



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

Case Number: 21292/2023

In the matter between:

CAPE CASH AND CARRY (PTY) LTD

First Applicant

MARYNA ESTELLE SYMES NO

Second Applicant

ANDRE CHARL VAN HEEREN NO

Third Applicant

KAGISO SURPISE DINAKO NO

Fourth Applicant

and

XTREME WORKS (PTY) LTD

First Respondent

DANIEL O'CONNOR

Second Respondent

TYRONE WHITAKER

Third Respondent

HILTON MER

Fourth Respondent

MASTER OF THE HIGH COURT

Fifth Respondent

JUDGMENT

JANISCH AJ:

Introduction

1. This is an application for security for costs in terms of Rule 47 of the Uniform Rules.
2. The applicant for security is the Fourth Respondent.
3. To avoid confusion, I shall continue to refer to the parties as they are cited in the main proceedings.
4. The Applicants, being respectively a company in liquidation and its three appointed liquidators, launched motion proceedings against the Respondents on 21 November 2023. The Applicants' claims against the First to Fourth Respondents are, in overview, as follows:
 - 4.1. As against the First to Third Respondents, they claim relief in terms of section 341(2) of the Companies Act 61 of 1973 arising from alleged dispositions of property by the First Applicant to the First to Third Respondents after the commencement of the winding-up. They seek the setting aside of a security cession and the transfer of movables by the First Applicant, the return of the movables or their value, the setting aside of cash payments to the First to Third Respondents and the repayment of such amounts, plus interest;
 - 4.2. As against the Fourth Respondent, they claim relief in terms of section 29 of the Insolvency Act 24 of 1936 (read with section 339 of

the Companies Act 61 of 1973) arising from alleged dispositions of property by the First Applicant to the Fourth Respondent within six months of (i.e. prior to) the commencement of the winding-up. The claim is for payment of R1,512,500, plus interest; and

- 4.3. The Applicants seek costs against all the Respondents jointly and severally.
5. On 20 February 2024, the Fourth Respondent demanded from the Applicants security for his costs in the application in the sum of R1,500,000. The grounds upon which security was sought were stated as follows:
 - “1. the First [Applicant] is in final liquidation. It was wound-up by Order of court on the grounds that it is commercially insolvent and unable to pay its debts;
 2. the Second, Third and Fourth Applicants are the First [Applicant’s] joint liquidators. According to their report (at page 240 of the indexed papers) there is a deficit in the First [Applicant’s] estate in the sum of approximately R17.1 million;
 3. the First, Second, Third and Fourth Applicants will be unable to satisfy a costs order against them in this application;
 4. the First, Second, Third and Fourth Applicants’ application against Fourth Respondent is vexatious, reckless and amounts to an abuse of process of the Court.”
6. On 4 March 2024, the Applicants delivered a response to the Fourth Respondent’s demand, setting out their reasons for refusing to provide security.
7. The Fourth Respondent launched the present application for security on 8 April 2024. The Applicants filed answering papers and the Fourth Respondent filed a reply.

8. Pending determination of the present application for security for costs, the Fourth Respondent has not filed answering papers in the main application.

The test for security for costs

9. Rule 47 provides only the procedural framework for a party to demand security for costs from the other. Whether a party is entitled to receive security from a plaintiff or applicant that is an *incola* of South Africa (such as the Applicants in this case) is a question of law.
10. Prior to the commencement of the Companies Act 71 of 2008, section 13 of the Companies Act 61 of 1973 regulated the provision of security where the applicant was a limited company. Section 13 was not replicated in the new Act. Applications for security for costs against *incola* companies must now be determined in the same manner as under the common law in relation to *incola* natural persons (**Boost Sports Africa (Pty) Limited v South African Breweries Limited** 2015 (5) SA 38 (SCA) in para [16]).
11. A decision as to whether to order the provision of security involves the exercise of a judicial discretion. But as the authorities show, the discretion is not unfettered.
12. The starting point of any consideration of security for costs is the possibility that the applicant or plaintiff may be unable to satisfy a costs order in favour of the respondent or defendant if its claim fails. Accordingly, in each case the Court will have regard to “*the nature of the claim; the financial position of the company at the stage of the application for security; and its probable financial position should it lose the action*” (**Boost Sports** (*supra*) in para [14]). In **Fitchet v Fitchet** 1987 (1) SA 450 (E), it was held (at 454H) that “*the financial ability of the plaintiff to comply with an order to pay the defendant’s costs of the action should it prove to be unsuccessful is an obvious factor which should be taken into account*”.

