



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no.: D1768/2020

In the matter between:

**SOURCE SAMPLING SERVICES CC T/A APEX
EMISSIONS TESTING**

PLAINTIFF

and

APEX ENVIRONMENTAL CC

FIRST DEFENDANT

(formerly known as Hazardous Environment Decontaminators CC)

ROBERT WINSTON RANDOLPH

SECOND DEFENDANT

SEAN JOHN CHESTER

THIRD DEFENDANT

KEEGAN SEERAM

FOURTH DEFENDANT

BRADLEY ALLEN SWIFT

FIFTH DEFENDANT

DAVID FISHER

SIXTH DEFENDANT

LEON PRETORIUS

SEVENTH DEFENDANT

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the handing down of the judgment is deemed to be 24 August 2026 at 09h30.

ORDER

The following order is granted:

1. The affidavit of Mr Liberty Maunzagona is treated as *pro non scripto*.

2. The plaintiff is directed to furnish security for the defendants' future costs reasonably connected with the completion of the trial.
3. The amount, form and manner of the security must be determined by the Registrar under Uniform Rule 47, after both parties have been afforded an opportunity to make representations.
4. The plaintiff must furnish the security so determined within 20 days after the Registrar's written determination has been served on the plaintiff's attorneys.
5. If the plaintiff fails to furnish the security within that period, the action is stayed until the security is furnished.
6. If the plaintiff fails to furnish the security, the defendants are granted leave to apply on the same papers, supplemented where necessary, for the dismissal of the action.
7. The plaintiff is directed to pay the defendants' party and party costs of this application on scale B, including the costs of counsel, but excluding the costs incurred in obtaining, preparing or delivering the affidavit of Mr Liberty Maunzagona.

JUDGMENT

Bramdhew AJ

Introduction

[1] The defendants seek an order that the plaintiff provide security for their costs in the action, in an amount of R500 000. The plaintiff is a close corporation. The application is brought under s 8 of the Close Corporations Act 69 of 1984 ("the Close Corporations Act") and Uniform rule 47. The underlying action concerns copyright claimed in modifications to software used for stack-emission testing.

[2] The main questions in this application are the following:

- a) What legal test governs an application for security against a close corporation under s 8 of the Close Corporations Act?
- b) Did the defendants make out their case only in reply?
- c) Was the application for security brought too late?

- d) Should the defendants' accountant's affidavit be admitted?
- e) Is there reason to believe that the plaintiff will be unable to pay the defendants' costs if it loses?
- f) If so, should security be ordered?

Background

[3] The case began as an application in February 2020. By consent, it was referred to trial on 13 October 2021. A declaration and plea followed. The defendants delivered an exception, which was dismissed on 3 November 2022. The parties held a pre-trial conference on 3 August 2023 and signed a certificate of readiness in October 2024.

[4] The action was set down for five days, from 11 to 15 August 2025. It was removed from the roll by consent. On 7 August 2025, the defendants delivered a rule 47(1) notice demanding security of R500 000. The plaintiff refused the demand on 25 August 2025.

[5] The defendants launched this application on 9 March 2026, more than six months after the plaintiff's refusal. The trial which was then set down for 3 to 7 August 2026 was adjourned pending the determination of this application.

[6] In their founding affidavit, the defendants stated that the plaintiff had no known immovable property, had not discovered financial statements, had little visible business activity and would be unable to pay a substantial costs order. They also said that the action was likely to fail.

[7] The plaintiff denied that it was a dormant corporation. Together with its answering affidavit, it produced annual financial statements for the year ended 28 February 2025, a profit-and-loss account and a daily sales summary. It said that it was trading and owned equipment, receivables and cash.

[8] The answering affidavit was deposed to on 21 April 2026. The defendants instructed an accountant, Mr Maunzagona, to analyse the plaintiff's financial records.

The replying affidavit was deposed to on 15 May 2026 and Mr Maunzagona's affidavit on 19 May 2026. A filing notice and email dated 20 May 2026 stated that both affidavits were being delivered, but it was common cause at the hearing that Mr Maunzagona's affidavit was not in fact delivered at that time, but a few days later.

