



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

REPORTABLE

CASE NO: 22938/2018

In the matter between:

CLASS A TRADING 153 (PTY) LTD

DEFENDANT / APPLICANT

and

SEVEN FALLS TRADING 55 (PTY) LTD

PLAINTIFF / RESPONDENT

Coram: **MOOSA AJ**

Heard: 29 August 2025

Delivered: 25 September 2025 (delivered electronically to the parties)

Summary: Civil procedure – Uniform Rule 47 – applicant demanding security after 6 years of litigation – long delay is no bar to ordering security – respondent dormant with no income and no attachable assets – respondent litigating recklessly and vexatiously – security for costs ordered – promotes fairness in the administration of justice.

ORDER

1. The application succeeds. The Respondent is directed to furnish security for the Applicant's costs in the main action. The Respondent shall do so in the form, amount, and manner determined by the Registrar under Uniform Rule 47(5). Pending compliance herewith, the proceedings in the main action are stayed.
2. Respondent is liable for costs, including costs for counsel on tariff scale B.

JUDGMENT

Moosa AJ

Introduction

[1] This judgment relates to an application under Uniform Rule 47(3) in which the Applicant, the defendant in the action ("the main action"), seeks an order directing the Respondent, the plaintiff in the main action, to give security for the Applicant's costs if it succeeds in that action, and to do so in a sum, form, and manner determined by this Division's Registrar. In this judgment, I refer to the parties as in this application, although the context may, at times, require reference to each as in the main action.

[2] In this interlocutory dispute, the Applicant was represented by Mr P de B Vivier SC; and Mr H N de Wet appeared for the Respondent.

[3] At the onset, I will narrate those background facts which are germane to the adjudication of this petition. The facts are distilled from the pleadings. Unless indicated otherwise, the enumerated facts are common cause. Owing to Uniform Rule 47(1) stipulating that security for costs should be demanded 'as soon as practicable after the commencement of proceedings', and Mr de Wet argued that this

stipulation was not adhered to, a chronological timeline of key events is provided below.

Relevant background facts

[4] At all material times, Stephanus Hunter van Zyl (“Fanie”) is the Respondent’s sole director and shareholder. The Respondent is an incola company. It had conducted a farming business at its farm De Heuwel situated in Windmeul, Agter-Paarl.

[5] On 14 October 2016, the Respondent sold its farm, farming business, and all assets as a going concern. The sale yielded a price of R9,5m. After the sale of its business which cultivated table grapes, the Respondent has not conducted any further trade. Except for the litigation in the main action, the Respondent has been dormant from 2016: it has no income; no auditor; no bank account; and no attachable asset(s).

[6] On 13 December 2018, the Respondent instituted an action against the Applicant, a local company operating a business as a marketing and export consultant of fruit, including table grapes. The Respondent sues for contractual damages in the sum of R3 586 058,00. Its cause of action pre-dates the sale of its farm and business.

[7] On 1 November 2014, the Respondent appointed the Applicant as its agent to market, export, and sell the grapes cultivated by the Respondent for the 2015 harvest season. On 30 April 2015, a further agreement was concluded in which the Respondent appointed the Applicant to sell its grapes for the 2016 harvest season.

[8] Neither the 2014 nor the 2015 agreements contained express provision of the price at which the Applicant would sell the Respondent's grapes. For purposes of the present application, it is common cause that the parties' 2014 and 2015 agreements were to the effect that the Respondent's table grapes would be sold at the best possible price that could be achieved for them in the markets where they were sold.

[9] The Respondent sues the Applicant for damages alleged to have been suffered owing to the Applicant allegedly selling the Respondent's grapes during the 2015 and 2016 seasons at prices which are deemed less than the average market related yield. In its plea dated 5 March 2019, the Applicant denies that it acted in breach of the parties' contracts, and denies that the Respondent suffered the alleged losses.

[10] Together with its plea, the Applicant delivered a conditional counter-claim. The Applicant sues the Respondent for payment of R1 750 160,00. Its claim is based on the same written contracts on which the Respondent sues for contractual damages. On 1 October 2019, the Respondent delivered its replication to the Applicant's plea. Simultaneously, the Respondent delivered its plea to the Applicant's counter-claim.

[11] In and during November 2020, various discovery notices were delivered by the Applicant's and the Respondent's attorneys. On 25 November 2020, the Applicant's attorneys complied with the call for discovery under Uniform Rule 35(3).

[12] On 7 October 2022, a joint pre-trial minute was filed. On 20 October 2022, the Respondent delivered its request for particulars. On 17 January 2023, the Applicant provided a response. On 18 January 2023, a revised joint pre-trial minute was filed. On 31 January 2023, the matter was certified as trial ready. The main action (including counter-claim) was then set down for trial scheduled to commence on 22

April 2024. While the parties were in the process of trial preparation, a problem arose.

[13] On 20 January 2024, the Respondent was de-registered from the companies' register by the Companies and Intellectual Property Commission ("CIPC"). This occurred because Fanie failed to file the Respondent's statutory annual returns. CIPC started the de-registration process for this reason as far back as 12 December 2020.

[14] From February 2024 onwards, several applications for reinstatement pursuant to s 82(4) of the Companies Act 71 of 2008 were lodged with CIPC, but failed. As a result, in March 2024, the trial scheduled for April 2024 was removed from the roll.

[15] On 27 September 2024, Fanie launched an application under s 83(4) of the Companies Act for an order declaring void the Respondent's dissolution.

[16] In his founding affidavit in support of the s 83(4) application, Fanie explained the purpose for the Respondent's reinstatement to be linked solely to an intention to pursue its lawsuit in the main action. He recorded this as follows (at paras 25 and 32):

'25. The company was deregistered due to its failure to file its annual returns. This was entirely my fault. At the time, I had not realised that this was still required in circumstances where the main, if not the sole, focus of the company was the litigation referred to above. ... 32. *Further, the litigation is further indicative that it had always been the intention that the company would continue to exist (sic) until, at least, the conclusion of the litigation.*' (my emphasis added)

[17] On 1 November 2024, CIPC revived the Respondent's legal status. This appears to be in terms of s 82(4) of the Companies Act. On 28 January 2025, an order was granted by this Court, the relevant part of which reads:

‘By agreement between the parties, IT IS ORDERED:

1. That the matter is set down for hearing on the fourth division roll for four consecutive days, being the 25th, 26th, 27th, and 28th August 2025.’

[18] During March 2025, the Applicant’s attorneys delivered expert notices under Uniform Rule 36(9)(a); and served a discovery notice under Uniform Rule 35(12) and (14). During April and May 2025, the Applicant’s attorneys delivered its expert summaries under Uniform Rule 36(9)(b). In April 2025, it served a Rule 35(3) notice.

