



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: 773/2021

In the matter between:

SHAUN SMITH

Applicant

and

PARKER BEUSEKOM PARTNERSHIP

Respondent

HEARD ON: 27 OCTOBER 2022

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be 12h30 on 23 January 2023.

[1] This is an opposed application instituted by the applicant on 29 September 2022 seeking an order that the respondent furnish security for costs in the amount of R 500 000.00 or such amount, form and manner as the registrar may determine and that the proceedings be stayed until such order is complied with together with costs of the application.

[2] The notice of demand for security costs in terms of Rule 47 of the Uniform Rules of Court was delivered on 19 September 2022 and was based on the

ground that the respondent was a peregrinus of the court and the applicant had a reasonable need for security of the costs.

[3] The respondent opposed the application on the grounds that:

3.1 The applicant failed to demand security for costs as soon as possible after the commencement of the main action and had therefore failed to timeously pursue the application in terms of Rule 47;

3.2 The applicant was sufficiently safeguarded in other ways;

3.3 The application was manifestly *mala fide*;

3.4 The respondent's claim against the applicant had prospects of success and was not viscous or *mala fide*;

3.5 The applicant failed to make out a case for security for costs.

[4] It is essential to give a brief background of the facts. The applicant and the respondent entered into a sale agreement for an Apollo Aircraft on 05 October 2018. On 22 February 2021, the respondent, having cancelled the agreement, issued a summons against the applicant for the repayment of the purchase price. The applicant defended and the matter proceeded on a defended basis. The applicant filed a plea and a counterclaim on 21 April 2021 and on 17 May 2021 the respondent filed a reply to the applicant's plea and a plea to the counterclaim. The applicant demanded security for costs in the amount of R 500 000.00 in terms of Rule 47 by delivering a notice of demand for security costs on 23 February 2022. The respondent refused to furnish the security for the costs and dared the applicant to proceed with an application in terms of Rule 47 (3).

[5] On 19 September 2022, the applicant delivered a second notice of demand for the security for costs in the amount of R 500 000.00 on the same grounds as the previous notice. Once again the respondent refused to furnish the security for costs. The respondent amended his particulars of claim on 14 June 2022

and amended his residential address to reflect that he was now resident in Israel.

- [6] In its founding affidavit, the applicant stated that it was informed by its attorney that the respondent was a peregrinus, legal terminology to describe a foreigner. This conclusion was drawn by the attorney from the amendment of the applicant's particulars of claim on 1 July 2022. The amendment described the respondent as a businessman resident in Israel.¹ Before the amendment, the respondent was cited as a businessman resident at Plettenberg Bay in South Africa. This was denied in the applicant's plea as it pleaded that the respondent was permanently resident in the United States of America as he had emigrated thereto in 2020.² The respondent's summons was issued on 21 February 2021. The applicant's plea and counterclaim were served on 23 April 2021.
- [7] The application could not be brought earlier as it was not established that the respondent was a peregrinus.³ In the period between late 2020 and the beginning of 2021, the applicant was under the impression that the respondent was no longer residing in the United States but in South Africa, albeit with the stated intention of emigrating to Israel.⁴ Up until their amendment, the particulars of claim stated clearly that the respondent was resident in South Africa.⁵ The applicant was under the impression during the latter part of 2020 and up until June 2022 that the respondent was back in South Africa and no longer resident in the United States.⁶
- [8] In argument, the applicant submitted that it had made out a proper case for the relief sort in the application. There was absolutely no merit in the respondent's allegation that the applicant failed to act as soon as possible after the commencement of the proceedings.⁷ Relying on the case of *Silvercraft Helicopters (Switzerland) Ltd and another v Zoonekus Mansions (Pty) Ltd, and two other cases*⁸, the applicant submitted that the court will not in applications

¹ Paragraph 5 of the Applicant's Founding Affidavit.

² Paragraph 7 of the Applicant's Founding Affidavit.

³ Paragraph 24 of the Applicant's Founding Affidavit.

⁴ Paragraph 10 of the Applicant's Founding Affidavit.

⁵ Paragraph 15 of the Applicant's Founding Affidavit.

⁶ Paragraph 13 of the Applicant's Affidavit.

⁷ Paragraph 7.4 of the Heads of Argument.

⁸ 2009 (5) SA 602 (C).

for security, enquire into the merits of the dispute of the *bona fides* of the parties. Taking into account the manner in which the answering affidavit was drafted, it was submitted that the only *mala fides* present in this matter was on the part of the respondent.⁹ The applicant was entitled to be protected to the full in the proceedings initiated by the respondent peregrinus. The respondent's reliance on the aircraft as security was misplaced as it was clear from the replying affidavit that the aircraft was being dismantled and was subjected to harsh coastal weather conditions. The value of the aircraft appeared to be R 1 500 000.00 as an offer for such an amount was made by a prospective purchaser. This amount was not even sufficient to cover the amount of the applicant's counter-claim.¹⁰

[9] Rule 47 (1) of the Uniform Rules of Court provides that 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. 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, 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.