The statutory and common-law tests

[9] Rule 47¹ regulates the procedure by which security is demanded and enforced. It does not create a substantive right to security. That right must be found in the common law or in a statute. In this case the defendants rely on s 8 of the Close Corporations Act which provides:

'When a corporation in any legal proceedings is a plaintiff or applicant or brings a counterclaim or counterapplication, the court concerned may at any time during the proceedings if it appears that there is reason to believe that the corporation or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent, or the defendant or respondent in reconvention, if he or she is successful in his or her defence, require security to be given for those costs, and may stay all proceedings till the security is given.'

[10] The plaintiff submits that security may be ordered only if its action is vexatious or reckless or otherwise an abuse of process. That submission is best addressed by distinguishing three legal positions: the common-law position of an *incola* natural person; the position of an *incola* company under s 13 of the Companies Act 61 of

¹ Rule 47 provides: '(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.

(2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.

(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.

(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient; and his decision shall be final.'

1973 (“the 1973 Companies Act”) and after its repeal; and the present statutory position of a close corporation under s 8 of the Close Corporations Act.

[11] At common law, an *incola* plaintiff is not required to furnish security merely because it may be unable to satisfy an adverse costs order. In *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd*,² the Supreme Court of Appeal (“the SCA”) held that mere inability to pay is insufficient. Something more is required. In the case of an *incola* company governed by the common law, the action must be vexatious or reckless, or otherwise amount to an abuse of the court’s process.

[12] Section 13 of the 1973 Companies Act prescribed a different statutory basis for ordering security against a plaintiff company or other body corporate. This distinction was decisive in *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd*.³ The high court had reasoned that, because Afro Call’s contractual action could not be described as vexatious, security should not be ordered under s 13. On appeal, Brand JA held that this was a ‘fundamental misdirection’ because it failed to recognise the different legal foundations of the two applications:

‘[15] To my way of thinking this line of approach is indicative of a fundamental misdirection, because it fails to recognise the crucial dissimilarity in the legal substructures on which the two different applications are based. Against an insolvent natural person, who is an *incola*, so it has been held, security will only be granted if his or her action can be found to be reckless and vexatious (see *Ecker v Dean* 1938 AD 102 at 110). The reason for this limitation, so it was explained in *Ecker* (at 111), is that the court’s power to order security against an *incola* is derived from its inherent jurisdiction to prevent abuse of its own process in certain circumstances. And this jurisdiction, said Solomon JA in *Western Assurance Co v Caldwell’s Trustee* 1918 AD 262 at 274, “is a power which . . . ought to be sparingly exercised, and only in very exceptional circumstances”. (See also eg *Ramsamy NO and Others v Maarman NO and Another* 2002 (6) SA 159 (C) at 173F-I.)

[16] In the exercise of its discretion under s 13 of the Companies Act, on the other hand, there is no reason why the Court should order security only in the exceptional case. On the contrary, as was stated in *Shepstone & Wylie (supra)* at 1045I-J, since the section presents

² *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* [2015] ZASCA 93; 2015 (5) SA 38 (SCA) (*Boost*).

³ *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* [2007] ZASCA 97; 2007 (6) SA 620 (SCA) (*MTN*).

the Court with an unfettered discretion, there is no reason to lean towards either granting or refusing a security order. It follows, in my view, that although *bona fides* of the company's claim is a consideration that may legitimately be taken into account in the exercise of the Court's discretion, as one of many factors, mere *bona fides* in itself cannot serve as a basis to refuse security when applied for under s 13.'

[13] While s 13 of the 1973 Companies Act was in force, vexatiousness was not a jurisdictional fact. *MTN* sets out the two-stage enquiry required by s 13.⁴ First, the applicant had to place facts before the court giving reason to believe that the plaintiff company would be unable to satisfy an adverse costs order. If that threshold was not met, the application failed. If it was met, the court exercised its discretion on all the relevant circumstances, without leaning for or against security. At the second stage the court considered, amongst others, the nature of the claim, the company's financial position when security was sought, and its probable financial position if it lost the action. The *bona fides* and nature of the claim were relevant, but they did not replace the statutory test.⁵

[14] The Companies Act 71 of 2008 did not replicate s 13 of the 1973 Companies Act. The significance of that omission was explained in *Boost* as follows⁶:

'...The omission of a similar provision to s 13 from the 2008 Act must therefore be taken (prima facie at least) to import a change of intention on the part of the legislature. It must therefore follow that it is not open to a court to approach an enquiry such as this as if the position were unaltered and that s 13 is still part of our law....[T]he omission of a provision akin to s 13 from the new Act is strange, particularly since s 8 of the Close Corporations Act 69 of 1984, which has been interpreted in accordance with the principles that have evolved in relation to the corresponding provisions in the previous Companies Act, has been retained. It follows that the principles pertaining to the furnishing of security by a close corporation will henceforth differ from that applicable to a company. ...' (Footnote omitted.)