[19] On 8 April 2025, with the trial looming and the parties litigating at full throttle, a notice under Uniform Rule 47(1) was served. In relevant part, that notice read:

‘BE PLEASED TO TAKE NOTICE that the Defendant herewith demand from the Plaintiff to provide security for the Defendant’s costs in an amount of R1 873 731,93 on the following grounds:

1. The Plaintiff through its legal representative and its sole director, Mr Fanie van Zyl, indicated to the Defendant, as long ago as during the period of March 2016 to October 2016, that it experienced financial difficulties and sought financial assistance from the Defendant to prevent the Plaintiff from being in a state of insolvency.
2. During or about October 2016 the Plaintiff sold its only assets, the farm De Heuvel and the farming business conducted thereon, as a going concern.
3. The Plaintiff has not conducted any business or other income-generating activity since the sale of its farm.
4. The Plaintiff has no assets. Its only contingent “*asset*” would be the claim it seeks to enforce in this action, in the event of it being successful in proving the claim.
5. The Plaintiff has indicated that the sole reason for its continued existence, is to conduct the present litigation and that in all likelihood, at the end thereof, the Plaintiff would be deregistered/liquidated.

6. The Plaintiff has already on two occasions been deregistered by CIPC for failing to file annual returns, in 2010 and 2024.
7. The Plaintiff does not conduct any bank account, and has been dormant since the sale of its farm and farming business in October 2016.
8. In the event of the Plaintiff failing to succeed with its claim and a costs order being granted in favour of the Defendant, the Plaintiff will not be able to pay such costs. The Defendant will be faced with a substantial irrecoverable bill of costs.'

[20] On 29 April 2025, the Respondent's attorneys delivered a notice in which the Respondent contests its liability to furnish security for costs. This notice culminated in the Applicant, on 14 May 2025, launching this application under Uniform Rule 47(3).

[21] The grounds averred in the Applicant's founding affidavit supporting the relief sought in the petition include those factual circumstances particularised in its Uniform Rule 47(1) notice quoted in paragraph [19] above. Therefore, they are not repeated here. Additional grounds were recited in its founding papers. They include the following grounds, which are denied by the Respondent in its answering affidavit:

- (a) Respondent's reinstatement to pursue its claim against the Applicant, coupled with 'the intention that the company would continue to exist (sic) until, at least, the conclusion of the litigation' (at para 43), is 'irrebuttable proof thereof that in the event of the main action being dismissed, the Respondent would not be able to pay the Applicant's costs. The Applicant would in such instance be faced with a substantial irrecoverable bill of costs.' (at para 45 of the founding affidavit);

- (b) Fanie's sole purpose for the Respondent's reinstatement (namely, to pursue the latter's claim against the Applicant in the main action) 'constitute an abuse not only of the separate legal personality of a corporate entity, but also of the court process' (at para 46 of the founding affidavit);
- (c) Fanie's explanation quoted in paragraph [16] above from paragraph 25 of his founding affidavit in the Respondent's revival application 'defies belief' (at para 88). Applicant avers that the fact that Fanie failed to file the Respondent's annual returns for multiple years 'underscore the extent to which Mr Van Zyl simply used the Respondent as a separate corporate entity for a purpose wholly unrelated to the true reason for its existence, i.e. to conduct a farming business' (at para 88 of the founding affidavit); and
- (d) Respondent's claim lacks merit and is likely to fail. In support of this ground, the Applicant relies, inter alia, on emails between the parties' agents concerning the poor quality of grapes delivered for sale in the 2015 and 2016 seasons, and correspondence in which Fanie explains why the Respondent's grapes were of poor quality. Applicant further relies on correspondence in which its representatives furnished Fanie with financial information pertaining to grape sales for both harvest seasons, which figures were not disputed when furnished.

[22] The Respondent filed an answering affidavit. Based on the facts averred therein, the contents of paragraphs 1 to 8 of the Applicant's notice delivered pursuant to Uniform Rule 47(1), quoted in paragraph [19] above, are common cause.

[23] It is also common cause that Respondent is a dormant corporation – it conducts no trade. It has not traded since October 2016. Fanie has no intention to resume any trading activity in the Respondent. It exists now solely to pursue the disputed claim against the Applicant in the main action. Moreover, it is common cause that the Respondent owns no attachable asset and is not now, nor will it in future be, in a financial position to settle a costs order issued against it at trial in the main action.

[24] The kernel of the Respondent's opposition is two-fold: first, it is averred that Respondent's lawsuit is grounded on a sound factual footing and will prevail (termed 'an inevitable conclusion'). Consequently, it is averred that substantial damages will be awarded. Secondly, and flowing directly from the first ground, it is averred that this application is not bona fide, but is a ploy (labelled a 'cynical attempt') which is designed to avoid the inevitable damages award in the Respondent's alleged bona fide action.

Issue for adjudication

[25] The disputed issue arising for adjudication is a crisp one: should the Respondent be compelled to furnish security for Applicant's costs in the main action in a form, quantum, and manner to be determined by the Registrar of this Division?

Submissions by counsel

[26] At this point, it is necessary to provide a synopsis of the core arguments advanced by each party's counsel. Mr Vivier SC contended that security for costs ought to be ordered. His submission is rooted in several vital strands of thought.

[27] First, citing *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) para 15, Mr Vivier SC advanced the position that, since the Respondent is an empty shell and will, by its own admission, not be in a financial position to satisfy any costs order issued against it at trial, the Applicant should not be prejudiced by having to litigate at risk of a real loss, while the Respondent litigates free of any risk. Respondent has everything to gain from the litigation, but nothing to lose.

[28] Secondly, Mr Vivier SC acknowledged that the inability of an incola to satisfy a costs order is insufficient grounds at common law to justify an order for security. Relying on *Boost Sports Africa* supra paras 15 - 16, he conceded that something more is needed (such as, proof that the main action is vexatious, or reckless, or is an abuse).

[29] As for abuse of court process, Mr Vivier SC submitted that the Applicant persists in the case pleaded by it in the founding affidavit quoted in paragraphs [19](b) and (c) above. He submitted that this ground must be viewed with his other arguments (see below) because, cumulatively, they establish a sound basis for ordering security.

[30] Citing *Standard Bank of SA Ltd v Maloka* 2024 JDR 1569 (GJ) para 49, Mr Vivier SC argued that Respondent's lawsuit is vexatious as it appears unsustainable. Citing *Davidson's Bakery (Pty) Ltd v Burger* 1961 (1) SA 590 (O) at 593E, he submitted that the test is less stringent in an application for security. Relying also on *Boost Sports Africa* supra para 18, he submitted that, at this juncture, the merits test for the main action is not certainty; rather, it is a preponderance of probability. As such, the merits need only be doubtful or questionable ('twyfelagtig') – the action

need not be found to lack any prospects of success. Relying on *Liberty Holdings v Maloka* 2022 JDR 1772 (GJ) para 18, he submitted that a thorough investigation into the merits is not required; nor is it necessary to undertake a close investigation of the facts in casu.

