

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2018/41434

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

17 JANUARY 2024

DATE

In the matter between:

AFRICAN WOMEN CO-ORDINATED INVESTMENTS (PTY) LTD	1st Applicant
SEFULARO, MAGGIE SANDRA	2nd Applicant
LANGENI, NOLUTHANDO	3rd Applicant
MOJAPELO, FRIEDAH EFFY	4th Applicant
SANGION, QUEEN ELIZABETH	5th Applicant
NDUNGANE, FUNEKA	6th Applicant
NHLANGULA AGNES	9th Applicant
SEFULARO, MAGGIE SANDRA N.O.	19th Applicant
LANGENI, NOLUTHANDO	20th Applicant
MOJAPELO, FRIEDAH EFFY N.O.	21st Applicant
SANGION, QUEEN ELIZABETH N.O.	22nd Applicant
and	
GAUTENG AFRICAN WOMEN'S ALLIANCE (PTY) LTD	Respondent

and

In Re:

GAUTENG AFRICAN WOMEN'S ALLIANCE (PTY) LTD	Plaintiff
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and

AFRICAN WOMEN CO-ORDINATED INVESTMENTS (PTY) LTD	1 st Defendant
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SEFULARO, MAGGIE SANDRA	2 nd Defendant
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LANGENI, NOLUTHANDO	3 rd Defendant
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MOJAPELO, FRIEDAH EFFY	4 th Defendant
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SANGION, QUEEN ELIZABETH	5 th Defendant
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NDUNGANE, FUNEKA	6 th Defendant
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MBIZANA, SINDISIWE SHIELA	7 th Defendant
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OLIPHANT, JILL CLAUDELLE	8 th Defendant
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NTHLANGULA, AGNES	9 th Defendant
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RWEXANA, SINDISWA PATRICIA	10 th Defendant
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MPUMALANGA AFRICAN WOMEN'S ALLIANCE (PTY) LTD	11 th Defendant
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NORTH WEST AFRICAN WOMEN'S ALLIANCE (PTY) LTD	12 th Defendant
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FREE STATE AFRICAN WOMEN'S ALLIANCE (PTY) LTD	13 th Defendant
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KWAZULU-NATAL AFRICAN WOMEN'S ALLIANCE (PTY) LTD	14 th Defendant
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WESTERN CAPE AFRICAN WOMEN'S ALLIANCE (PTY) LTD	15 th Defendant
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EASTERN CAPE AFRICAN WOMEN'S ALLIANCE (PTY) LTD	16 th Defendant
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NORTHERN CAPE AFRICAN WOMEN'S ALLIANCE (PTY) LTD	17 th Defendant
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LIMPOPO AFRICAN WOMEN'S ALLIANCE (PTY) LTD	18 th Defendant
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SEFULARO, MAGGIE SANDRA N.O.	19 th Defendant
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LANGENI, NOLUTANDO N.O.	20 th Defendant
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MOJAPELO, FRIEDAH EFFY N.O.	21 st Defendant
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SANGION, QUEEN ELIZABETH N.O.	22 nd Defendant
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Summary: Civil procedure – application for security for costs – whether the court’s discretion should be exercised in the applicants’ favour by ordering the respondent to put up security for costs.

JUDGMENT

MODIBA, J

Introduction

- [1] This judgment is rendered in respect of an application for security for costs. The application is brought by African Women Co-ordinated Investments (Pty) Ltd (AWCI) as the first applicant together with the second to sixth, ninth, nineteenth to twenty first applicants against Gauteng African Women’s Alliance (Pty) Ltd (GAWA) as the respondent. AWCI seeks an order for security for costs in the amount of R1 million.
- [2] AWCI is the first defendant in the main action. Its co-applicants are cited in the main action as its co-defendants. GAWA is the plaintiff in the main action. The nineteenth to twenty second defendants are Trustees of the African Women Coordinated Investments Business Trust (Trust Registration number: IT002205/2018 T) (the Trust). The second to tenth defendants are directors of the AWCI. Sangion, Queen Elizabeth (Sangion) is cited in her personal capacity as the second defendant and in her capacity as the Trustee of the Trust as the nineteenth defendant. She deposed to the founding affidavit in this application on behalf of all the applicants.
- [3] I generally refer to parties by their names or as cited in the main action.
- [4] In the main action, GAWA seeks an order against the defendants for the production and inspection of constitutional and corporate documents of AWCI in its capacity as an alleged 10% shareholder in AWCI. GAWA brought the main action on 7 November 2018. It has since amended its particulars of claims twice. It made the first amendment on 13 August 2019 and the second on 25 March