[10] In *Magida v. Minister of Police*,¹¹ it was held that:

"Notwithstanding the obsolescence of the cautio iuratoria as security on oath we must bear in mind that our common law principles which underlie its granting are still applicable in our modern practice when a peregrinus in his answering affidavit deposes to his inability to furnish security for costs owing to his impecuniosity, since it must be left to the judicial discretion of the Court by having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both the incola and the peregrinus to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs. Nor is there any justification for requiring the Court to exercise its discretion in favour of a peregrinus only sparingly. It follows that the following dictum in Saker & Co Ltd v Grainger 1937 AD 223 per De Wet JA at 227, viz: 'The principle underlying this practice is that in proceedings initiated by a peregrinus the Court is entitled to protect an incola to the fullest extent,' should be

⁹ Paragraph 8.1 of the Heads of Argument.

¹⁰ Paragraph 29 of the Replying Affidavit.

¹¹ 1987 (1) SA 1 (A) D-G.

read subject to the qualification that it is only applicable after the Court, in the exercise of its judicial discretion in accordance with the principles hereinbefore stated, had come to the conclusion that the peregrinus should not be absolved from furnishing security for costs.”

[11] Some of the guidelines that a court will take into account when exercising its discretion are whether the plaintiff’s claim is made in good faith or whether it is mala fide, whether it can be concluded that a plaintiff has a reasonable prospect of success and whether the application for security was used to stifle a genuine claim.¹² In *Shepstone and Wyle and Others vs. Geysers N.O*¹³ it was said that a court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon consideration of all the relevant features, without adopting a pre-disposition either in favour of or against granting security. In *Fusion Properties 233 CC v Stellenbosch Municipality 2021 JDR 0094 (SCA)*, it was stated that whilst it may be desirable that a party entitled to demand security for costs must do so as soon as reasonably practicable, failure to do so was not necessarily fatal. 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. Delay in itself will rarely be an overriding and decisive consideration.

[12] In *Giddey No v JC Barnard and Partners*¹⁴, it was stated that:

“The Courts have accordingly recognised that in applying s 13, they need to balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against the potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its own costs in the litigation. To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An applicant for security will therefore need to show that there is a probability that the plaintiff company will be unable to pay costs. The respondent company, on the other hand, must establish that the order for costs might well result in its being unable to pursue the litigation and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospects of success. Equipped with this information, a court will need to balance the interests of the plaintiff in pursuing the litigation against the risks to the defendant of an unrealisable costs order.”

¹² *Barker v Bishops Diocesan College and Others 2019 (4) SA 1 (WCC)*.

¹³ 1998 (3) SA 1036 (SCA).

¹⁴ 2007 (5) SA 525 (CC).

[13] The applicant's version in its founding affidavit is that it was informed by its attorney that the respondent was a peregrinus when the attorney drew such a conclusion from the plaintiff's amended particulars of claim on 1 July 2022.¹⁵ The applicant, as the defendant in the main action, pleaded specifically that the plaintiff was not resident in South Africa but had emigrated to the United States of America in 2020 where he was permanently resident.¹⁶ The respondent submitted that the applicant failed to disclose the first request for security in its founding papers and why it did not apply to the court for the security for the costs in February 2022 after the demand for such security was made.¹⁷ The applicant, instead of addressing this issue fully, fleetingly mentioned in its affidavit that:

"Defendant's attorney's notices under Rule 47, calling for security, have been declined. The plaintiff has not set up security and the defendant is accordingly compelled to launch this application, which I have been advised, will apparently be opposed."¹⁸

[14] The respondent's response to the demand for security was contained in an email of 25 February 2022 which, for the sake of background and clarity, is quoted near verbatim as follows:

- "3. Our client denies to furnish security for costs, as demanded or at all.*
- 4. We respectfully submit that your client is not entitled to such security in the circumstances of this action, for inter alia the following reasons (this is not a closed list):*
 - 4.1 The sole reason your client advances to support its demand for security is that our client is a foreign peregrine. It is long established that this is not by itself reason enough, something more is required, and the court always retains the overriding discretion;*
 - 4.2 Your client has known that our client emigrated, on its own version per its plea, since at least 23 April 2021. This is well over more than 200 court days prior to your client's demand under reply, which is not "as soon as practicably after the commencement of proceedings" [vide rule 47(1)] and on this ground alone we submit that any application for security is still born;*

¹⁵ Paragraph 5 of the applicant's founding affidavit.