[31] To prove that the merits of the Respondent's main action are doubtful and, by extension, that its lawsuit is vexatious and an abuse of judicial process, Mr Vivier SC undertook an excursion of emails between the parties which were contemporaneous with the 2015 and 2016 seasons, and the sale of grapes related thereto. Mr Vivier SC submitted that the emails reveal key facts that, so he reasoned, seriously undermine the merits of the Respondent's cause of action. In this way, he advanced the thesis that the Respondent's conduct is clearly irreconcilable with its pleaded cause of action.

[32] Mr Vivier SC pointed to correspondence in which Fanie admits the substandard quality of the grapes produced. He argued that this fact would naturally adversely impact the prices at which the Applicant could sell the Respondent's grapes in the relevant local and overseas markets. Mr Vivier SC also pointed to correspondence which he submitted shows that the Applicant's representatives communicated, in a timely manner, to Fanie the fact that the Respondent's table grapes were sold for the 2015 and 2016 harvest seasons, as well as disclosed the sums earned on the sales.

[33] Moreover, he submitted that the emails show that the financial information pertaining to the sales for both seasons was provided to Fanie who expressed no dissatisfaction whatsoever in relation thereto, despite the Applicant's representatives

inviting Fanie to raise any concerns which he may have as regards the figures and other information provided to him. Fanie did not respond with any concerns.

[34] Mr de Wet's attack was essentially four-pronged. First, he pointed to the fact that, in casu, security for costs is sought more than 6 years after the action was instituted in December 2018. He submitted that, contrary to the express provisions in Uniform Rule 47(1), the timing of the demand for security was not 'as soon as practicable after the commencement of proceedings'.

[35] As regards the effect of the delay, Mr de Wet referred to *Exploitatie - en Beleggingsmaatschappij Argonauten 11BV and Another v Honig* 2012 (1) SA 247 (SCA). There it was held that 'as a general rule a party is expected to apply expeditiously for security under rule 47' (para 14). The SCA (at para 15) held that an 'undue delay' in seeking security should be explained on the papers and that a failure to provide a plausible explanation may justify a refusal to order security for costs.

[36] Mr de Wet argued that the more than 6-year delay to invoke Uniform Rule 47(3) is unexplained in the Applicant's papers. This, so he reasoned, ought to count heavily against the Applicant when this Court evaluates whether the Applicant discharged its onus to persuade this Court to exercise its narrow discretion by ordering security.

[37] Citing *Cape Cash and Carry (Pty) Ltd and Others v Extreme Works (Pty) Ltd and Others* 2025 (4) SA 156 (WCC) paras 17 - 18, Mr de Wet shot a further arrow from his arsenal, namely, the Respondent's admitted dormancy and financial inability to satisfy any future costs order is not the central consideration when it comes to the ordering of security, let alone a decisive one. Its right to access court is more pivotal.

[38] A third arrow shot from Mr de Wet's bow is that, as appears from the Applicant's Uniform Rule 47(1) notice quoted in paragraph [19] above (read with the Applicant's founding papers), the true reason for seeking security is the Respondent's financial inability to satisfy a costs order. The rule 47 notice does not aver that the Respondent's claim is vexatious or reckless, or an abuse. As such, this is an afterthought. Mr de Wet argued that if real concerns existed about Respondent's claim being reckless or unsustainable, then the Applicant would have invoked Uniform Rule 47 much earlier. This, so he reasoned, is logical because the grounds on which Applicant's case is predicated were known at the time when the Applicant filed its plea in March 2019.

[39] A fourth arrow shot from Mr de Wet's arsenal is his thesis that I cannot, on the facts before me, conclude on a preponderance of probability, being the legal standard for assessing merits (see *Golden International Navigation SA v Zeba Maritime* 2008 (3) SA 10 (C) para 18), that the Respondent's claim is vexatious, or reckless, or an abuse of process.

[40] Mr de Wet argued that key facts which drive the Respondent's claim and its prospects of success are, first, the quality of the table grapes which the Respondent delivered to the Applicant and which the latter either exported on the Respondent's behalf, or sold domestically to local purchasers. Secondly, the Respondent's claim hinges on establishing the best prices that the table grapes of the proved quality would potentially yield in the local or overseas markets, depending on where they were sold. Mr de Wet submitted that, on the papers before me, I am not in a position to properly assess whether the merits of the Respondent's claim are doubtful or questionable.

Applicable legal principles

[41] To assess the cogency of the submissions delineated in the preceding part, it is necessary that I outline the applicable legal framework crafted in Uniform Rule 47, as well as the principles emerging from our case law. In relevant part, this rule reads:

- ‘(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, *deliver a notice setting forth the grounds upon which such security is claimed*, and the amount demanded. ...
- (3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar’s decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.
- (4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.
- (5) Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.’ (my emphasis added)

[42] No litigant enjoys a right to security. A requirement to furnish security is sourced in our law of civil procedure (not our substantive law). See *Jeanru Konstruksie (Pty) Ltd v Botes* 2023 (6) SA 305 (GP) paras 21 - 23. At common law, a superior court’s reservoir of inherent powers to regulate its own procedure includes the power to order security for costs. See *Boost Sports Africa* supra para 14. A court’s power to order security is described as ‘a most reasonable one’ (*Boost Sports Africa* supra para 13). As against an incola, even an insolvent, this power ‘ought to be sparingly exercised and only in very exceptional circumstances’ (*Western*

Assurance Co v Caldwell's Trustee 1918 AD 262 at 274), particularly when security would restrict access to court.

[43] A party seeking security for costs bears the burden to persuade a court that the interests of the fair administration of justice would be served by requiring security. See *Boost Sports Africa* supra para 13. Adjudicating whether to order security involves the judicious exercise of 'a narrow and unfettered discretion' (*Fusion Properties 233 CC v Stellenbosch Municipality* (932/2019) [2021] ZASCA 10 (29 January 2021) para 23).

[44] Deciding whether or not to order security involves 'the exercise of a value judgment' (*Fusion Properties 233 CC* supra para 38) after taking into consideration all pertinent facts and then balancing them on the scales of the fair administration of justice, but always without adopting a predisposition for or against granting security (see *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) 620 (SCA) para 16).

[45] In the evaluative process, a court weighs competing considerations and performs a balancing act. On the one hand, there is the potential injustice and unfairness to a litigant who successfully defends a case and is awarded costs, but would be unable to collect costs due to the impecuniosity of the costs debtor, and the former, qua costs creditor, is obliged to fund all litigation costs out of pocket. On the other hand, there is the potential injustice and unfairness to a claimant who may be prevented from pursuing a proper (i.e., legitimate) claim owing to its inability to give security. See *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) para 8.

