

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2025-026341

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

31 August 2026

DATE

[REDACTED]
SIGNATURE

In the matter between:

ASI CAPITAL (PTY) LTD

Applicant

And

TMS PRO PROPERTY MANAGEMENT CC

Respondent

JUDGMENT

VETTER, AJ

A. INTRODUCTION

- [1] ASI Capital (Pty) Ltd (ASI) is the defendant in an action brought against it by TMS Pro Property Management CC (TMS). It applies under rule 47(3) of the Uniform Rules of Court, read with section 8 of the Close Corporations Act 69 of 1984, for security for its costs in that action and a stay until the security is furnished.¹ The roles of the parties are reversed as between this application and the action, and I refer to them by name throughout.
- [2] Two members of the Mann family feature in the papers. Ms Chere Mann was the sole member of TMS at the time of the transaction and deposed to its answering affidavit; Mr Shaun Mann is her husband and is now the sole member.
- [3] For the reasons that follow, TMS must furnish security. I decline to fix the amount at the figure ASI demanded. The form, amount and manner fall to be determined by the Registrar, which is what ASI's own notice of motion asks for.
- [4] The following facts are common cause. On 24 June 2021 TMS and ASI concluded a written sale agreement, and on 8 September 2021 an addendum to it. TMS sold to ASI its sale equity, defined as the right to income and the goodwill attaching to its property management portfolio. The sale took effect on 1 July 2021. The consideration was payable in two tranches, and TMS was to continue to render management services against a monthly fee. Clause 17.1.4 provides that upon transfer of TMS's entire property management book and contracts, TMS "shall cease to trade". TMS transferred the book during 2021. A memorandum of agreement concluded on 29 September 2021 made any surplus management fee payable to Ms Mann and Mr Wouter van den Heever personally. ASI is not a party to it, and it endured only until the initial two-year period expired on 30 June 2023.²
- [5] TMS instituted this action on 27 February 2025. It claims R 3 011 752.05 with interest and costs, being management fees for July 2021 to October 2024 together with the balance of the purchase consideration. From that total it

¹ Notice in terms of rule 47, CaseLines 002-7 to 002-10; and notice of motion, CaseLines 002-13 to 002-15.

² Sale agreement, clauses 4.3, 10.2 and 17.1.4, CaseLines 003-19, 003-26 and 003-28; addendum, CaseLines 003-30 to 003-36; memorandum of agreement, clauses 5 and 7, CaseLines 004-31; and answering affidavit, paras 9.1 and 10.4.1, CaseLines 002-46 and 002-48.

deducts the R 7 814 525.31 claimed in an earlier action between the same parties. ASI's plea raises a special plea that TMS lacks standing because it ceded its right to payment to Ms Mann and denies liability on the merits. TMS pleads that on 1 December 2023 Ms Mann orally ceded back to it all such rights as she may have held.³

[6] ASI delivered its notice under rule 47(1) on 15 April 2025. It demanded R 3 000 000 "or such amount as may be determined by the Registrar", to be furnished in the form the Registrar directed within ten days of the determination. ASI originally sought security in both actions and their consolidation but confined this application to the present action in its supplementary heads of argument.⁴

[7] One preliminary matter. On the morning of the hearing ASI delivered a supplementary affidavit annexing an affidavit by Ms Mann in sequestration proceedings brought against her and recorded that it would seek leave to file it. I decide this application on the founding, answering and replying affidavits, and reach the conclusions that follow without regard to that affidavit. Leave is therefore unnecessary and I make no order on the application.

B. THE ISSUES

[8] Three issues arise, and they fall to be decided in that order:

- a. first, has ASI shown that there is reason to believe that TMS will be unable to pay ASI's costs if ASI is successful in its defence of the action? If it has not, the application fails and no discretion arises;
- b. second, if that threshold is crossed, should the discretion conferred by section 8 nevertheless be exercised against ordering security? If it should, the application fails notwithstanding TMS's financial position; and

³ Particulars of claim, paras 8A, 13 and 14, CaseLines 003-40 to 003-41; and plea, paras 1.4 to 1.8 and 5 to 18, CaseLines 004-21 to 004-26.