13. But these financial considerations are not dispositive of the right to security, particularly where the claimant is an *incola*. Courts are anxious not to close their doors to *incola* claimants merely on the grounds of impecuniosity, for this would be to limit access to justice based on wealth. Accordingly, it has been held that mere inability by an *incola* to satisfy a potential costs order is insufficient to justify an order for security: “*something more is required*” (**Ramsamy NO v Maarman NO** 2002 (6) SA 159 (C) at 172J-173A). That “*something more*” is found in the nature of the main proceedings.
14. The authoritative statement of the law in this regard is as follows (**Boost Sports** (*supra*) in para [16]:

“[E]ven though there may be poor prospects of recovering costs, a court, in its discretion, should only order the furnishing of security for such costs by an incola company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse.”
15. This reflects the underlying rationale for a court’s power to order security, namely the prevention of abuse of its own process (**Ecker v Dean** 1938 AD 102 at 111, **MTN Service Provider (Pty) Ltd v Afro Call (Pty) Limited** 2007 (6) SA 620 (SCA) in para [15]).
16. The security power is therefore not meant to be available in response to what may be viewed as merely misguided, careless or ill-advised procedural steps in litigation. It is more fundamental than that. This is reflected in the admonition in **Western Assurance Co v Caldwell’s Trustee** 1918 AD 262 at 274 that the power “*ought to be sparingly exercised and only in very exceptional circumstances*”.
17. The question as to whether the applicant or plaintiff is likely to have the financial means to settle a costs order if the respondent or defendant succeeds is therefore not the central consideration when it comes to ordering security. In **Fitchet v Fitchet** (*supra*), the defendant sought security in the face of what was contended to be a vexatious claim. The Court found that it had not been shown

that the financial ability of the plaintiff was of such a nature that it should play any significant role in deciding the issue. Indeed, the Court was unable to find that the plaintiff would be unable to satisfy an adverse order of costs. But notwithstanding that, it held that the application was “*vexatious in the sense that that it is one standing outside the realm of probability altogether and is therefore incapable of succeeding*” (at 455A-C). The plaintiff was ordered to put up security despite his apparent ability (or lack of proof of his inability) to settle a costs order.

18. From these authorities I would conclude that while an *incola* claimant's probable inability to settle an adverse costs order may be a factor in the exercise of the discretion, it is not the most important factor, let alone a decisive one. Proof of an ability to pay will not necessarily save a claimant from such an order if the proceedings are tainted in the respects envisaged in **Boost Sports** (*supra*), while proof of a likely inability to pay will not be fatal to the claimant if the proceedings which it launched are not open to criticism in one of the identified respects.
19. The authorities provide guidance as to what is meant by proceedings that are “*vexatious*” or “*an abuse*”.
20. In **Boost Sports** (*supra*) in paras [17] and [18], the following *dicta* were endorsed in relation to what is meant by “*vexatious*” or “*abusive*” proceedings:
 - 20.1. “*In its legal sense ‘vexatious’ means ‘frivolous, improper; instituted without sufficient ground, to serve solely as an annoyance to the defendant’ ... Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; ‘abuse’ constitutes a mis-use, an improper use, a use mala fide, a use for an ulterior motive*” (**Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Limited** 1979 (3) SA 1331 (W) at 1339E-F);