[46] No hierarchy of importance exists between the factors relevant to determining whether security should be ordered. Factors to be considered are case-specific. No

single factor is decisive. Relevant factors include: (i) the nature of the claim in the main case; (ii) the claim's likely prospects of success; (iii) whether a claim is made bona fide or not; (iv) the financial position of a respondent when security is sought; (v) a respondent's probable financial position if it loses the main case; (vi) whether a respondent is an incola or peregrinus; (vii) whether demand for security was delayed; (viii) whether an applicant for security seeks to stifle or terminate a genuine claim; and (ix) the potential prejudice or impact if security is ordered as compared if it is not. See *Boost Sports Africa* supra para 14; *Barker v Bishops* 2019 (4) SA 1 (WCC) para 28.

[47] Therefore, a judicious exercise of discretion in casu requires a proper consideration of all relevant facts and principles, all of which are canvassed herein.

[48] In the present case, the antagonists are both incola companies. Owing to the repeal of s 13 in the old Companies Act 61 of 1973, every application for security against an incola company is now resolved in the same way under the common law as is applicable to incola natural persons. See *Boost Sports Africa* supra para 16.

[49] A principal concern is that 'an incola defendant should not be left unprotected if ultimately successful in the main action' (*Browns The Diamond Store CC v Van Zyl* (717/2015) [2017] ZAGPJHC 70 (3 February 2017) para 14). However, since access to justice cannot be based purely on wealth (see *Cape Cash and Carry* supra para 13), the probable or likely inability of an incola plaintiff to satisfy a potential costs order is, on its own, insufficient grounds to require security. In law, proof of 'something more' is required on a preponderance of probability. See *Boost Sports Africa* supra para 15.

[50] The 'something more' referred to in this context is to be found in the nature of the main proceeding instituted by an incola plaintiff. This entails proof that the litigation launched is either vexatious, or is reckless, or is an abuse of process. *Only* if proof of the existence of any such criticism is established by an applicant, can security for costs be ordered against an incola litigant. See *Boost Sports Africa* supra para 16.

[51] The SCA, in *Boost Sports Africa* supra para 17, approved the following dictum (per Nicholas J) in *Fisheries Development Corporation v Jorgensen* 1979 (3) SA 331 (W) at 1339E-F as regards the meaning of 'vexatious' and 'abuse' in this setting:

'In its legal sense "vexatious" means "frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant" (Shorter Oxford English Dictionary). 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" connotes a mis-use, an improper use, a use *mala fide*, a use for an ulterior motive.' (footnotes omitted)

[52] As for the meaning of 'reckless' litigation for a successful invocation of Uniform Rule 47(3), it was held in *Cape Cash and Carry* supra para 25 that this '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'.

[53] Accordingly, determining if litigation is vexatious, reckless, or an abuse, usually involves some level of assessment concerning its merits. However, for purposes of Uniform Rule 47(3), a court is not required, nor expected, to embark on an in-depth analysis of the kind which a court undertakes at the end of a civil trial. This is because, in an application for security, courts are not required to resolve the underlying dispute between the parties. Doing so would frustrate the purpose for

which security is sought. The 'extent to which it is practicable to make an assessment of a party's prospects of success would depend on the nature of the dispute in each case' (*Zietsman v Electronic Media Network Ltd and Others* 2008 (4) SA 1 (SCA) para 21). The SCA, in *Fusion Properties 233 CC* supra para 36, held that it 'is sufficient that a court has a fair sense of the strength and weakness of the antagonists' respective cases'.

[54] An order requiring security should not be refused because it will, or may reasonably likely, bring an end to litigation in the main case. See *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1046G – I; *Giddey NO v JC Barnard* supra paras 30, 33, and 34. Termination of an action is an outcome which, when Uniform Rule 47 was crafted, would have been foreshadowed by its drafters as an inherent possibility. Despite this, the rule maker decided to cater for security.

[55] A litigant relying 'on the probability that a security order will exclude it from the court, must therefore adduce evidence that it will be unable to furnish security, not only from its own resources, but also from outside sources such as shareholders or creditors' (*MTN Service Provider (Pty) Ltd v Afro Call* supra para 20). Also, see *Fusion Properties 233 CC* supra para 34. Therefore, when assessing whether to require security, a relevant factor is whether ordering security might or will end the litigation in the main action. A respondent should pertinently plead facts germane to this issue.

[56] Even if requiring security from an incola would lead to the main litigation coming to an end, that potential outcome should not deter a court from ordering security when the circumstances merit doing so. Shying away from ordering security merely to keep litigation alive would, in my view, be an injudicious exercise of

discretion under Uniform Rule 47(3). This is more so if the proceedings concerned is vexatious, or reckless, or is an abuse of process (in the legal sense explained above).

[57] Finally, on the question of the nature and extent of a court's discretion to order security for costs within the framework of Uniform Rule 47(3), Janisch AJ held as follows in *Cape Cash and Carry* supra para 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.’

The statement in the first sentence is undoubtedly correct. The correctness of the recordal in the second sentence is, with respect, doubtful for the reasons given below.

[58] First, in *Browns The Diamond Store CC v Van Zyl* supra para 14, Kathree-Setiloane J held that ‘there should be no fetter on a court's discretion to order security for costs’. I endorse this view. Secondly, in *Fusion Properties 233 CC* para 23, the SCA recorded the prevailing legal position in this regard to be as follows:

‘It is by now well-established that a court considering an application for security exercises a narrow *and unfettered discretion*.’ (my emphasis added)

[59] If Janisch AJ meant that a court's discretion to order security is fettered by the rules which render the exercise of a strict discretion to order security being susceptible to setting aside on appeal if it was made on the strength of incorrect facts, or on a wrong principle, or if it is tainted by bias or caprice (see *Giddey NO v JC Barnard* supra paras 19 - 23), then I agree with his second sentence quoted above.

Application of the relevant principles to the facts in casu

[60] It is against the backdrop of the legal principles discussed under the preceding heading that I now consider their operation in the application before me.

(a) *Delay in demanding security*

[61] As stated in paragraphs [34] to [36] above, Mr de Wet argued that the demand for security was inexplicably delayed, and for an unreasonable period. This challenge was not pleaded. It surfaced for the first time in Mr de Wet's heads of argument.

[62] Although Uniform Rule 47(1) stipulates that a party entitled to demand security must ('shall') do so as soon as is reasonably practicable after the commencement of legal proceedings, failure to call for security expeditiously is not necessarily fatal to an application launched under the aegis of Uniform Rule 47(3). This is clear from the following dictum by the SCA in *Fusion Properties 233 CC supra* para 31:

'Whether a delay should constitute a bar to the demand entails a fact-based enquiry in the light of the facts of a given case. Thus, a court faced with an application to compel will, in exercising its discretion, undoubtedly have regard to this factor and weigh it up together with other relevant factors. *Therefore, delay in itself will rarely be an overriding and decisive consideration.*' (my emphasis added)

[63] The Applicant demanded security for the first time in April 2025. This occurred almost 7 years after the main action started in December 2018. As such, the Applicant failed to invoke Uniform Rule 47(1) with the degree of expedition that it envisages.