2022. I refer to the particulars of the amendments at a pertinent point in the judgment.

- [5] On or about 07 July 2020, AWCI furnished GAWA with the requested records from the date of its incorporation until 10 October 2018. AWCI contends that despite this, GAWA persists with seeking the same documents. AWCI further contends that this constitutes a clear abuse of the process of this court.
- [6] In its amended particulars of claim, GAWA added the following to the relief it seeks:

5.1 Claim A

(a) An order declaring that GAWA is a 10% shareholder of the issued share capital of the AWCI for the period from AWCI's incorporation until 10 October 2018, alternatively 9 October 2018;

(b) AWCI is ordered to produce for inspection and copying all company records from its incorporation until the date of the granting of the order;

(c) AWCI is directed to make payment to GAWA all declared dividends and/or any other entitlement it may have had pursuant to it being a shareholder of AWCI from AWCI's date of incorporation until 10 October 2018, alternatively 9 October 2018;

(d) An order declaring that GAWA was and remains a holder of 10% of the issued share capital in AWCI;

(e) An order directing AWCI to produce for inspection and copying all company records from 10 October 2018 until the date of the granting of the Court Order.

5.2 Claim B

(a) A declaration that the trustees are obliged to account to GAWA and other beneficiaries of the Trust regarding the affairs of Trust in relation to its shareholding in AWCI from the period 10 October 2018 to date of this order;

(b) A declaration that the resolution of AWCI dated 13 May 2014 (the resolution) is unlawful, invalid and of no force and effect and is set aside;

5.3 Claim C

(a) An order declaring that the following AWCI directors are delinquent: Noluthando Langeni; Friedah Effy Mojapelo (Mojapelo); Funeka Ndungane; Agnes Ntlhangula; Sindiswa Patricia Rwexana; Queen Elizabeth Sangion; Maggie Sandra Sefularo; Catherine Linkong Moeti; and Gillian Mapheko Makgamatha.

[7] On 21 April 2022, the defendants delivered their consequential plea. GAWA subsequently delivered its amended pages.

[8] The defendants contend that AWCI's resolution of 13 May 2014 was a shareholders' resolution properly taken and valid. GAWA was duly notified of the meeting, and was represented by the fourth defendant, Mojapelo in her capacity as GAWA's authorised representative.

[9] On 27 June 2023, the defendants demanded security for costs from GAWA in terms of uniform rule 47(1). On 20 November 2023, GAWA filed a notice in terms of Rule 47(3), disputing liability for the defendant's security for costs. The defendants subsequently brought this application seeking an order in terms of which the GAWA is ordered to provide security for the defendants' costs within thirty days of the order and that GAWA's action is stayed pending compliance with that order, failing which the action is dismissed.

[10] In this application, the defendants contend that GAWA's action is *mala fide*, vexatious, reckless and constitutes an abuse of court process for reasons set out below.

[11] In respect of claim A:

(a) GAWA persists with the action despite being furnished with the documents that it seeks. The defendants contend that there is no basis for such an order because they do not allege that they were denied access to the documents while GAWA was still a shareholder in AWCI or that it did request the documents but

was denied access. Section 26 of the Companies Act 71 of 2008 (the Companies Act) only permits a shareholder to access company records. Since GAWA is no longer a shareholder in AWCI, it is not entitled to the latter's company records.

(b) GAWA seeks company records in excess of the 7-year period a company is required to retain them in terms of s 24 of the Companies Act.

(c) As a non-shareholder, GAWA ought to have sought AWCI's company records in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA). It has not done so.