- 20.2. *“An action is vexatious and an abuse of the process of court inter alia if it is obviously unsustainable”* (**African Farms and Townships Ltd v Cape Town Municipality** 1963 (2) SA 555 (A) at 565D).
21. In **Phillips v Botha** 1999 (2) SA 555 (SCA), the question arose whether a private prosecution was an abuse of the Court’s process. The Court had regard to what is meant by abuse of civil process. It found the following definition (drawn from the Australian case of **Varawa v Howard Smith Co Ltd** (1911) 13 CLR 35 at 91) *“terse but useful”*:
- “...[T]he term ‘abuse of process’ connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim ... they are regarded as an abuse for this purpose...”*
22. The Court in **Phillips** went on to say this (at 565H):
- “Where the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the Court’s duty to prevent such abuse. This power, however, is to be exercised with great caution and only in a clear case.”*
23. The judgment in **Boost Sports** does not elucidate the meaning of the term *“reckless,”* and I have not found any authority that specifically interprets or fleshes out the meaning of this word in the context of applications for security. The term was used (but not expanded upon) in **Ecker v Dean** (*supra* at 111: *“I see no reason ... why we should depart from the ordinary rule as to onus of proof and throw on the insolvent the burden of proving the negative proposition that his action is not reckless or vexatious”*). It was also used in the formulations of the test in **Crest Enterprises (Pty) Limited v Barnett and Schlosberg NNO** 1986 (4) SA 19 (C) at 22C-D and **Ramsamy NO v Maarman NO** (*supra* at 173G). Finally, it appeared in the dictum in **Boost Sports** quoted in paragraph 14 above.

24. The dictionary meaning of the word “reckless” is “*without thought or care for the consequences of an action*” (Concise Oxford English Dictionary). In **Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Limited** 1980 (4) SA 156 (W) at 169A to 170D, the Court considered the meaning of the word in the context of section 424 of the Companies Act 61 of 1973 (i.e. where “*any business of the company was or is being carried on recklessly or with intent to defraud the creditors of the company*”). Margo J pointed out that in **S v Van Zyl** 1969 (1) SA 553 (A) Fagan J held that gross negligence met the requirement, while Steyn CJ said that the ordinary meaning of the term incorporates “*growwe nalatigheid met of sonder risiko bewustheid*” (i.e. gross negligence with or without awareness of the risks). Margo J concluded that it connotes at least *culpa lata*.
25. It appears to me that the term when used in relation to security for costs must be read in the context of the other circumstances with which it is associated, namely vexatious proceedings or an abuse of process. So read, it would connote, at least, a very high degree of negligence; or a wanton disregard for the legitimate interests of the other party; or an obviously inappropriate or extraordinary harnessing of the process of litigation.
26. I therefore am of the view that mere incorrect, ill-advised or even negligent procedural steps in pursuit of litigation relief will not be treated as vexatious, reckless or an abuse of process, such as to warrant an order to furnish security for costs.
27. Against that background, I turn to the basis upon which the Fourth Respondent seeks the provision of security by the Applicants.

The relevant facts

28. The Fourth Respondent contends that security should be provided on two main grounds:

- 28.1. First, that the First Applicant is insolvent and unable to pay its debts, having been wound up on that basis, and therefore that it does not have the ability to satisfy a potential costs order in his favour in the main application; and
- 28.2. Second, that the main application, insofar as it relates to him, is “*vexatious, reckless and an abuse of the Court’s process*”.

Financial position / impecuniosity

29. In relation to the first ground (i.e. the financial position of the First Applicant), it is true that the First Applicant is in the process of winding up on the basis that its liabilities far exceed its assets. The Fourth Respondent contends that there is no certainty that any costs order in his favour would be satisfied out of the insolvent estate. He says that the costs pertaining to the application will undoubtedly be substantial (pointing *inter alia* to the considerable volume of the main application papers and their annexures).
30. In response to the demand for security, the Applicants stated that despite the insolvent position of the company, the liquidators could settle litigation costs out of the free residue in the winding-up process. They provided statements of the insolvent estate banking account which, as at 31 January 2024, showed a credit balance of some R3,7 million, and on that basis contended that they were able to satisfy an adverse costs order.
31. In his founding papers in the application for security, the Fourth Respondent raised various concerns about the bank account, including that it was unclear whether there were secured or preferent creditors whose claims would rank ahead of his, or what further costs (such as costs of the concluded insolvency enquiry and liquidators’ fees) needed to be paid out of that sum. He also pointed out that there was no commitment to set aside or ring-fence any part of these funds for costs, having regard to the possibility that a costs order may be made months or even years hence.