[64] The Applicant did not heed the procedural stipulation requiring expeditiousness. Therefore, in its court papers, the Applicant failed to address the delay and explain its cause. Mr Vivier SC argued that the delay in demanding

security is of no moment. I disagree. There will be instances, admittedly rare ones, when a delay would be a bar to security. A delay ought to be explained. Sometimes, failure to do so may prove fatal.

[65] The Respondent did not use the delay as a ground for its opposition. Since the delay was not raised in the answering papers, it was not canvassed in the replying affidavit either. The following dictum in *Honig supra* para 14 is instructive here:

‘In addition, in motion proceedings the affidavits serve as both the pleadings and evidence relevant to the issues between the parties, *and a party can only be expected to deal with averments raised by the other side and not with allegations possibly anticipated but which are not made. Had the appellants raised the alleged delays and their contention that the court should decline to deal with the matter as a result, the respondent may well have offered a perfectly acceptable explanation.* Without the respondent having being called upon to do so, it would not be proper to decide the application against him by having regard to an issue that he was not called upon to meet.’ (my emphasis added) (footnotes omitted)

[66] On the facts before me, I conclude that, although the delay in demanding security is substantial in duration, the delay itself is not a central consideration; nor is it a factor which would be dispositive of the matter by serving as a complete bar to ordering security; nor does the delay, when it is viewed with the other relevant factors in casu, tilt the scales of the fair administration of justice in the Respondent’s favour.

(b) Impact on access to court if security is ordered

[67] In its founding affidavit, the Applicant persists in seeking security for costs in the amount of R1 873 731,93 as per its demand in terms of Uniform Rule 47(1). In its answering papers, the Respondent avers ‘that the Applicant is not entitled to any security for costs’ (at para 52.4). The Respondent’s case is not that it is unable to

source any sum for security; nor does the Respondent make the case that it will be denied access to court in the main action if security for costs is ordered in any sum.

[68] Before me, Mr de Wet argued that the doors to the halls of justice should not be closed to the Respondent merely because it is not in a financial position to provide security owing to a lack of its own resources. In *MTN Service Provider (Pty) Ltd v Afro Call* supra para 20 (see quote in paragraph [55] above), the SCA affirmed that litigants who contend that an order requiring security will deal a death blow to their action must adduce evidence of an inability to give security, both from its own resources *and external sources too*. The Respondent failed to adduce evidence to this effect.

[69] In its replying affidavit, the Applicant pointed out, correctly so, that Fanie was not candid with this Court in his answering affidavit. Fanie failed to take this Court into his confidence by not disclosing the source of the Respondent's litigation funding.

[70] Accordingly, on the evidence before me, I am unable to conclude that the Respondent cannot provide security sourced from the same person(s) who is/are funding the main action (and/or possibly from other persons) in such sum, form, and manner as may be determined in terms of Uniform Rule 47(5). In the circumstances, I am unpersuaded that the Respondent may potentially, or will, be denied access to court in the main action owing to insufficient funding from available sources.

[71] It bears repetition that merely because an order requiring security might, or will, have the effect of limiting access to court is not an overriding or decisive

consideration; nor is it a sufficient reason to refuse security. See paragraphs [54] to [56] above.

[72] Importantly, I am satisfied that the application for security is bona fide. The Applicant is, in my view, not seeking security to shut the Respondent out of court. If that were its motive, then it can reasonably be expected that the Applicant would have sought security a long time ago, particularly since some of the key facts which underpin the demand for security manifested themselves some years ago. See the contents of the notice delivered in terms of Uniform Rule 47(1) quoted in paragraph [19] above.

[73] Also, the Applicant seeks security mainly for its future trial related costs. FA31 is a schedule attached to the founding papers showing how the sum of R1 873 731,94 demanded as security is computed. The breakdown records that R1 729 811,73 is an estimate of trial costs for an advocate, an attorney, expert witnesses, travel, and accommodation. The rest are costs incurred from 1 January 2017 to 11 April 2024.¹

(c) *Respondent's present financial position and its financial position later*

[74] The Respondent does not conduct any trading activity. This has been the position from October 2016 onwards to date. Fanie has no intention to recommence trading in the Respondent. As a result, it has no banking account. All the Respondent's assets were sold in 2016 for R9,5m. The sale proceeds are depleted (or withdrawn).

¹ The main action was launched in December 2018. It is unclear why the Applicant seeks security for costs incurred before the summons was issued and served. This is a matter for the registrar to address when she performs her functions pursuant to Uniform Rule 47(5).

[75] Fanie avers that the Respondent has one asset, namely, a R3,586m claim against the Applicant. That claim is not an asset. It is illiquid and disputed. Liability must be judicially determined. Until a court finds that the Respondent suffered a loss of R3,586m caused by the Applicant, uncertainty exists as a matter of fact and law whether the Applicant is liable to pay the Respondent the sum claimed. At most (if at all), the Respondent's damages claim may be labelled a 'contingent asset', the value of which remains the subject of a judicial determination to be made in due course.

[76] Fanie has not provided any financials for the Respondent which shows its current balance sheet (such as, the value of all monies received on loan to fund its litigation costs, and the nature and value of any asset/claim). The failure to provide a set of financial statements which bears out Fanie's assertion that the Respondent has one asset of substantial value in its accounting records is unsurprising. This is so for the reasons enumerated in paragraph [75] above, and because the Respondent has no auditor in place who can verify Fanie's assertion. It last had an auditor in 2005.

[77] Based on the Respondent's financial information before me in the pleadings viewed in their totality, as summarised in paragraphs [74] to [75] above, I find that there is merit in the Applicant's founding averment that 'the Respondent is for all intents and purposes an "empty shell"' (at para 14). The Respondent has no asset(s). However, it does appear to have liabilities, namely, the value of loans received to fund the Respondent's litigation costs in both the main action and this application. To those debts must now be added the value of the costs order granted against it herein below.

[78] For all these reasons, I conclude that the Respondent is, at present, litigating in a state of insolvency. The reasonably estimated value of its assets is zero (nil). This is exceeded by the reasonable (unquantified) value of its actual and probable liabilities.

[79] If the Respondent fails in the main action with costs, then its financial position will be more precarious than at present. Its insolvency would be considerably worse.

[80] Consistent with these findings, Mr de Wet was constrained to concede that the evidence establishes unequivocally that the Respondent will not be in a financial position to pay the Applicant's litigation costs as quantified in any bill of costs; nor will the Respondent be able to pay any cost contribution in relation thereto.

[81] As a result, this case has a distinguishing feature. The Applicant has gone beyond proving a mere *probable* inability on the Respondent's part to satisfy a costs order which may be granted against it at the end of the main action. The Applicant has proved an *actual* inability on the Respondent's part to satisfy any adverse costs order.