[15] *Boost* confirms⁷ that the nature of the claim and the company's present and probable future financial position remain relevant, but held that, after the repeal of s

⁴ *MTN* para 7.

⁵ *Ibid* para 16.

⁶ *Boost* para 13.

⁷ *Ibid* para 14.

13, an *incola* company is treated like an *incola* natural person. A poor prospect of recovering costs is not enough; the action must be vexatious or reckless, or otherwise amount to an abuse. The SCA concluded:⁸

‘Absent s 13, there can no longer be any legitimate basis for differentiating between an *incola* company and an *incola* natural person. ... Accordingly, even 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.’

[16] A close corporation is differently situated because s 8 of the Close Corporations Act remains in force. In *Fusion Properties 233 CC v Stellenbosch Municipality*,⁹ the SCA held that s 8 ‘in substance, mirrors s 13’ of the 1973 Companies Act.¹⁰ The SCA stated that the consequence thereof is:¹¹

‘In view of the fact that s 8 of the Close Corporations Act is, for all intents and purposes, the functional equivalent of the now repealed s 13 of the Companies Act, there is no rational basis in fact or principle why the principles discussed above in relation to s 13 should not apply with equal force to s 8.’

[17] The resulting position is therefore the following. An *incola* natural person is governed by the common law, and inability to pay is not enough. An *incola* company is now governed by the same common-law rule identified in *Boost*. A close corporation remains governed by s 8 of the Close Corporations Act. Under s 8, the applicant does not need to prove vexatious, reckless or abusive litigation as an additional jurisdictional fact. It must first establish the financial threshold in the section.

[18] Once that threshold is met, the court exercises its discretion in the light of all relevant circumstances. These include the nature of the claim, the plaintiff’s present financial position and its probable financial position if it loses.

⁸ Ibid para 16.

⁹ *Fusion Properties 233 CC v Stellenbosch Municipality* [2021] ZASCA 10 (*Fusion*).

¹⁰ Ibid para 21.

¹¹ Ibid para 28.

[19] The court is required to balance the possible injustice to the plaintiff if security prevents it from pursuing a proper claim against the possible injustice to the defendants if they succeed but cannot recover their costs.¹² *Fusion* also deals with the related question whether security will stifle the claim.¹³ These are discretionary considerations.

[20] The nature and merits of the action must also be considered. The assessment is limited. In *Fusion*,¹⁴ the SCA in applying *Zietsman v Electronic Media Network Ltd*,¹⁵ said that the court need only obtain a 'fair sense of the strength and weakness' of the parties' cases. It must not try the action in the security application. I consider the merits below as part of the exercise of the court's discretion.

Did the defendants make out their case in reply?

[21] The plaintiff contends that the defendants did not explain in their founding affidavit either their delay in demanding security or their subsequent delay in bringing this application. It also contends that the defendants did not address the prejudice allegedly caused by those delays. The plaintiff submits that the defendants attempted to cure these omissions in paragraphs 6-14 of their replying affidavit.

[22] An applicant must make out its case in its founding affidavit. The founding affidavit must contain the allegations necessary to disclose the basis for the relief sought. New matter or new grounds may not ordinarily be introduced in reply, although a court may permit this in exceptional circumstances. Where no case at all was made out in the founding affidavit, the defect cannot be cured in reply. These principles are stated in *Fine and Country South Africa (Pty) Ltd v Tradelink Properties (Pty) Ltd*,¹⁶ with reference to *Airports Company of South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC*¹⁷ and *Bowman NO v De Souza Roldao*.¹⁸

¹² Ibid para 24.

¹³ *Fusion* paras 34 to 35.

¹⁴ Ibid para 36.

¹⁵ *Zietsman v Electronic Media Network Ltd* [2008] ZASCA 4; 2008 (4) SA 1 (SCA) para 21.