32. In their answering papers, the Applicants provided a signed and lodged (but not yet approved) liquidation and distribution account for the First Applicant, which showed that there were no secured or preferred creditors, and provided for an amount of R2 million from the free residue to be held back for “*future litigation*,” by which I understand was meant the main application against the Respondents. It was also contended that there were substantial further sources of funds still to be recovered by the Applicants, including the amounts claimed from the First to Third Respondents in the main application, and that in any event, by virtue of section 106(c) of the Insolvency Act, if there was a shortfall, the proven concurrent creditors would be obliged to contribute their *pro rata* share of that shortfall.
33. The Fourth Respondent remained unsatisfied, stating in reply that it was still unclear that the R2 million would be sufficient given the nature of the main application and the number of parties and issues involved in the litigation. He contended that it was not certain that there would be any other recoveries to the estate, and that it could not be said that the concurrent creditors would be good for any shortfall that may arise. He continued to submit that the Applicants would be unable to satisfy what he contended was the likely costs order in his favour.
34. I have considered these competing facts and contentions with a view to determining, as a factor in the exercise of my discretion, the Applicants’ probable financial position should they be liable for the Fourth Respondent’s costs in due course. On the facts before me, it does not appear that there is a preponderance of probability either way. On the one hand, litigation is notoriously expensive and it is not certain that a sum of R2 million set aside for both the Applicants’ own costs and any adverse costs order will suffice if the main application goes the distance. There is also no evidence as to the financial position of the concurrent creditors should it be necessary to fall back on them. On the other hand, the Applicants have made considerable provision for litigation costs (about a third of the total value of recoveries to date), and there are prospects of making further recoveries. Moreover, a glance at the

names of the concurrent creditors does not immediately suggest that they are unlikely to be able to contribute if there is a shortfall. For those reasons I also cannot conclude that there are no (or even poor) prospects of a costs order being satisfied.

35. The financial prospects are therefore balanced. But in any event, for reasons set out above, the financial position of *incolae* applicants is not decisive. Even if I were to rate the prospects of recovery as poor, I would have to be satisfied that “*something more*” existed to warrant ordering security; and even if I thought that there were reasonable prospects of recovery of costs, that would not be enough by itself to ward off the application if I were to find that it constituted an abuse or reckless or vexatious proceedings.
36. I therefore do not intend to delve any deeper into the probability of the Applicants being able to fulfil any costs order in favour of the Fourth Respondent. I will instead focus on whether it can be said, as the Fourth Respondent contends, that the application is tainted in one of the identified respects, namely that it is vexatious, reckless or an abuse of process.

The tainting elements

37. The Fourth Respondent contends that the application against him is vexatious for four main reasons. I shall deal with them in turn.

A discrete claim that should have been brought by way of action

38. The **first complaint** in fact raises two separate issues. They are as follows:
- 38.1. First is the contention that the claim against the Fourth Respondent is discrete and should not have been brought in one proceeding together with the claims against the First to Third Respondents; and
- 38.2. Second is the contention that the claim against the Fourth Respondent should not have been brought by way of application

proceedings when there were foreseeable disputes of fact, as a result of which it will either be dismissed or referred to trial. It is contended that the motion proceedings are “*stillborn*”.

39. As to the first of these complaints, I agree that the case against the Fourth Respondent differs materially from that against the other Respondents. They are based on entirely different alleged dispositions, to different persons, which occurred at different times (November/December 2021 in the case of the Fourth Respondent as opposed to April to June 2022 in the case of the others) and in different factual circumstances. They invoke entirely different statutory provisions.
40. The Applicants seek to justify the inclusion of the two sets of claims in a single proceeding on the basis of Uniform Rule 10(3), which provides as follows:

“Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.”