⁴ Rule 47 notice, CaseLines 002-7 to 002-10; and applicant's supplementary heads of argument, paras 3 and 4, CaseLines 002-164.

- c. third, if security is to be ordered, should I fix the amount, or should the form, amount and manner be determined by the Registrar?

C. IS THERE REASON TO BELIEVE THAT TMS WILL BE UNABLE TO PAY ASI'S COSTS?

[9] Section 8 of the Close Corporations Act 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 is successful in his defence, require security to be given for those costs, and may stay all proceedings till the security is given.”

[10] Two things follow from the words the legislature used. The standard is not proof of inability but that “it appears that there is reason to believe” in one, which is a lighter burden and does not require proof of insolvency. And the enquiry looks forward, to whether the corporation will be able to pay if the defendant succeeds, so that its position now matters as a guide to its probable position at the end of the action. The belief must nonetheless rest on facts, and the onus of placing them before the court lies on the party seeking security. A conclusion asserted by a deponent, a bare opinion, or hearsay to which a reasonable person would not give credence will not do.⁵

[11] First, I consider what the section does not require. Section 13 of the repealed Companies Act 61 of 1973 has no counterpart in the Companies Act 71 of 2008. In *Boost Sports* the Supreme Court of Appeal accordingly held that an *incola* company may now be ordered to furnish security only where the proceedings are vexatious or reckless or otherwise an abuse. TMS raised that test in its heads of argument as a requirement which ASI had to meet. It is not the test in this

⁵ *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* [2015] ZASCA 93; 2015 (5) SA 38 (SCA) (*Boost Sports*) at para 14 and *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 (W) (*Vumba*) at para 8, a decision of three judges of the Witwatersrand Local Division.

application. The same judgment records that section 8 was left standing when section 13 was repealed and says in terms that the principles governing a close corporation will henceforth differ from those governing a company. *Fusion Properties* puts the point beyond doubt. Mr Potgieter did not press it in argument, and he was right not to. ASI's notice for its part asserts that this action is vexatious and an abuse of process. I make no such finding, and I do not need to.⁶

[12] I turn to the facts. TMS's want of trading income is not an inference drawn from its silence. It is what TMS agreed would happen and what TMS says did happen. Clause 17.1.4 provided that it would cease to trade once its book had been transferred, and it admits the transfer. Ms Mann's affidavit records that TMS performed under the agreement until November 2024, when it cancelled for what it says was ASI's breach, and that it has not traded since. Her explanation for the cessation is that TMS did not trade for its own account in order to avoid possible court action from ASI. On its own version TMS has been without a trading business for more than 20 months.⁷

[13] Against that TMS puts up four things, and I take each at its highest.

- a. The first is the value of its claims in this action and in the earlier one. That argument assumes away the very event against which security is sought. The costs order from which ASI seeks protection will be made only if the claim fails, and if the claim fails there will be no proceeds out of which to pay it.⁸
- b. The second is an intention to resume trading. Ms Mann's affidavit, deposed to during 2025, said that TMS would recommence trading from 10 January 2026, when the restraint of trade enforced against her in this court expired. That date passed more than seven months before the hearing. Nothing

⁶ *Boost Sports* above n 6 at paras 13 and 15-6 and *Fusion Properties 233 CC v Stellenbosch Municipality* [2021] ZASCA 10 (*Fusion Properties*) at paras 21, 28 and 33.

⁷ Answering affidavit, paras 9.1, 9.2, 9.5 and 10.4.1 to 10.4.3, CaseLines 002-46 and 002-48 to 002-49.