¹⁶ *Fine and Country South Africa (Pty) Ltd v Tradelink Properties (Pty) Ltd* [2024] ZAGPJHC 586 (*Fine and Country*) paras 24 to 28.

¹⁷ *Airports Company of South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC* [2022] ZAGPJHC 410 para 9.

¹⁸ *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 336B.

[23] In *Fine and Country*, the applicant's founding papers did not contain the essential case required for the relief sought, and the applicant attempted to make out that case subsequently. The question here is whether the defendants' founding affidavit disclosed a basis for security, or whether the defendants sought to introduce that basis for the first time in reply.

[24] The defendants' founding affidavit disclosed the substantive basis on which they sought security under s 8 of the Close Corporations Act. They alleged that the plaintiff had no assets or apparent income and would be unable to satisfy an adverse costs order. They relied on the absence of financial statements from the plaintiff's discovery, the absence of immovable property registered in its name and what they understood to be its limited business activity. Those allegations may or may not ultimately establish the financial threshold required under s 8, but the founding affidavit was not devoid of a case for security.

[25] The defendants were required to establish the substantive basis for security in their founding affidavit. Delay was not part of that jurisdictional basis. Although rule 47(1) requires security to be demanded as soon as practicable, delay is not necessarily fatal. The plaintiff raised delay and the resulting prejudice in its answering affidavit, and the defendants were entitled to respond to those matters in reply. Delay nevertheless remains relevant to the exercise of the court's discretion and *Fusion* makes clear that delay will rarely be decisive by itself.¹⁹

[26] Paragraphs 6-14 of the defendants' replying affidavit were directed at addressing those allegations. They did not introduce a new substantive basis for security or attempt to repair an application in which no case had been made out. Rather, they dealt with a matter raised in the answering affidavit that was relevant to the exercise of the court's discretion. As explained in *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another*,²⁰ an applicant may in reply answer an

¹⁹ *Fusion* para 31.

²⁰ *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) para 10.

issue raised for the first time in the answering affidavit where that issue was not required to establish the case in the founding papers.

[27] Whether the defendants' explanation adequately accounts for the delay, and whether the plaintiff established material prejudice, are separate questions relevant to the exercise of the discretion. Accordingly, it is found that the defendants did not make out their case for security only in reply.

Was the application for security brought too late?

[28] The plaintiff relied particularly on *ICC Car Importers (Pty) Ltd v A Hartrodt SA (Pty) Ltd*,²¹ *BK Foyle also known as Bertram or Bert or B Koning and Another v D'Hooghe and Another*²² and *Smith v Parker Beusekom Partnership*.²³ Those decisions establish that the timing of the demand, the explanation for any delay and the prejudice caused by it are relevant to the exercise of the discretion. I accept that. Those decisions must, however, be read with the later and binding decision in *Fusion*, which deals directly with delay under s 8 of the Close Corporations Act as follows:²⁴

'...whilst it may be desirable that a party entitled to demand security for costs must do so as soon as is reasonably practicable, failure to do so is not necessarily fatal. 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.'

[29] In *Fusion*, the SCA held that a demand for security made at the discovery stage fell within the words 'at any time during the proceedings' in s 8.²⁵ Accordingly, the timing of the demand must be weighed with the other relevant circumstances and is not, by itself, decisive.

²¹ *ICC Car Importers (Pty) Ltd v A Hartrodt SA (Pty) Ltd* 2004 (4) SA 607 (W).

²² *BK Foyle also known as Bertram or Bert or B Koning and Another v D'Hooghe and Another* [2006] ZAWCHC 44.

²³ *Smith v Parker Beusekom Partnership* [2023] ZAFSHC 11.

²⁴ *Fusion Properties 233 CC v Stellenbosch Municipality* [2021] ZASCA 10 para 31.

²⁵ *Ibid.*

[30] There were two periods of delay. The first concerned the demand for security. The defendants delivered their rule 47(1) notice on 7 August 2025. By then the pleadings had closed, a pre-trial conference had been held, trial-readiness documents had been filed and the August 2025 trial had been removed from the roll by consent. The demand was therefore made at an advanced stage of the proceedings.