41. In support of their contention, they point out that there are common factors between the claims and what is needed to prove them: for example, each case requires proof of the financial position of the company (under section 29, the question arises whether, immediately after the disposition, the debtor’s liabilities exceeded his assets, while the section 341(2) relief requires proof that the company is unable to pay its debts). They also say that a key aspect of the section 29 claim is whether the disposition was in the ordinary course of business, while one of the factors that a Court will consider in deciding whether in its discretion to validate a post-commencement disposition under section 341 is whether it was the result of the *bona fide* operation of business.

42. I agree that there are some overlapping requirements. However, Rule 10(3) requires the applications to “*depend upon the determination of substantially the same question of law or fact*”. This has been interpreted to mean that the questions of law or fact must “*in the main*” or in their “*principal essentials*” be “*essentially*” the same (**Dendy v University of the Witwatersrand** 2005 (5) SA 357 (W) in para [71]).
43. In my view, the Fourth Respondent is justified in criticising the decision to incorporate the case against him in the same motion as that against the other Respondents. The “*principal essentials*” of the cases are different, being claims based on different statutory provisions, against different people, and involving different conduct. What is common from a factual perspective is really only the general history of the First Applicant and its worsening financial position over time. Moreover, the vast bulk of the founding affidavit and its annexures (including the transcript of the section 417/418 enquiry which I address below) pertains to the claim against the First to Third Respondents, and has no or little bearing on the claim against the Fourth Respondent (indeed, counsel for the Applicants conceded that there was nothing in the entire attached enquiry transcript that they relied upon in their case against the Fourth Respondent). The limited intersection between the legal tests applicable to the two cases also does not cover the core issues on which they will each turn. I note that the high-water mark of the Applicants’ argument in their heads is that “*the issues are not totally different*”. While that is true, that is a far cry from establishing a positive case of substantial similarity.
44. Accordingly, although I need not make a final finding in this regard, I do not think that the Applicants have compelling arguments to have brought the two applications together under Rule 10(3).
45. As regards the second part of the first complaint, as I understand it the Fourth Respondent’s contention is that the section 29 case against the Fourth Respondent has no prospect of success, simply because it was brought by way of application as opposed to action.

46. Application proceedings are an available route for the determination of most legal disputes. Except in cases which must under statute occur by way of action (such as divorces), a claimant has the option in principle to proceed by way of summons or motion.
47. However, proceeding by way of application for final relief comes with risks, particularly when a matter becomes opposed. Application proceedings are not suited to the resolution of disputes of fact, because an affidavit cannot be cross-examined. For that reason, the well-established rule is that an applicant can only obtain final relief on motion where the facts stated by the respondent, read together with the facts stated by the applicant and admitted by the respondent, justify such an order (**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A). As stated by the SCA in **Media 24 Books (Pty) Limited v Oxford University Press Southern Africa (Pty) Limited** 2017 (2) SA 1 (SCA) in para [36]:

“[In an application for final relief] the case could not be determined simply on a weighing of the probabilities as they emerged from the affidavits. The facts deposed to by [the respondent’s] witnesses had to be accepted, unless they constituted bald or uncreditworthy denials or were palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers. A finding to that effect occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of evidence.”

48. Where a dispute of fact that cannot be properly resolved on paper arises, it is possible for the Court at the request of the applicant – who would otherwise be unsuccessful on the **Plascon-Evans** approach – to refer that dispute to oral evidence (or indeed to refer the whole matter to trial), but that is not necessarily a course that the Court will agree to follow, particularly where the applicant should have anticipated a material dispute of fact arising. In such a case, the applicant would fail in its claim for final relief.