⁸ Answering affidavit, paras 9.4 and 17.1.2, CaseLines 002-46 and 002-56; and *Boost Sports* above n 6 at para 14.

was placed before me to show that trading resumed, and TMS's supplementary heads, delivered on the morning of the hearing, still put the matter in the future tense. No contract, client, invoice or bank statement was produced.⁹

- c. The third is a default judgment for R 153 212.51 said to have been granted in TMS's favour against the Wildtuin Park Homeowners Association. A judgment is an asset in principle, and I do not treat it as worthless. But the annexure put up to prove it is a court file cover which does not name the parties, and nothing on its face identifies TMS as the judgment creditor. Nor, in any event, is a judgment money. TMS says only that a warrant of execution will be issued, not that one was issued or that anything was recovered.¹⁰
- d. The fourth is Mr Mann. Ms Mann says that he assisted her financially to the extent of some R 800 000 over several years, meeting the obligations of her own creditors and of TMS's. She transferred her member's interest to him for that reason. That is evidence of assistance given in the past. What is absent is any present undertaking by him to provide security or to meet an adverse costs order. He is the sole member, and he signed the resolution authorising this opposition, but he has not deposed to an affidavit, and nothing is said about whether he is willing, or whether he was asked.¹¹

[14] TMS produced no financial statements, management accounts or bank statements. It was not obliged to, and a refusal to produce them cannot by itself found an order: a defendant may not make an unfounded demand and then rely on the refusal as its case. But this is not that case. ASI's demand rested on facts: the sale of the whole income producing portfolio, the contractual provision that TMS would cease to trade, and TMS's own admitted cessation. Where the

⁹ Answering affidavit, paras 9.2 and 9.3, CaseLines 002-46; and respondent's supplementary heads of argument, para 27, CaseLines 002-187.

¹⁰ Answering affidavit, para 9.4, CaseLines 002-46; and annexure RA3, CaseLines 002-73.

¹¹ Answering affidavit, paras 9.7 and 11.2, CaseLines 002-47 and 002-49; replying affidavit, para 10.7, CaseLines 002-123; and the resolution at CaseLines 002-61, signed by Mr Mann as member.

demand is founded, the absence of any answering financial material leaves those facts where they stand.¹²

[15] There is reason to believe that TMS will be unable to pay ASI's costs if ASI is successful in its defence, and the threshold in section 8 is crossed. I reach that conclusion without rejecting anything Ms Mann says. Taken at its highest her version establishes no present and realisable means. Nor does it attribute her liabilities to TMS. TMS is a separate juristic person, and I have treated it as one. The finding rests on the absence of evidence about TMS itself, and not on Ms Mann's personal position or the costs order taxed against her.

[16] I should record what I have not decided. ASI says that the transfer of the member's interest followed its unsuccessful execution against Ms Mann, that no commercial explanation was offered, and that these actions are a device to place TMS beyond the reach of execution. TMS denies it. I need not resolve that dispute, because my conclusion rests on TMS's own account of its own affairs, and a finding about motive is one which the result does not require.

D. SHOULD THE DISCRETION BE EXERCISED IN FAVOUR OF SECURITY?

The factors to be weighed, and why

[17] Section 8 says that the court "may" require security. Crossing the threshold does not decide the application; it opens a discretion. Both parties took the governing principles from *Henry v R E Designs CC*. Both took from it the proposition that although the respondent bears no onus to establish special circumstances, it must at least point to special circumstances justifying a refusal. That proposition does not survive *Shepstone & Wylie*, decided a year later. There the Supreme Court of Appeal held that a court must decide each case on a consideration of its relevant features, without a predisposition either way and without an approach which brooks of no departure except in special circumstances. The remainder

¹² *Vumba* above n 6 at paras 9 and 11. See also *Lecuona v Property Emporium CC* 2010 JDR 0417 (GSJ) at para 11.

of the summary in *Henry* is unobjectionable and the parties' reliance on it was otherwise well placed.¹³