[82] As such, I am satisfied that if the trial in the main action proceeds and the Applicant prevails with costs, then it faces the real danger of suffering a substantial loss in the form of an irrecoverable bill of costs. This would be so regardless of whether the Respondent is actually liquidated or not.

[83] I hold that the considerations discussed in paragraphs [74] to [82] tilt the scales of fairness towards Applicant being entitled to security for its costs. Respondent should not have a free pass to litigate with everything to gain, but with nothing to lose. The Respondent should be able to litigate the main action to finality,

but not without any risk of indemnifying the Applicant, if the Respondent's action is dismissed with costs.

[84] In my view, the fair administration of justice requires that the Respondent should only be permitted to proceed with the litigation in the main action after it provides security for the Applicant's fair and reasonable litigation costs in a sum, form, and manner to be determined by the Registrar in accordance with Uniform Rule 47(5).

(d) Abuse of process

[85] The Applicant's case for security is grounded, in part, on its averment that the Respondent's reinstatement for the sole purpose of pursuing its damages claim against the Applicant constitutes an abuse of both the separate corporate personality of the Respondent and this Court's process (see paragraphs [21](b) and (c) above).

[86] As discussed in paragraphs [50] to [51] above, abuse of process is one of the recognised grounds which, if proved, would establish the Applicant's entitlement to security for its costs against an incola plaintiff. This legal position made it incumbent on Fanie to deal head-on with the contents of the founding affidavit which alleged that he was engaged in a stratagem tantamount to an abuse of process. He failed to answer the averments concerned in any meaningful way. This failure proved fatal.

[87] The following is Fanie's entire answer to the allegation that his conduct as particularised in paragraph 46 of the founding affidavit evidences an abuse of process:

'28. **AD PARAGRAPHS 46 AND 47 THEREOF**

The content of these paragraphs is denied.'

[88] This is a bald denial of a serious and vital allegation. It required a proper answer. Fanie's failure to substantiate the denial speaks volumes about the probable lack of a plausible explanation for his impugned conduct. This adds considerable weight and credence to the Applicant's case of mala fide litigation and mala fide litigation tactics.

[89] Quite clearly, Fanie revived the Respondent's corporate status so that he could litigate in its name. In this way, he shields himself from, inter alia, liability for costs. As the Respondent's sole shareholder (and presumably the funder of its litigation costs), Fanie will be the sole beneficiary of any damages awarded. Instead of taking transfer of the Respondent's claim and litigating in his own name with all the associated risks, Fanie elects to hide behind the corporate veil between him and the Respondent.

[90] If the Respondent's lawsuit succeeds, then Fanie and the Respondent will be the victors; the Applicant will be the loser. If that lawsuit fails with costs, then Fanie and the Respondent will still be the victors because there would be no assets susceptible to execution; the Applicant will still be the loser, suffering losses through not being able to recover its costs (and any damages awarded in its counterclaim).

[91] I am satisfied that Fanie and the Respondent have adopted a litigation posture and a litigation strategy that is intended to enable Fanie and the Respondent to gain everything from a favourable outcome in the main action, while at the same time ensuring that neither loses anything if an unfavourable result comes to pass. This consideration favours ordering security. See *Boost Sports Africa* supra para 15.

[92] Is this conduct an abuse of process? My answer is 'yes'. There is no finite or precise conception of 'abuse of process' which fully articulates all its various shades and forms. In *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734F-G, the SCA held:

'What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept "abuse of process"'.

Some guidance may also be gleaned from *Price Waterhouse Coopers Inc and Others v National Potato Co-Operatives Ltd* 2004 (6) SA 66 (SCA) para 50. There it was held:

'It has long been recognised in South Africa that a court is entitled to protect itself and others against the abuse of its process, but no all-embracing definition of 'abuse of process' has been formulated. Frivolous or vexatious litigation has been held to be an abuse of process and it has been said that 'an attempt made to use for ulterior purposes machinery devised for the better administration of justice' would constitute an abuse of the process (*Hudson v Hudson and another* supra at 268). In general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof, of *mala fides*. In order to prove *mala fides* a further inference that an improper result was intended is required. Such an application of a court procedure (for a purpose other than that for which it was primarily intended) is therefore a characteristic, rather than a definition, of *mala fides*. Purpose or motive, even a mischievous or malicious motive, is not in general a criteria for unlawfulness or invalidity. An improper motive may however be a factor where the abuse of court process is in issue. Accordingly, a plaintiff who has no bona fide claim but intends to use litigation to cause the defendant financial (or other) prejudice will be abusing the process.' (footnotes omitted) (my emphasis)

A court should enquire whether impugned conduct was undertaken with the sole or predominant intention to cause harm or prejudice to an opposing litigant. If yes, then

the conduct concerned may amount to an abuse of process. See *Koukoudis and Another v Abrina 1772 (Pty) Ltd and Another* 2016 (5) SA 352 (SCA) paras 30 - 31.

[93] Fanie's misuse of an empty shell to litigate, coupled with the fact that (i) the Respondent is dormant for all trading purposes since 2016; and/or (ii) it is litigating in insolvent circumstances (see paragraphs [74] to [78] above); and/or (iii) it is litigating vexatiously and/or recklessly (see below), then a mala fide practice is clearly exposed.

[94] This conduct is intended to cause harm and/or be seriously prejudicial to the Applicant and its legitimate interests. It stands to suffer substantial losses, whether it wins or loses the main case. In as much as Fanie and the Respondent are intentionally litigating in a way where both stand to gain everything and neither stands to lose anything, Fanie and the Respondent are litigating in a manner which, by design, is intended to leave the Applicant in a damaged financial position, no matter what the outcome in the main action. The Applicant will lose all the money it spent in defending that action, and it will, simultaneously, gain nothing from any favourable award.

[95] This harmful and prejudicial outcome is intended. It is a dominant aim. It is precisely for this reason that Fanie, as the Respondent's sole director and shareholder, orchestrated the main action to be run through a dormant, empty shell which is technically insolvent at all material times during the main action, and likely after it ends.

[96] As a result of this intention, Fanie instructed Werksmans Attorneys, during February 2024, to secure the Respondent's reinstatement. Fanie was determined to litigate in the Respondent's name for his benefit and to the Applicant's detriment. The

reinstatement was sought, despite Fanie having no intention to conduct any trade. The juristic entity is being misused. It is a vehicle used to pursue a reckless and vexatious claim (see discussion below) in a manner that is intended to cause harm and/or serious prejudice to the Applicant, while insulating Fanie and the Respondent. This shows improper motives and mala fides. I find this conduct constitutes an abuse of process.

[97] The Respondent is a proverbial 'sitting duck' for liquidation. On the facts before me, the Applicant has a reasonable apprehension that the Respondent's liquidation will likely ensue if the Respondent's action is dismissed with costs. This is another consideration which cries out for an explanation of the rationale behind the strategy of litigating in the Respondent's name. Fanie chose to evade disclosure thereof.

