.1. Meynell submitted that security had not been sought "as soon as practicable after the commencement of the proceedings", as

⁵ Echoing the basis on which security was demanded in *Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd, and two other cases* 2009 (5) SA 602 (C) para [16].

⁶ *Mystic River Investments 45 (Pty) Ltd and Another v Zayeed Paruk Inc. and Others* 2023 (4) SA 500 (SCA) para [7].

⁷ *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14E-G; *Mystic River supra* fn.6 paras [7], [13] to [15].

required by rule 47(1) – the notice demanding security having been sent on 25 June 2024, approximately three months after the winding-up application had been launched – and that Azarenka had moreover taken a further step before requesting security.

7.2.2. It also submitted that Azarenka could set off any costs order it obtained against its principal indebtedness to Meynell, which far exceeds the amount of security requested, and that Azarenka was therefore otherwise protected.

7.2.3. Meynell argued, too, that it should not be unduly onerous for Azarenka to enforce a costs order against Meynell in the Bahamas under their Reciprocal Enforcement of Judgments Act.

7.2.4. Finally, Meynell contended that the amount of security sought was unsubstantiated and excessive.

[8] It is true that Azarenka's request for security could have been brought earlier (albeit that security was sought prior to Azarenka doing anything other than delivering its notice in terms of Rules 35(12) and (14)). It is however unnecessary to consider whether Azarenka should be denied security on this basis, or on some of the other grounds raised by Meynell, as an unanswerable response to Azarenka's security demand is that it could simply set off any costs order granted in its favour against its substantial indebtedness to Meynell and it therefore already enjoys sufficient protection against the peregrine applicant.

[9] Under the common law, set-off (or *compensatio*) is possible where debts owed by two entities are (i) of the same nature (e.g., in money), (ii) liquidated (i.e., when the exact money value is certain); (iii) fully due; and (iv) payable by

and to the same persons in the same capacities (i.e., where two persons reciprocally owe each other something in their own right).⁸ In the event of Azarenka being possessed of a taxed or agreed costs order in its favour, all the requirements for set off would be met, and Azarenka could consequently set off the amount of that costs order against its next repayment to Meynell. It was recognised more than a century ago in *Bovenzer* that an *incola* defendant has sufficient security where it is liable for future monthly payments to the plaintiff, and that a claim for security against a peregrine plaintiff should be refused in such circumstances.⁹ In my view, this is another such case.

- [10] Azarenka's only response on affidavit to Meynell's submission that Azarenka's interests were sufficiently protected by its common-law right to set off a money debt owed by Meynell to Azarenka against Azarenka's own payment obligations to Meynell was that: "Sett [sic] off is denied as no indebtedness is admitted at all". That was not however a good faith disputation. For it was common cause on the papers – as correctly acknowledged by Azarenka's counsel in argument – that Azarenka still owed Meynell a considerable amount of money under the loan facility agreement. The extent of the payments still due by Azarenka is neatly illustrated by the letter from its corporate attorneys, Covington, to Meynell's attorneys, dated 8 September 2023, in which Covington aver that a liquidation will prevent Azarenka from "making payment of the next agreed payment [by Azarenka] of £339,063 ... in October 2023 or any other payments under the loan agreement for as long as those proceedings are ongoing" and "could also ... result in [Meynell] realising a fraction of the outstanding Capital Amount [defined earlier in the letter as the original loan amount of £4 million] upon liquidation". It is apparent from the various affidavits in the interlocutory and winding-up applications that Azarenka did not make the payment of the £339,063 which on its own version was due in October 2023. Even if that payment were to be made, there would

⁸ Du Bois (gen. ed) *Wille's Principles of South African Law* 9ed pp 832-834; Pothier *Traité du Contrat* (trans. Evans under the title *A Treatise on the Law of Obligations or Contracts*) §623-628.

⁹ *Bovenzer v Bovenzer* 1898 Cape Law Journal (CLJ) 203 (O). See, too, Cilliers, Loots, Nel Herbstein & Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5ed Vol. 1 p 397.

anyway still be a significant portion of the loaned amount of £4 million (easily more than £2.5 million) outstanding, and required to be repaid by Azarenka to Meynell.

- [11] Azarenka is consequently already sufficiently protected against its foreign counterparty and does not need the security claimed. That also means that there is no basis for a postponement of the winding-up application pending the provision of security – which was the only basis on which Azarenka could persist in seeking a postponement in the interlocutory application in the light of its withdrawal of the rule 35 prayer. What remains of the interlocutory application must therefore be dismissed.

The costs of the interlocutory application

- [12] There can be no dispute as to whether Azarenka must pay the costs of the interlocutory application. The rule 35 component thereof was without merit, and was thus sensibly not persisted with;¹⁰ while the prayers seeking security for costs and a postponement pending provision of security and the furnishing of the documentation sought under rule 35 were also unsustainable and have thus been dismissed. The only question can therefore be the scale of the costs order which should be granted in respect of the interlocutory application.
- [13] Meynell's counsel contended that the interlocutory application was an abuse, designed to delay, and that Azarenka should accordingly pay the costs of that application on a punitive, attorney and client, scale. Alternatively, it was submitted, at least the rule 35 component of the interlocutory application warranted a punitive costs order as it was utterly without merit. Azarenka's counsel, on the other hand, argued that it was within his client's rights to seek

¹⁰ The general rule is that a party withdrawing a claim is liable for the costs of the withdrawn proceedings (*Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd* 2003 (5) SA 547 (C) at 550C-D; and *Wildlife & Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others* 2005 (6) SA 123 (ECD) at 129E-130B; 131B-C); and there is absolutely no reason to depart from that principle in this instance given that the rule 35 demand was evidently withdrawn because of a realisation that it had no prospects of success.

documentation under rule 35, however ham-handed the request may have been; and that it was also entitled to ask for security from the foreign (Bahamas-incorporated) applicant.