[31] In reply, the defendants explained that the proceedings had begun as an application which they expected to be disposed of in one day. They submitted that it was only after the August 2025 trial did not proceed, and they realised the likely costs of a five-day trial, that they appreciated the extent of the potential costs implications. That explanation is plausible and is consistent with their delivery of the rule 47(1) notice shortly after the removal of the trial. The defendants could have appreciated the financial implications of the trial earlier, particularly because the matter had been referred to trial in 2021 and trial-readiness procedures had been completed. I nevertheless accept that the removal of the trial brought those costs implications into sharper focus. The explanation therefore reduces, but does not eliminate, the weight of the first period of delay.

[32] The second period of delay ran from the plaintiff's refusal of the demand for security on 25 August 2025 to the launch of this application on 9 March 2026. The delay lasted more than six months. The defendants provided no explanation for that delay, either in their founding affidavit or in reply. This weighs against them.

[33] By the time security was demanded, the plaintiff had already incurred substantial costs in preparing the action for trial. It had prepared for the August 2025 trial and thereafter for the August 2026 trial. The late application added expense and uncertainty, and the trial was subsequently adjourned pending the determination of this application. The plaintiff has therefore established some prejudice. It did not, however, show that evidence had been lost or that it had taken any particular litigation step which it would have avoided had security been demanded earlier.

[34] Although the timing of the demand and application caused prejudice, the evidence does not establish that the defendants deliberately timed the application to

frustrate the trial. Their explanation for the first period of delay was plausible, although the second period remained unexplained.

[35] Both periods of delay weigh against the defendants. They do not, however, dispose of the application. *Fusion* makes clear that delay will rarely be decisive by itself. Substantial trial costs remain to be incurred, and the delay must ultimately be weighed with the remaining considerations in the exercise of the court's discretion.

Mr Maunzagona's affidavit

[36] The plaintiff objected to the affidavit of Mr Liberty Maunzagona, the accountant instructed by the defendants to analyse the plaintiff's financial records. It submitted that the affidavit was not delivered with the replying papers and that the defendants had not obtained leave to introduce it as a further affidavit.

[37] The usual sequence in motion proceedings is a founding affidavit, an answering affidavit and a replying affidavit. Rule 6(5)(e) permits the court, in its discretion, to allow a further affidavit. A party wishing to place a further affidavit before the court must ask for leave and explain why it should be admitted.²⁶ If leave is not sought, the court may treat the affidavit as *pro non scripto*.²⁷

[38] The chronology in this matter is important. The answering affidavit included the plaintiff's financial records. The replying affidavit was deposed to on 15 May 2026. It stated that Mr Maunzagona had been asked to comment on the financial records and that reference would be made to his affidavit. Mr Maunzagona deposed to his affidavit on 19 May 2026.

[39] The defendants' filing notice and covering email, both dated 20 May 2026, stated that the replying affidavit and Mr Maunzagona's affidavit were being delivered together. It was, however, common cause at the hearing that Mr Maunzagona's affidavit was not in fact delivered with the replying affidavit. The filing notice and

²⁶ *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* [2012] ZASCA 127; 2013 (1) SA 161 (SCA) paras 9 to 13.

²⁷ *Du Plessis NO and Others v Standard Bank of SA Ltd and Others* [2026] ZAWCHC 10 paras 31 to 35; *Masoeu v Masoeu and Others* [2023] ZAFSHC 220 paras 11 to 15.

email show that the defendants intended to deliver it. They do not amount to delivery of Mr Maunzagona's affidavit.

[40] Mr Maunzagona's affidavit was delivered separately a few days later. By then the replying papers had already been delivered. The affidavit therefore constituted a further affidavit for which leave was required. Its later delivery and subsequent inclusion in the bundle did not cure the absence of leave.

[41] The defendants did not apply for leave to introduce the affidavit. They provided no explanation under oath for its separate delivery, did not afford the plaintiff an opportunity to answer it and did not seek leave after the plaintiff objected. It would not be appropriate for the court to grant leave of its own accord in those circumstances.

[42] An intention to deliver an affidavit does not amount to delivery and does not replace the need for leave. Mr Maunzagona's affidavit is treated as *pro non scripto*. No reliance is placed on his calculations, opinions or conclusions.

Is there reason to believe that the plaintiff will be unable to pay the defendants' costs if it loses?