49. Turning to the present facts, as stated the claim against the Fourth Respondent is based on section 29 of the Insolvency Act read with section 339 of the Companies Act. This permits the setting aside of “*every disposition of his property made by a debtor not more than six months before the [liquidation] of his estate ... if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets.*” If those requirements are satisfied, the disposition will be voided “*unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another*”.
50. Thus the liquidators must establish the fact of a disposition, the date thereof and the factual insolvency of the debtor at the time. The *onus* then lies on the beneficiary to show that the disposition occurred in the ordinary course of business and that there was no intention to prefer a creditor.
51. In my view, there is no reason to say that a liquidator cannot ever succeed with a section 29 claim on motion. The respondent may well fail to put up facts that, even if accepted as true, could not discharge its *onus*. One will often not know until answering affidavits are filed whether a material dispute of fact will arise. If it does, there may be a question as to whether the liquidator can be rescued by a referral to oral evidence, or should (because the dispute was foreseeable) be left to lie in the bed they made in deciding to proceed on application.
52. In the present case, again without deciding the point, my impression is that the Applicants have *prima facie* established the preliminary requirements of section 29 against the Fourth Respondent. If the Fourth Respondent failed to file an affidavit putting up facts in relation to the aspects on which he bears an *onus*, the application on that basis would succeed. The Fourth Respondent has however set out, in his affidavits in the present interlocutory proceedings, the factual basis for his contention that the repayment of the loan was (objectively) in the ordinary course of business and (subjectively) did not intend to prefer a creditor. He will presumably repeat this in his answering affidavit in the main application, and may well choose to file affidavits from other parties who may

shed light on those issues. The Applicants may then decide to move (successfully or unsuccessfully) for a final order on those facts if they think that they do not meet the legal tests; or they may apply (successfully or unsuccessfully) for oral evidence or a referral to trial if they think that there are disputes of fact that need to be resolved in their favour. All of this will have to be dealt with in future.

53. The point is that it cannot be said that merely because the claim was launched by way of motion proceedings, it can never succeed against the Fourth Respondent. That will depend on the facts and factors highlighted above. The Applicants may well come to rue having proceeded on motion and having exposed themselves to the **Plascon-Evans** test, but that is not something that can be determined now. I certainly cannot conclude, by reason of the elected procedure, that the claim is vexatious in the sense that it is “*obviously unsustainable*”, or reckless in that it exhibited wanton disregard for what was required to obtain the relief, merely because it has been brought on motion.

Jurisdiction: the proceedings should have been launched in Gauteng

54. The **second complaint** is that the proceedings should have been launched in Gauteng where the Fourth Respondent is domiciled.
55. It appears to be common cause that this Court does not have territorial jurisdiction over the person of the Fourth Respondent. Nonetheless, the Applicants contend that it does have jurisdiction over the application because of section 21(2) of the Superior Courts Act 10 of 2013, read with Rules 10(3) and 6(14).
56. Section 21(2) of the Superior Courts Act provides as follows:

“A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a

party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.”

57. It is not disputed by the Fourth Respondent that this Court has jurisdiction in respect of the claim against the First to Third Respondents. However, he contends that section 21(2) does not apply to him because he has not been “*joined as a party to any cause in relation to which [this] court has jurisdiction*”.
58. In my view, section 21(2) can only confer jurisdiction where the external party has been validly joined as a party to an existing cause. This clearly envisages the situation where the joinder is necessary, i.e. where the party has a direct and substantial interest in the subject matter of the litigation (i.e. a legal interest that may be affected prejudicially by the order of the court). It would probably also extend to joinders of convenience where a third party is joined in order to ensure that all parties interested in the issue are before the court, so as to avoid a multiplicity of actions and a waste of costs (see e.g. **Ploughmann NO v Pauw** 2006 (6) SA 334 (C) at 341E-F).
59. In my view, section 21(2) is not wide enough to confer jurisdiction over a person who is not joined as a party to the same claim in which jurisdiction exists. Whatever the similarities between the two applications, the fact is that the Fourth Respondent has no legal interest in the claim against the First to Third Respondents that could be prejudicially affected by an order against them. Nor do the Applicants seek to make out such a case. What has happened is that two discrete applications have been brought in a single proceeding, and the Fourth Respondent has not been joined to the other application as a party. Section 21(2), on its plain language, does not apply in this context.
60. The Applicants rely on Rule 10(3) as the basis for their “joinder” of the Fourth Respondent to the application where jurisdiction is not in issue. In my view, the provisions of that Rule (which I have already dealt with above) do not relate to the joinder of parties (as envisaged in section 21(2)) but of actions. As stated in **Spier Estate v Die Bergkelder Bpk** 1988 (1) SA 94 (C) at 10G-I, referring to the predecessor of section 21(2), the statutory extension of jurisdiction

“presupposes a valid joinder ... and furthermore the joinder must be to the impending cause”.