[18] The discretion answers to the purpose of the section. The rule that an unsuccessful litigant pays its opponent's costs deters plaintiffs from litigating vexatiously or where their prospects are poor. Where the plaintiff is a corporation which will be unable to pay, that deterrent is attenuated and the defendant is exposed to expense it cannot recover even when it wins. Section 8 restores the balance. What is weighed is the injustice to a plaintiff prevented by an order from pursuing a proper claim, against the injustice to a defendant left unable to recover what a successful defence has cost it. The considerations bearing on that balance are settled and are conveniently collected in *Giddey*:¹⁴

- a. the likelihood that an order will terminate the plaintiff's action, and what it has done to obtain assistance from its members, creditors or other backers, which together measure what an order would actually cost it;
- b. whether it is the conduct of the defendant that has caused the plaintiff's financial difficulty;
- c. the nature of the action and the strength of the competing cases, which measure the value of what the plaintiff would be shut out of; and
- d. the corporation's position at the stage of the application and its probable position should it lose. Weighed alongside all of them is the right of access to court entrenched in section 34 of the Constitution.

[19] That leaves a question which Mr Potgieter and I canvassed in argument: how closely is the evidence to be examined when these factors are weighed? His submission was that the examination is a superficial one. That is right of the merits and wrong of the rest. On the merits the court forms no more than a fair

¹³ *Shepstone & Wylie v Geyser N.O.* 1998 (3) SA 1036 (SCA) (*Shepstone & Wylie*) at 1045I-1046A, adopted in *Fusion Properties* above n 7 at para 23 and in *Boost Sports* above n 6 at para 11. But see *Henry v R E Designs CC* 1998 (2) SA 502 (C) at 508A-B.

¹⁴ *Giddey N.O. v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) (*Giddey*) at paras 7, 8 and 29-30; *Shepstone & Wylie* above n 14 at 1046B-C; *Fusion Properties* above n 7 at para 24; and *Boost Sports* above n 6 at para 14.

sense of the strength and weakness of the competing cases. An application for security is not the occasion on which to decide the dispute the action exists to resolve. The financial factors are a different matter, and on them the authorities require evidence. The applicant must show a probability that the corporation will be unable to pay. The corporation for its part must establish that an order might well leave it unable to pursue the litigation and must indicate the nature and importance of the litigation. The Supreme Court of Appeal has twice said the same. A submission is not evidence.¹⁵

Weighing the factors in this case

[20] I begin with the merits, because ASI's special plea, if good, disposes of the action altogether. TMS's claim is neither vexatious nor without prospects: it rests on written instruments, including a sale agreement which directs all payments into TMS's own bank account, and which contains an entrenched non-variation clause. ASI's defence is not a sham either. The memorandum of agreement did make the surplus management fee payable to Ms Mann personally. A payment instruction and a bank confirmation letter for her personal account were acted upon. And TMS's own plea of a cession back to it in December 2023 is at least consistent with rights having vested in her. Whether either case succeeds is for trial, and neither is so strong or so weak that it tips the balance.

[21] I turn to causation, which is the factor on which TMS placed most weight. Its case is that ASI withheld the balance of the purchase consideration and the management fees, refused it financial information, and locked it out of the management systems. ASI, it says, cannot demand security on the strength of a poverty of its own making. The principle is sound. But the allegations are the very dispute the action will decide, and I cannot resolve them on affidavit. What can be said is that the principal and admitted cause of TMS's want of a business is not any alleged breach. TMS sold its entire income producing portfolio, and the agreement provided that on transfer of the book it would cease to trade. The conduct alleged may explain why TMS says it is owed money. It does not explain

¹⁵ *Giddey* above n 15 at para 8; *Fusion Properties* above n 7 at paras 34-6; and *Shepstone & Wylie* above n 14 at 1046G-I and 1047A-B.

why it has no business, and Ms Mann's own explanation for the cessation is not that ASI withheld money, but that TMS refrained from trading to avoid litigation with ASI.¹⁶