[43] Annexure "JJ13" to the plaintiff's answering affidavit contains its annual financial statements for the year ended 28 February 2025. The accounting officer states that no assurance engagement was conducted and that he expresses no opinion or other assurance on the statements. He does, however, confirm that he agrees with the plaintiff's accounting records. The statements were approved by the plaintiff's member on 3 December 2025. I therefore treat them as the plaintiff's own financial information.

[44] The statement of financial position records total assets of R309 901. Current assets amounted to R291 570, while current liabilities amounted to R128 849. The plaintiff also had cash of R126 327. The financial statements record a loan from the plaintiff's member to the plaintiff, amounting to R462 866 in 2025. The loan was

unsecured, interest-free and had no fixed repayment date. These facts favour the plaintiff.

[45] The statement records positive equity of R93 769 in 2024 and negative equity of R281 814 in 2025. As at 28 February 2025 the plaintiff's recorded liabilities exceeded its recorded assets by R281 814. The statement of comprehensive income records a loss of R347 983 in 2024 and a loss of R375 583 in 2025.

[46] The statement of cash flows records net cash used in operating activities as negative R94 606 in 2024 and negative R349 605 in 2025. It also records R356 501 generated through financing activities in 2025. During the same year, the member's loan stood at R106 366 in 2024 and R462 866 in 2025. Despite that financing, the plaintiff's cash increased by only R6 895, from R119 432 to R126 327.

[47] Annexure "JJ14" to the plaintiff's answering affidavit is a profit-and-loss statement for March 2025 to February 2026. It records a profit of R26 824.19, which favours the plaintiff. Annexure "JJ15", a daily sales summary for the same period, also supports the plaintiff's contention that it continued trading. Neither document provides updated information about the plaintiff's assets, liabilities or cash flow.

[48] These figures do not establish that the plaintiff is commercially insolvent. The plaintiff was trading, had cash, its current assets exceeded its current liabilities, the member's loan was not immediately repayable, and the later profit-and-loss statement reflected a profit. Against that, the 2025 statements record negative equity, losses in both 2024 and 2025, substantial negative operating cash flow and an increased reliance on funding from the member. Despite the additional financing, cash increased by only R6 895. The records therefore do not show that the plaintiff would have sufficient available resources to satisfy a substantial adverse costs order.

[49] Considering the financial records as a whole, and the substantial costs of a five-day trial which remain to be incurred, there is reason to believe that the plaintiff will be unable to satisfy an adverse costs order if the defendants succeed. The financial threshold in s 8 of the Close Corporations Act is therefore met. Whether security should be ordered remains a matter for the court's discretion.

Should security be ordered?

[50] Having found that the financial threshold in s 8 has been met, I must decide whether security should be ordered. An order does not follow automatically. Relevant considerations include the nature and apparent merits of the claim, the plaintiff's present and probable financial position, the delay and resulting prejudice, and whether an order would prevent the plaintiff from pursuing its claim. These considerations must be weighed together.

[51] The plaintiff's action concerns copyright claimed in changes and improvements allegedly made to the IsoCalc97 program. It does not claim ownership of the original IsoCalc97 program. Its case concerns changes and improvements which it says it subsequently made to the program, including version 3.x, and in which it claims rights. At trial, the plaintiff will have to identify the relevant work and prove its improvements, originality and ownership. It will also have to prove that the defendants copied the whole or a substantial part of that work. The plaintiff relies on an agreement with Apex Instruments, documentary and digital evidence and evidence to be given by Mr White. The defendants dispute the plaintiff's rights in the alleged changes and deny that they copied its work. These issues will require the trial court to consider documentary, technical and witness evidence. On the papers before me, neither the plaintiff's claim nor the defendants' defence is plainly hopeless.

[52] The plaintiff's present financial position is mixed. It is trading, has cash and receivables, and its current assets exceed its current liabilities. The member's loan is unsecured, interest-free and has no fixed repayment date. Against that, the latest full statements record negative equity, losses and negative operating cash flow in both years, increased reliance on funding from the member and only a marginal increase in cash.

[53] The plaintiff's probable financial position if it loses is less certain. A five-day trial remains to be completed, and substantial further costs will be incurred. The

records do not demonstrate that the plaintiff will have sufficient available resources to satisfy the defendants' taxed costs if the action fails.

[54] The court must balance the potential injustice to the plaintiff if an order for security prevents it from pursuing a legitimate claim against the potential injustice to the defendants if they successfully defend the action but cannot recover their costs.