(d) Access to company records even by a shareholder does not extend to access to AWCI's books of account.

(e) On the one hand GAWA disavows the resolution. On the other hand, it wants the Trust (established pursuant to and in terms of the said resolution) and its trustees to account to it. This demonstrates its contrived and untenable contentions;

(f) GAWA is not actively trading and has no known source(s) of income. It has no known place of business. Therefore, it has no known realizable assets. Nine out of GAWA's twelve shareholders are de-registered for various reasons of non-compliance and are unable to contribute towards the payment of an adverse cost order. Further, the respondents contend that GAWA's action is not properly authorised by its Board of Directors.

[12] Claim B is contrived because in terms of the resolution, GAWA ceased to be a shareholder in AWCI. As a non-shareholder, it has no legal basis to access records in terms of s 26 of the Companies Act.

[13] Claim C also lacks a legal basis because an order for the declaration of a director as delinquent is only available to shareholders of a company. The basis on which it seeks such an order is also devoid of merit because:

(a) As an erstwhile shareholder of AWCI, it shared the responsibility with the other shareholders to call for a board meeting. It also failed in that duty.

(b) There is no basis on which the court will find that the directors in AWCI were negligent to defer its tax.

(c) It has not asserted the legal basis on which the court should find that payment of dividends should take precedence over the payment of directors' fees as contended by GAWA.

[14] GAWA opposes the application on the basis that its inability to pay the defendants' costs in the main action is, without more, insufficient to justify an order for security for costs. To succeed in the application, the defendants must establish that GAWA's action is vexatious, reckless and amounts to an abuse of the process of this court. They contend that the defendants have failed in that regard. GAWA accuses the defendants of dilatory conduct in defending the main action. It also contends that the defendants continue to be dilatory by bringing this application when the matter is almost trial ready. It further contends that the defendants:

(a) only made discovery three court days before GAWA's application to compel was heard;

(b) took 9 months to file their consequential plea, following the amendment of the plaintiff's particulars of claim;

(c) delayed to file opposing papers in GAWA's joinder application. Only the first defendant had filed a notice of intention to oppose. Ultimately, the joinder application was heard and an order granted on an unopposed basis;

(d) filed special pleas which lack merit and later withdrew them;

(e) failed to follow the procedure in uniform rule 47. The registrar is empowered to determine the amount of security for costs when contested. They have failed to meet this basic jurisdictional requirement. The defendants have not specified how they have arrived at the amount of R1 million. This amount has not been determined by the registrar as required in terms of uniform rule 47.

(f) The main action was under judicial case management for a period of three years. The defendant failed to call for security for costs during that time. Pleadings have closed, discovery made, discovered documents exchanged, GAWA's statement of case and the defendants' response thereto filed. What remains to get the matter trial ready is for the parties to hold a pre-trial conference and, thereafter approach the judicial case manager for a certificate of trial readiness.

[15] GAWA did not persist with the rule 47 ground of opposition in its written and oral submissions. This point shall therefore detain me no further.

[16] It is trite that an order for security for costs is granted at the discretion of the court, having regard to the nature of the claim, the financial position of the plaintiff when the application was made and its probable financial position should it lose the action. In *Biochlor (Pty) Ltd v G E Betz South Africa (Pty) Ltd*,¹ having considered various legal opinions regarding the legal principles applicable in an application for security for costs, the court articulated the approach to be followed in an application of this nature as follows:

“(1) The point of departure is to accept that in terms of the common law principle, *incola* litigants should not be ordered to pay security for costs. Courts must recognise and accept that *incola* litigants, including corporate entities, have the right to litigate in terms of section 34 of the Constitution;

(2) Section 173 of the Constitution provides the courts with inherent power to regulate their own processes and to develop the common law, taking into account the interests of justice;

(3) In regulating their own processes as stated in (2) above, the courts are entitled to intervene, on application by a party in litigation and where evidence exists, against any *incola* plaintiff/applicant, to protect the court process from litigation that appears to be vexatious, or reckless, or amount to an abuse of the process;

¹ [2014] ZAGPPHC 1030 (10 December 2014).