[22] Next, stifling. TMS says that an order for security will shut it out of court. It does not say what security it could furnish, what figure would put the action beyond its reach, or what it did to raise the money. That is not a finding that a plaintiff which cannot pay can never be shut out. It is a finding that the contention has not been established as a probability, which is what the authorities require of the party advancing it. Two matters point the other way. On Ms Mann's own account TMS has already paid approximately R 600 000 in legal fees, so funds have been found from somewhere. And about Mr Mann – the sole member, the transferee of the member's interest, and on her account already some R 800 000 out of pocket – TMS says nothing at all. The mischief at which the section is directed is precisely that those who stand to benefit from successful litigation will finance it while sheltering behind the corporate identity when costs are awarded. A plaintiff which does not place the position of its backers before the court cannot ask that the resulting gap be counted in its favour.¹⁷

[23] TMS invokes section 34 of the Constitution and what it calls an inequality of arms. The constitutionality of section 8 was not challenged, and I must proceed on the footing that the section is valid. That a plaintiff which cannot find security may be unable to pursue its action is an inherent and intended consequence of the provision; it does not make the order an infringement. Section 34 must nevertheless be weighed with the other factors, and I have weighed it. It does not turn the balance. TMS has not established that it would in fact be shut out. And the order I make does not fix security at a figure TMS could never meet, it

¹⁶ Answering affidavit, paras 9.2, 9.12, 15.2 to 15.3 and 19.2, CaseLines 002-46, 002-47, 002-54 to 002-55 and 002-57; and *Giddey* above n 15 at para 30.

¹⁷ Answering affidavit, paras 11.2 and 19.2, CaseLines 002-49 and 002-58; *Boost Sports* above n 6 at paras 25-6, quoting *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at para 20; and *Fusion Properties* above n 7 at paras 34-5.

refers the amount to the Registrar, who will fix it on material directed to what the defence will cost.¹⁸

[24] Against all of that stands the position of a defendant facing a claim of over R 3 million arising out of a commercial transaction. The pleadings raise a special plea of want of standing and a disputed cession, and both sides accept that the action will require substantial oral evidence. That is the risk section 8 exists to address, and on this material, it is a real one. Only the merits point in TMS's favour, and they point only so far as to establish that its claim is not hopeless. The balance favours an order for security.

E. SHOULD I FIX THE AMOUNT?

[25] ASI asks me to fix security at R 3 000 000. Mr Potgieter submits that the amount is grossly disproportionate and unsupported by any itemised breakdown of anticipated costs. I agree on the latter, and I decline to fix it, for three reasons.

[26] The first is that the figure is not supported. There is no estimate of the likely length of the trial, no schedule of witnesses or experts, no draft bill and no computation of any kind. What the founding affidavit offers is a list of features of the litigation – its complexity, the anticipated trial length, the costs of counsel and of preparation – followed by a round figure. A figure demanded in a notice under rule 47(1) is a demand. It is not evidence of what the defence of the action will cost.¹⁹

[27] The second is that the figure does not sit comfortably with the way in which it was arrived at. ASI demanded R 2 000 000 in the earlier action and R 3 000 000 in this one and put its costs across both trials at about R 5 000 000. It has since confined this application to this action alone, and no attempt was made to explain how the cost of defending this action by itself was arrived at.²⁰

¹⁸ *Giddey* above n 15 at paras 17-8; and *Fusion Properties* above n 7 at paras 32-3.

¹⁹ Founding affidavit, paras 12.2 to 12.4, CaseLines 002-29 to 002-30.

²⁰ Applicant's heads of argument, paras 27 and 28, CaseLines 002-134 to 002-135.

[28] The third is what the figure comes to when it is set beside the claim. TMS sues for R 3 011 752.05 and the security demanded is R 3 000 000, which is 99.6% of the capital claimed. An order in that amount would require TMS to find, in cash or by guarantee, very nearly the whole value of its claim before it could prosecute it. Security for costs protects a defendant against being left with an irrecoverable bill. It is not a mechanism for requiring a plaintiff to place the value of its claim on deposit, and a figure which comes to that requires justification. None was offered.