[98] The evasive tactics adopted are a miscalculation. Without an explanation that provides justification for Fanie's afore-described conduct, a finding of an abuse of process is, in my view, wholly merited. This is reinforced by a consideration of the facts surrounding the Respondent's deregistration and Fanie's conduct related thereto.

[99] On 20 December 2020, CIPC commenced the process of deregistering the Respondent. It effected deregistration on 20 January 2024, being more than 3 years after the process commenced. Throughout this time, litigation continued unabated.

[100] By law, CIPC is required to give notice to the Respondent of any intended steps to deregister it from the companies' register. In view of the allegations against Fanie of abuse of process related to, and arising from, his misuse of the Respondent's corporate status, it was incumbent on Fanie to explain, inter alia, when

and how he became aware of the Respondent's deregistration; and whether Respondent received notice from CIPC of its intention to deregister it; and if not, then why would that be so.

[101] Fanie's silence on all this (and more, as explained earlier) strongly favours the Applicant's case that Fanie and the Respondent are guilty of abuse of process. In my view, on all the facts before me, the probabilities favour a finding that Fanie continued to litigate in the Respondent's name knowing that it was being deregistered. Later, he even continued to litigate after the deregistration was brought to his attention.

[102] The Applicant was, during February 2024, engaged in preparation for the 4-day trial scheduled to run in April 2024. On 5 February 2024, its attorneys uncovered, rather fortuitously, that the Respondent was deregistered. As such, the Respondent had no corporate existence and lacked legal personality. See *Falk NO and Others v Rapitrade 659 (Pty) Ltd and Others* (3519/2021) [2022] ZAWCHC 128 (9 May 2022).

[103] If the Applicant's attorneys had not uncovered the deregistration, the Applicant would, as averred in its founding papers, have suffered serious harm and/or prejudice. It would have litigated entirely oblivious to the Respondent's true legal status under the Companies Act. The Applicant would have incurred substantial litigation costs, none of which would have been recoverable against the deregistered company. This improper outcome was part of Fanie's mischievous intention. This is entirely consistent with Fanie's improper motives discussed earlier in paragraphs [93] to [95].

[104] When the Applicant became aware of the Respondent's deregistration, its attorneys took immediate steps that protected scarce judicial resources from being wasted, and prevented further abuse of process through the running of a trial for the benefit of a company which, at that time, had no right of access to court.

[105] On 5 February 2024, the Applicant's attorneys addressed a letter to the Respondent's erstwhile attorneys, being Werksmans. The former demanded that the latter file a notice removing the main action from the trial roll owing to the Respondent's deregistration. This was an eminently reasonable request. It was, however, ignored.

[106] On 12 February 2024, the Applicant's attorneys sent a follow-up letter. Werksmans responded via email to the latter correspondence on 13 February 2024. It read:

'We are instructed that Mr Fanie van Zyl has already completed and lodged the necessary documentation to reinstate the company. We are further instructed that the reinstatement will take a maximum of 21 days from date of lodgement.

Accordingly, we confirm herewith that we hold instructions to proceed with the trial and that your client must proceed to prepare for trial which is set down for 10 weeks from now.

Our client's rights remain expressly reserved.'

[107] Fanie's insistence that the litigation and the trial preparation processes continue as normal despite the deregistration is abusive of the judicial process. At that time, the Respondent was non-existent in the eyes of the law and could not litigate. It had no rights, and none could be 'expressly reserved'. The position taken is, in law, untenable.

[108] In view of Werksmans response, the Applicant's attorneys, understandably so, sent an email marked 'Urgent' in which it requested 'a copy of the completed and lodged documentation to reinstate the Company'. This request was ignored, thereby culminating in a further 'Urgent' email sent on 23 February 2024.

[109] The latter email elicited the following response which, to my mind, further underscores Fanie's mala fides and his abuse of process in the main action:

'We are instructed that the application lodged at CIPC is not relevant to the dispute as set out in the pleadings. Furthermore, we are instructed to once again inform you to proceed to prepare for trial as Mr Van Zyl is confident that the reinstatement is a mere formality and will be finalised soon.'

[110] This response from Fanie through his attorneys evinces the same evasive tactic employed by him in his answering affidavit in the application with which I am seized. The Applicant's representatives were understandably concerned about the Applicant's exposure to harm and prejudice if it simply forged ahead on trust and Fanie's word, without proof that steps were underway to restore the Respondent's legal status.

[111] Providing the documentation requested would have gone a long way to demonstrating Fanie's bona fides in the litigation with the Applicant, and it would have allayed concerns that the Respondent's deregistration occurred with his knowledge.

[112] I am struck by the absence of any statement, both in communications from the Respondent's attorneys to the Applicant's attorneys and in the answering affidavit, to the effect that Fanie was taken by surprise when, on 5 February 2024, the Applicant's attorneys informed Werksmans that the Respondent was deregistered in January 2024. This omission suggests that Fanie was not surprised

to learn of the Respondent's deregistration. This aligns with my view (see paragraph [101] above) as to his probable knowledge that the Respondent was, since December 2020, in the process of deregistration. This would mean that he took no steps to stop it. Why not?

[113] Fanie's point blank refusal to provide a copy of the documentation which ought to have been readily available was unreasonable. Moreover, it wreaks further bad faith in the litigation and evidences improper motives on his part. All this conduct, when viewed together with Fanie's other conduct, leads me to conclude that Fanie is, as alleged by the Applicant, guilty of abuse of process in relation to the main action.

[114] I find that this is a 'clear case' where this Court's discretion should 'be sparingly exercised' against an incola plaintiff by requiring it to provide security before it can litigate further against an incola defendant. See *Cape Cash and Carry* supra paras 16, 22. I deem it necessary to discuss certain additional factors which, when considered with the other relevant factors discussed above, serve to fortify my view that this case has exceptional circumstances which justify security being ordered. See *Caldwell's Trustee* supra at 274. To some degree, the factors discussed below work hand-in-hand with the abuse of process consideration discussed in this part.

(e) *Reckless litigation*

[115] The Respondent is not trading, and has not traded since 2016. It has no assets; nor any bank account. The Respondent lacks the necessary own resources that would provide it with the liquidity to fund its own litigation costs. Those costs are

presently being funded by an external source(s). Presumably, Fanie is funding these costs on loan account.

[116] All such borrowings are reckless in that the funds are received at a time when Fanie, as director, knows that there is no reasonable prospect of repaying the loans. The corporation lacks the necessary solvency and liquidity. The company is dormant: it has no staff; it does not trade; it has no business; it has no assets; and it has no income. The Respondent is receiving the loans with a high degree of negligence.

[117] The loans are used exclusively to fund the main action. If the Respondent's lawsuit fails, then it can never repay the loans. Fanie is forging ahead with the pending action and funding it with borrowings regardless of the consequences. This taints the litigation with a high degree of negligence. This, in my view, amounts to recklessness.