[14] There are reasons to suspect that each of the components of the interlocutory application, as well as that application itself, were designed to delay the winding-up application. The rule 35 request was only made on or about 3 May 2024, less than a week before Azarenka's answering affidavit was due; while the security notice was only delivered in late June 2024, some three weeks after the rule 35 demand had been rejected. There was also a delay, albeit slight, between the rejection of the request for security and the bringing of the interlocutory application, at a stage when time was of the essence given the earlier set-down of the winding-up application. On the other hand, it is perfectly possible that the timing of the request for security was attributable to a belated realisation that Azarenka was entitled to ask for security for costs under the common law, read with rule 47. Furthermore, while the request for discovery under rules 35(12) and (14) was badly misconceived, this does not mean that it was not genuinely pursued. It would, in any event, seem unwieldy to grant a different, and more stringent, costs order in respect of only that component of the interlocutory application and prayer 2 of the notice of application, as well as in respect of the costs pertaining to the initial set-down of the interlocutory application on 7 August 2024, which were, in terms of the court order made on that day, reserved for determination at the hearing on 21 August 2024. Azarenka will accordingly be directed to pay the costs of the interlocutory application on a party and party scale.

[15] As to the scale of counsel's costs, under rule 67A, read with rule 69: Meynell contended for scale C, in the event of the costs of the interlocutory application being awarded on a party and party basis; while Azarenka submitted that the interlocutory application was straightforward and warranted no more than scale A. The rule 35 aspect of the interlocutory application was indeed uncomplicated, but the security for costs component was arguably more intricate. The main application itself is also of high value and not without complexity. It is significant, too, that Azarenka has both on 7 August and

21 August 2024 briefed senior counsel. While I am not convinced that this matter justifies granting counsel's costs on the highest scale, it accordingly seems appropriate to grant Meynell's counsel's costs on scale B.

The consequences of Azarenka's breach of the 25 March court order

[16] As was common cause, Azarenka must also pay the wasted costs occasioned by its late answering affidavit and heads of argument in the main application – which were delivered on Monday, 19 August, well out of time.¹¹ All that remains to be considered in that regard is again the scale of the costs order.

[17] Had Azarenka's answering affidavit in the winding-up application been delivered timeously, Meynell could have replied well before the set-down date of 21 August 2024; both parties' heads of argument could have engaged with the allegations as contained therein; and the winding-up application could have been heard immediately after the interlocutory application. Instead, because of Azarenka's non-compliance with the 25 March 2024 court order, as well as the Uniform Rules and the Court's Practice Directives, Meynell's heads of argument, filed in early August, could only motivate the case advanced in the as-then-unanswered founding affidavit, Meynell was also unable to deliver a replying affidavit before the winding-up application was due to be heard, and the winding-up application could consequently not be argued on 21 August 2024. As a result of its disregard of a court order, Azarenka has thus obtained a postponement of the winding-up application, despite having had its interlocutory application, in which it *inter alia* sought a postponement, dismissed. It hardly needs to be stated that this constitutes vexatious conduct and an abuse of process, which is worthy of censure by a punitive costs order. Azarenka must accordingly pay the wasted costs occasioned by its breaches of the court order on an attorney and client scale.

¹¹ I was advised that Meynell was not opposing the admission of Azarenka's late answering affidavit, or thus disputing that Azarenka should be granted condonation for having filed it about three months' late. It is accordingly unnecessary to evaluate the flimsy condonation motivation at the end of Azarenka's answering affidavit.

[18] While the prejudice caused to Meynell will to some extent be assuaged by the punitive costs order, it will be further disadvantaged if the hearing of the winding-up application were now to be delayed unduly. In case this may assist with the finalisation of this matter, I accordingly record that, in my view, this is a matter that could appropriately be allocated a preferential hearing date on the semi-urgent roll, and that the applicant may advise the Acting Judge President of this recordal should it consider it appropriate to do so.

Order

[19] **I accordingly make the following order:**

1. The interlocutory application of the respondent in the main application (“Azarenka”) is dismissed with costs on a party and party scale. Such costs include the costs of the postponement of the interlocutory application on 7 August 2024 and the costs of counsel, which are granted on scale B.
2. Azarenka is granted condonation for the late filing of its answering affidavit in the main application (the “winding-up application”).
3. The winding-up application is postponed for hearing on a date on the semi-urgent roll to be arranged by the parties with the Court.
4. Azarenka is to pay the wasted costs occasioned by the late filing of its answering affidavit and its heads of argument in the winding-up application, and the resultant postponement of the winding-up application, on an attorney and client scale.

ACTING JUDGE P FARLAM

For applicant: Adv H C **Jansen van Rensburg**

Instructed by: Garlicke & Bousfield Cape Inc., A Liebenberg

For respondent: Adv N **Redman** SC

Instructed by: Thompson Wilks Inc. (Johannesburg), John Hunter, c/o Thompson Wilks Inc, (Cape Town)