61. If section 21(2) incorporated joinder of actions under Rule 10(3), the Court would be in a position to assume jurisdiction over any person residing anywhere outside the jurisdiction merely because the claim against them depends on substantially the same question of fact or law as a claim that is already before the Court between other parties. The section does not in my view envisage such a significant extension of jurisdiction. Rule 10(3) presupposes that the Court has jurisdiction over both causes.
62. I therefore consider that the Fourth Respondent has good reason to resist the jurisdiction of this Court on the basis of section 21(2) of the Superior Courts Act.
63. That, however, does not necessarily mean that the application against the Fourth Respondent is bound to fail entirely for want of jurisdiction.
64. As a first point, although neither party raised this issue before me, there may well be a basis to establish jurisdiction by reference to where the cause of action against the Fourth Respondent arose. If it can be demonstrated that the cause of action (the alleged disposition by the First Applicant, which resided in Cape Town) took place within this Court’s jurisdiction, then the fact that the Fourth Respondent is domiciled elsewhere in the Republic is not a bar to jurisdiction: in terms of section 42(2) of the Superior Courts Act, *“the civil process of a Division runs throughout the Republic and may be served or executed within the jurisdiction of any Division”*. The Applicants may conceivably seek to expand their case for jurisdiction in this regard.
65. Second, the mere commencement of proceedings in the wrong Division is not necessarily fatal to the claim. Section 27(1) of the Superior Courts Act permits a court, upon application by any party thereto, to order proceedings that should have been instituted in another Division to be removed to that other Division. I see no reason in principle why a single cause forming part of a wider

application involving discrete claims against other parties should not be capable of being removed to another Division, with appropriate directions as to the separation of the matters. This is effectively what is envisaged by Rule 10(5), which permits the ordering of separate trials. Untangling the pleadings to ensure that each matter only proceeds on what is relevant to it should not be too burdensome an exercise.

66. I appreciate that having to take such steps to overcome a jurisdictional objection may involve the parties in time-consuming and costly processes. However, this can be ameliorated by an appropriate order as to costs, which may be immediately executed upon. The significant point for present purposes is that it is impossible to conclude, from the possibility that this Court may lack jurisdiction, that the claim is so certain to fail that it may be considered vexatious.

Inadmissibility of transcripts

67. The **third complaint** is that the transcripts of the section 417 enquiry into the affairs of the First Applicant have been unlawfully attached to the founding affidavit and constitute inadmissible hearsay evidence.
68. I do not view this as an issue that has a proper bearing on the present application for security for costs. It seems to be common cause that the Applicants do not rely for their cause of action against the Fourth Respondent on any part of the transcript or the underlying evidence. While it is clearly aggravating to the Fourth Respondent that he has been served with voluminous papers, large portions of which are not directly relevant to the case against him, the propriety of attaching them (without an application for the admission of hearsay evidence under the Law of Evidence Amendment Act 45 of 1988) is a matter between the Applicants and the First to Third Respondents. In my view, it cannot be a factor in deciding whether the claim against the Fourth Respondent was vexatious, reckless or an abuse of process.

69. To the extent that the main application proceeds as a single matter, the Fourth Respondent can apply for the unnecessary documents to be struck out in respect of the case against him, with a costs order that again need not be held in abeyance until the end of the case, or he can obtain the Applicants' formal confirmation that it is not necessary for him to address these facts in his answering papers.