(4) The court may, in appropriate instances, and in its discretion, order a party to litigation to pay security for costs;

(5) The fact of insolvency or being an impecunious litigant should not, on its own, be a reason to order an *incola* plaintiff/applicant to pay security for costs;

(6) The court's discretion must be exercised judiciously and sparingly, after having carefully balanced the right to litigate on the one hand and the need to protect court process from vexatious, or reckless or conduct that amount to abuse of the court process, on the other hand."

[17] As contended on behalf of the defendants, in *Boots Sports Africa*,² the Supreme Court of Appeal did not replace the test as articulated in *Biochlor*. However, in their written and oral submissions, they tried to persuade this court to grant the application because of GAWA's precarious financial position. They relied on various judicial authorities to support their contention that since GAWA failed to dispute their allegation that it is unable to meet an order for costs because it is a non-trading entity with no assets, they should succeed. This ignores the balancing approach enunciated in *Biochlor*.

[18] It concerns me that the defendants conducted this litigation until it is almost trial ready without seeking an order for costs. Its reasons for seeking costs have been there from inception. It has provided no reason why it is only brought the application when the matter is almost trial ready, further delaying the hearing of the matter. It has not addressed the allegation of dilatory conduct in defending the action because it is largely incontrovertible yet is it quick to blame GAWA for not belatedly recording that it is not persisting with the relief in respect of the disclosure of documents that are not in its possession. This is of no moment because this relief is not dispositive of GAWA's claim.

[19] It is unclear how the defendants arrived at the amount they seek as security for costs. They made no effort to justify it.

[20] The high-water mark of the defendants' case is that GAWA's action is vexatious, reckless and constitutes an abuse of the court process. The question of GAWA's

² 2015 (5) SA 38 (SCA) at para 25.

shareholding in AWCI is highly contested. It is the primary basis on which the GAWA seeks the remaining relief in the main action. It is also the primary basis on which the defendants oppose that relief. This issue will turn on the validity of the resolution which is also highly disputed between the parties. These issues stand to be determined at the trial on the basis of the parties' evidence. The defendants' have not persuaded me that GAWA's shareholding claim is baseless. The fact that GAWA belatedly in this application abandoned its claim for the disclosure of AWCI's company records is not dispositive of these other claims.

[21] Therefore, the defendants have failed to establish that GAWA's action is vexatious, reckless and constitutes an abuse of the court process. This leaves GAWA's precarious financial position as the only basis on which the defendants seek an order for security for costs.

[22] I am not persuaded that if the defendants are successful in the main action, they are facing a hallow cost order. They have not explained why they cannot recover their costs from GAWA's directors. Yet, in this application, they argued that GAWA's directors have not put up security. Nothing precludes the defendants from pursuing them for their legal costs. They may do so by piercing the corporate veil in terms of the Companies Act. This may be a long way to recovering its costs. Any prejudice it stands to suffer as a result is self-created because it inexplicably brought this application more than four years after the action was instituted. It therefore opted to conduct its defence for that period at risk notwithstanding GAWA's precarious financial position.

[23] GAWA is an investment company. It seeks to realize a return on its investment in the main action. Ordering GAWA to put up a security for costs under these circumstances will only serve to stymie its ability to run the trial, thus adversely affecting its rights in terms of section 34 of the Constitution. These circumstances justify the exercise of this court's discretion in favour of GAWA.

[24] AWCI took issue with the authority of the deponent to GAWA's affidavits to depose to them on GAWA's behalf. However, it did not persist with this point *in*

limine during oral argument. This is another issue that I do not allow to detain me.

[25] In the premises, the application is dismissed with costs.



L.T. MODIBA
JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances

For the Applicant:

M Sikhakhane
Mabuza Attorneys

For the Respondent:

HP Van Nieuwenhuizen
Reginald Tshabalala Attorneys

Date of hearing:

06 November 2024

Date of judgment:

17 January 2025

MODE OF DELIVERY: This judgment is handed down electronically by email, uploading on CaseLines and release to SAFLII. The date and time for delivery is deemed to be 10 am.