[29] It does not follow that security must be refused. The complaint is directed at the amount and not at the entitlement, and to refuse security altogether would be to reach for the wrong instrument to answer it. Rule 47(5) provides that security shall, unless the court directs otherwise or the parties agree otherwise, be given in the form, amount and manner directed by the Registrar. That is the appropriate course, and it is the course taken in the orders under consideration in *Boost Sports* and in *Fusion Properties*. It is also, on a proper reading, what ASI itself asks for. Prayer 1 of the notice of motion seeks security in terms of the notice delivered on 15 April 2025, and that notice demands R 3 000 000 or such amount as the Registrar may determine.²¹

[30] Two further directions are needed to make the order work. Rule 47(4) allows the court, where security is not given within a reasonable time, to dismiss the proceedings or to strike out the pleadings of the party in default. The orders in both of the judgments I have mentioned provided expressly for the defendant to return on the same papers for that relief, and prayer 2 of the notice of motion asks for the same thing. I also direct ASI to approach the Registrar within ten days. The stay is subject to a proviso: if ASI does not do so, TMS may approach the court on the same papers for its upliftment. A stay which operates in ASI's favour should not be capable of being prolonged by ASI's own inaction, and the court which grants a stay under rule 47(3) may control the terms on which it

²¹ *Boost Sports* above n 6 at para 4 and *Fusion Properties* above n 7 at fn 4, in each of which the order under consideration left the form, amount and manner of the security to the Registrar. As to the relief sought, see the notice of motion, prayer 1, CaseLines 002-13, and the rule 47 notice, CaseLines 002-7.

continues. The period for furnishing the security is the ten days for which ASI's own notice provides.

F. COSTS

[31] ASI has succeeded. It has not obtained the fixed figure it preferred, but the question which was fought was entitlement, and on that question, ASI has prevailed; the relief it obtains is the relief for which its notice of motion prays. Costs follow the result.

[32] ASI's draft order asks for costs including the costs of counsel on scale B, and TMS advanced no contrary contention as to the scale if ASI succeeded. This was an opposed interlocutory application on a substantial affidavit record, raising a statutory discretion, in an action in which more than R 3 million is claimed. The appropriate scale is scale B.

G. ORDER

[33] I make the following order:

1. TMS Pro Property Management CC is to furnish security for the costs of ASI Capital (Pty) Ltd in the action under case number 2025-026341.
2. The form, amount and manner of the security are to be determined by the Registrar in terms of rule 47(5) of the Uniform Rules of Court.
3. ASI Capital (Pty) Ltd is to approach the Registrar within ten days of this order for that determination.
4. TMS Pro Property Management CC is to furnish the security so determined within ten days of the date of the Registrar's determination.
5. The action under case number 2025-026341 is stayed pending the furnishing of the security determined by the Registrar, provided that if ASI Capital (Pty) Ltd has not approached the Registrar within the period referred to in paragraph 3, TMS Pro Property Management CC may approach the court on the same papers for the upliftment of the stay.

6. If the security is not furnished within the period referred to in paragraph 4, ASI Capital (Pty) Ltd may approach the court on the same papers, duly supplemented, for an order in terms of rule 47(4) of the Uniform Rules of Court.
7. TMS Pro Property Management CC is to pay the costs of the application, including the costs of one counsel, on scale B.


VETTER AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances

For the Applicant:	Ms K Mitchell
Instructed by:	Gerhold & Van Wyk Attorneys
For the Respondent:	Mr W C Potgieter
Instructed by:	McCarthy Cruywagen Attorneys
Date of hearing:	25 August 2026
Date of judgment:	31 August 2026

This Judgment is handed down electronically by circulation to the parties' legal representatives by email and publication on CaseLines and SAFLII. The date for the handing down is deemed 31 August 2026.