[118] In addition, the circumstances surrounding the main action reflect a wanton disregard for the Applicant's interests in the outcome of the lawsuit. The lack of any prospect to recover anything pursuant to an order in its favour is not because the Respondent is impecunious, but owing instead to wanton indifference being shown to the Applicant's legitimate interests. Fanie intentionally arranged the Respondent's affairs in a manner that allows it to litigate free of any chance that the Applicant could recover anything. It will gain nothing. Fanie made sure that the Respondent is, for all intents and purposes, an empty shell. It has, and will have, no attachable assets. This renders the action to be reckless litigation. See *Cape Cash and Carry* supra para 25.

[119] Consequently, the scales of fairness in the administration of justice tilt heavily in the Applicant's favour for the granting of an order requiring the Respondent to

provide security before it can proceed further with its action. Also, pending security being provided, the Respondent's action ought to be stayed. This will be ordered.

(f) *Vexatious litigation*

[120] For the Respondent to succeed in its claim at trial, it bears the burden to prove, inter alia, that it suffered contractual damages which were caused by the Applicant selling the Respondent's grapes for the 2015 and 2016 seasons at prices below their market value. In addition, the Respondent must prove the quantum of its alleged losses. The Respondent's claim suffers from certain weaknesses.

[121] In Fanie's answering affidavit, he admits that the Respondent has problems with its case. This is, in part, due to the Respondent not having access to significant source documents which the Applicant authored, but which it is unable to produce for reasons disclosed in the pre-trial minutes dated 17 January 2023. Despite this, the Respondent records in various pre-trial minutes filed of record that it accepts that it is not prejudiced in its preparation for trial. It is difficult to understand how this can be so.

[122] The problems experienced by the Respondent in accessing various source documents will hamper its ability to discharge its onus of proof on the question of merits. This consideration raises serious doubts in my mind about the Respondent's prospects of success in the main action. Success, while not impossible, is unlikely.

[123] The weaknesses identified include, but are not necessarily limited to, the following aspects of the Respondent's claim for contractual damages in the aggregate sum of R3 586 058,00 for the 2015 and 2016 harvest seasons:

- (a) In its plea, the Applicant alleges that the grapes delivered by the Respondent were of poor quality and could not, as a result, yield the best possible prices. Its defence is that the price yielded was the best price for the quality of grapes delivered. To prove this defence, the Applicant will rely on the expert evidence of Johan van der Westhuizen who will testify as to inspections conducted by him on the Respondent's grapes and the quality thereof. In his answering affidavit (at para 35.1), Fanie denies 'that the grapes that Van der Westhuizen inspected originated from the Respondent'. Fanie provides no factual basis for this averment. Fanie was not present at the inspections. Thus, he would not be able to testify as to the origins of the grapes inspected. Van der Westhuizen's testimony and that of the Applicant's representatives would probably, in the absence of source documents, be the best available evidence that would prove the grapes' origins. This consideration favours Applicant in its defence and exposes weakness in the Respondent's claim for damages for both seasons;
- (b) In its plea, the Applicant avers that the grapes delivered by the Respondent were of poor quality. In his answering affidavit, Fanie avers that 'on the assumption that these grapes [i.e., the grapes inspected by Van der Westhuizen] were in fact the Respondent's grapes, it is impossible, without the necessary source documents to determine who was responsible for the poor quality of the grapes' (at para 35.2). This assertion appears to be rather weak. It overlooks the various emails authored by Fanie, particularly in relation to the 2015 harvest season, in which he admits that the grapes produced by the Respondent were of poor quality at source. He explains the reasons for their poor quality. This consideration too favours the Applicant in its defence and exposes further weakness in the Respondent's claim for damages;

- (c) To prove the defence raised by the Applicant, namely, that the Respondent's grapes were of poor quality for export purposes, the Applicant gave notice of its intention to call Alexander Veltman and Stefan Droogendijk 'to give expert evidence on the examination and quality reports on grapes of the Plaintiff inspected on arrival in the Netherlands'. The Respondent has not given notice to call any expert to counter the Applicant's intended expert evidence. On the face of it, this further indicates that the Applicant is more likely to show that the Respondent's grapes were of poor quality than the latter seems able to prove that its grapes were of good quality for purposes of an export market to, inter alia, the Netherlands so that it ought to have yielded a higher price than it actually did;
- (d) In his answering affidavit, Fanie records that 'by the time that the Applicant provided any information to the Respondent, it was already too ..., the Respondent could not confirm the correctness of the allegations regarding poor quality and/or investigate which party was responsible for the poor quality of the grapes' (at para 39.2). The Respondent is in no better position at present. Therefore, it appears that the Respondent is unable to genuinely refute the testimony which the Applicant intends to lead to the effect that the Respondent's grapes were of poor quality and that the Respondent is responsible for the poor quality (and not the Applicant). This consideration too favours the Applicant in its defence and shows weakness in the Respondent's claim; and
- (e) In the signed pre-trial minutes, the Respondent records that it will not call any expert. This is an Achilles's heel. To prove the loss pleaded and its quantum,

expert evidence would be needed to prove what, on the Respondent's version, is a market related price was for its 2015 and 2016 grapes.

[124] After a careful consideration of the apparent strengths and weaknesses of the Respondent's claim and the Applicant's defence to it, I am persuaded that, on a preponderance of probability, the Respondent's prospects of success are open to sufficient doubt as to render its claim vexatious. Its claim appears to be unsustainable.

[125] I emphasise that, in accordance with the principles discussed in *Liberty Holdings v Maloka* supra para 18, I reached this conclusion without engaging in a close analysis of all the facts, and without undertaking the kind of in-depth analysis of all the evidence as would be required of a trial court when it adjudicates the question of merits. I reviewed the pleadings, and considered the notices and the other contents in the court file, both in the main action and the Uniform Rule 47 application.

[126] Further to the above, I conclude that the Respondent's prospects of success are so bleak that continuation of its action would itself be an abuse of process. See *Golden International Navigation SA v Zeba Maritime* supra para 18.

[127] For all these reasons, I find that an order requiring security is merited in casu.

Costs

[128] At the hearing, both parties' counsel argued that costs of the application ought to follow the result and that costs for counsel should be on tariff scale B. I agree.

Order

[129] In the result, the following order is made:

- (a) The application succeeds. The Respondent is directed to furnish security for the Applicant's costs in the main action. The Respondent shall do so in the form, amount, and manner determined by the Registrar under Uniform Rule 47(5). Pending compliance herewith, the proceedings in the main action are stayed;
- (b) Respondent is liable for costs, including costs for counsel on tariff scale B.

F. MOOSA

ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicant: P de B Vivier SC

Instructed by: Saunders Venter Van der Watt (Mr N van der Watt)

For Respondent: H. N de Wet

Instructed by: BBS Attorneys Inc (Mr B Boshoff)