[55] Although the defendants provided a plausible explanation for why the financial implications of a five-day trial became apparent to them after the August 2025 trial was removed from the roll, that explanation reduces, but does not eliminate, the significance of the first period of delay. The second period of delay – the period of more than six months before the defendants launched this application – remained unexplained. The late application added expense and uncertainty and resulted in a further adjournment of the trial. In addition, the founding allegations that the plaintiff was a shell with no assets or income were not borne out by its financial records.

[56] Other considerations favour the defendants. A five-day trial still lies ahead and substantial costs remain to be incurred. The plaintiff's latest full financial statements record the adverse features already described, while the later records do not include an updated statement of financial position or cash-flow statement. For the reasons given above, there is reason to believe that the plaintiff will be unable to satisfy an adverse costs order if the defendants succeed.

[57] I must also consider whether an order for security would prevent the plaintiff from pursuing its claim. The SCA in *MTN*²⁸ held that a company which relies on that possibility must produce evidence showing that it cannot furnish security either from its own resources or with assistance from its shareholders, members, creditors or other funders. *Fusion*²⁹ applied that same principle to a close corporation under s 8 of the Close Corporations Act.

[58] The plaintiff did not allege that an order for security would end the action. It produced no evidence that it would be unable to furnish security from its own

²⁸ *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) para 20.

²⁹ *Fusion Properties 233 CC v Stellenbosch Municipality* [2021] ZASCA 10 paras 34 to 35.

resources or with assistance from its member or another funder. The increase in the member's loan does not establish that the member can or will provide further funding. It nevertheless shows that the possibility of outside assistance required consideration if the plaintiff wished to contend that security would stifle its claim. On the evidence before me, I cannot find that proportionate security would prevent the action from proceeding.

[59] I have weighed all the relevant circumstances. The delay, the resulting prejudice and the defendants' overstated description of the plaintiff as a shell entity favour the plaintiff. Against that, the financial risk contemplated in s 8 of the Close Corporations Act has been established, substantial trial costs remain to be incurred and the plaintiff has not shown that proportionate security would prevent it from pursuing the action. Security should be ordered for the defendants' future costs reasonably connected with the completion of the trial. The amount and form of the security should be determined by the Registrar after both parties have been afforded an opportunity to make representations.

Costs

[60] The defendants obtained the substantive relief sought, and costs should ordinarily follow the result.

[61] The plaintiff did, however, succeed in its objection to Mr Maunzagona's affidavit. Because that affidavit was not properly delivered and has been treated as *pro non scripto*, the defendants should not recover the costs incurred in obtaining, preparing or delivering it.

[62] The application involved questions of moderate complexity. Costs on scale B are therefore appropriate.

Order

[63] The following order shall issue:

1. The affidavit of Mr Liberty Maunzagona is treated as *pro non scripto*.
2. The plaintiff is directed to furnish security for the defendants' future costs reasonably connected with the completion of the trial.

3. The amount, form and manner of the security must be determined by the Registrar under Uniform Rule 47, after both parties have been afforded an opportunity to make representations.
4. The plaintiff must furnish the security so determined within 20 days after the Registrar's written determination has been served on the plaintiff's attorneys.
5. If the plaintiff fails to furnish the security within that period, the action is stayed until the security is furnished.
6. If the plaintiff fails to furnish the security, the defendants are granted leave to apply on the same papers, supplemented where necessary, for the dismissal of the action.
7. The plaintiff is directed to pay the defendants' party and party costs of this application on scale B, including the costs of counsel, but excluding the costs incurred in obtaining, preparing or delivering the affidavit of Mr Liberty Maunzagona.

Bramdhew AJ

Case information

Heard on: 3 August 2026

Judgment delivered: 24 August 2026

For the defendants/applicants: Mr Collingwood

Instructed by: McNaught and Company Inc
Suite 1, 555 Bluff Road
Bluff, Durban
Email: litigation@maclaw.co.za
Ref: Mat 5214

For the plaintiff/respondent: Mr Pretorius

Instructed by: Van Nierop Attorneys
130 Zen Drive
Ballito
Email: johan@vannieropattorneys.co.za
Ref: 05AET00121
c/o Norman Sepping Attorney
2 Twiggs Road

Malvern

Email: normansepp@gmail.com