Excessive and unnecessary costs

70. The **fourth complaint** is that the Applicants' decision to include the Fourth Respondent's case with the other cause of action has led, and will lead, to "enormous" unnecessary costs for him, and that these costs "[are] vexatious in and of [themselves]".
71. I have already expressed the view that the Fourth Respondent is justifiably aggravated by being included as a further respondent together with a discrete claim against others, in circumstances where there may be valid jurisdictional complaints. I also accept that this has led, and will lead, to increased costs as he seeks to ward off the claim against him, while having to be a spectator to the other cause of action.
72. In my view, however, I do not think that exposing the Fourth Respondent to a potentially higher costs burden through the form of proceedings adopted means that the claim against the Fourth Respondent itself is vexatious, reckless or an abuse of process in the sense understood in the authorities.
73. The Fourth Respondent is not without remedies, including bringing an application to separate his matter from the other one under Rule 10(5), applying to strike out irrelevant material, or seeking a ruling on jurisdiction. Success would reduce his ongoing costs burden, and would probably come with an immediately executable costs order in his favour.

Conclusion

74. The test for requiring an *incola* applicant to provide security for a respondent's costs is a difficult one to overcome. Such orders are only made in rare cases where the conduct of the applicant meets the high threshold of vexatiousness, recklessness or an abuse of process.
75. On an overview of the matter, and having regard to the various basis upon which the Fourth Respondent relies, I am of the view that this is not one of those cases where it would be appropriate to order security. Although I consider that the inclusion of the Fourth Applicant as a participant in a case together with parties subject to a very different (and considerably more voluminous) application is prejudicial to the Fourth Respondent, and that the jurisdictional basis currently relied upon by the Applicants appears to be inapplicable, I cannot go so far as to say that the case against the Fourth Respondent is vexatious (in the sense of being obviously unsustainable), reckless (in the sense of exhibiting a wanton disregard for the Fourth Respondent's interests) or an abuse of process (in the sense of pursuing an ulterior motive). The Applicants are clearly attempting, as they are both entitled and obliged to do, to recover amounts for the benefit of the insolvent estate, and I cannot say, on the facts pleaded in relation to the Fourth Respondent, that they have no or remote prospects of success in relation to a section 29 cause of action. There is no suggestion that they are merely trying to annoy or distract the Fourth Respondent through a hopeless case.
76. The apparent procedural or jurisdictional flaws that I have identified seem to me to fall more into the category of ill-advised (but potentially remediable) litigation steps, rather than vexatious, reckless or abusive ones. I also cannot say that the Fourth Respondent will not, in responding to the litigation, be able to use the machinery of the court to place the matter against him on a proper footing, together with appropriate costs orders.
77. I am therefore of the view that the Fourth Respondent is not entitled to the exercise of this Court's power to direct that the Applicants should provide security for his costs.

Costs of this application

78. The ordinary rule in this Court is that costs should follow the result. However, I have a wide discretion in making costs orders, and am entitled to depart from the general rule in appropriate circumstances.
79. Although I have concluded that the application for security should fail, I do not think that the Fourth Respondent was unreasonable in launching it. In various respects I have held that he is justifiably aggrieved by the manner in which the litigation against him has been brought. The Applicants' reliance on Rule 10(3) and Section 21(2) to draw him into an extraneous dispute between other parties, in a Court which may well lack jurisdiction over him, I have considered to be misguided. While these facts are not enough in my view to overcome the high hurdle to obtaining security, I consider it fair that the Fourth Respondent, who is already prejudiced in the above respects, should not carry the additional burden of adverse costs in relation to his application.

ORDER

80. In the circumstances, I make the following order:

1. The application for security for costs is dismissed.
2. There is no order as to costs.

M W JANISCH
Acting Judge of the High Court
Western Cape Division

APPEARANCES:

For the Applicant: Adv L Meintjes

Instructed by: Van Der Spuy & Vennote/Partners

For the Fourth Respondent: Adv L Choate

Instructed by: Assheton-Smith Ginsberg Inc

Date of hearing: 15 October 2024

Date of judgment: 21 October 2024