¹⁶ Paragraph 7 of the applicant's founding affidavit.

¹⁷ Paragraph 56 of the respondent's heads of argument.

¹⁸ Paragraph 24 of the applicant's founding affidavit.

- 4.3 *The amount of R500 000.00 is astronomical, and our client verily believes the demand for security is, in this context, vexatious, intended more to stifle his bona fide claim/s and/or dissuade him from the further pursuit of the matter and/or try to garner some leverage in settlement negotiations;*
- 4.4 *Your client has remained adamant throughout the dispute and the litigation, for going on three years this year, that, essentially, “there is nothing at all wrong with the Apollo” and therefore on your client’s own version our client is the sole registered owner of the aircraft worth at least R4 000 000.00, which sits in Plettenberg Bay in South Africa; and/or*
- 4.5 *The merits of the matter prima facie favour our client, evidenced inter alia by the fact that no expert notice was ever filed following your client’s own appointed expert Gerhard van Wyk inspecting the Apollo circa June 2021, which speaks for itself.*
5. *Should your client persist in its demands, then we await service of their application per rule 47(3) accordingly.*
6. *This letter will be used to support our client’s prayer that our client, when its application is dismissed, be liable for our client’s attorney and own client costs, a punitive order that we respectfully submit is appropriate to the facts of the matter to hand.*

[15] The applicant failed to either respond to this letter or launch any application in terms of Rule 47(3) despite having been instructed to call for security for costs from the respondent. In an email dated 23 February 2022 addressed to the respondent’s attorneys, the applicant’s latest attorney, Mr Willem van Rensburg, advised that he had properly consulted on the pleadings and issues with counsel and had received detailed information and instructions before calling for security for costs and amending the Plea and Counterclaim.¹⁹ A second notice of demand for security costs was delivered to the respondent on 19 September 2022.

[16] The respondent valued the Apollo at between R4 200 000.00 and R5 200 000.00 which is ten times the amount of security required by the applicant. He was of no intention of removing it from South Africa as he tendered to return it to the applicant against its payment to him of the amount

¹⁹ Annexure SFC2 to the Answering Affidavit.

claimed.²⁰ The applicant was adequately safeguarded in respect of security for costs or judgment.²¹ The applicant did not contest these amounts but contended that the aircraft was disassembled for shipment elsewhere at the instructions of the respondent. However, there was interest to purchase the aircraft at a price of approximately R1.5 million. This amount would be insufficient security taking into account that the counterclaims exceeded this amount and especially if litigation were to be pursued in Israel.²² The aircraft, being a movable item forming the subject matter of the main action does not qualify as constituting acceptable security for costs.²³ This proposition is misconceived.

[17] In *Browns the Diamond Store CC v Van Zyl*,²⁴ Kathree-Setiloane J opined as follows:

"In my view, there should be no fetter on a court's discretion to order security for costs. Central to the proper exercise of its discretion is whether the peregrine plaintiff has sufficient or adequate assets to meet any order as to costs, which is available for satisfaction. That enquiry is not limited to the presence of immovable property but must include an enquiry into all assets – including movable assets, both corporeal and incorporeal, if they exist. The principal concern being that an incola defendant should not be left unprotected if ultimately successful in the main action."

[18] Having considered the circumstances of this case and in an endeavour to strike a balance between the interests of the parties, I am not persuaded that the applicant has made out a case against the respondent for the furnishing of security for costs. The applicant failed to furnish an explanation of his delay in bringing the security application that is sufficiently full to enable this court to understand how it really came about and to assess the plaintiff's conduct and motives.²⁵ The applicant was not candid in its founding affidavit and failed to mention that he had issued a notice of demand for security in February 2022, giving the impression that the only notice delivered was in September 2022. Neither a full explanation was given why the first notice of demand was not

²⁰ Paragraphs 38-40 of the Answering Affidavit.

²¹ Paragraph 42 of the Answering Affidavit.

²² Paragraphs 29 and 30 of the Replying Affidavit.

²³ Paragraph 4.10 of the applicant's Heads of argument. Paragraph 13e of the Answering Affidavit.

²⁴ 2017 JDR 0583 (GJ) para 14.

²⁵ *Christoffel Botha t/a Tax Consulting SA v Renwick* [2021] JOL 50197 GJ para 52.

pursued to its logical end nor why the second notice was not delivered as soon as practicable after the commencement of proceedings, setting forth the grounds upon which the security was claimed

[19] On the applicant's own version,²⁶ the respondent owns sufficient assets to satisfy a costs order as interest was shown in purchasing the aircraft at a price of approximately R1.5 million which is in excess of the R500 000.00 required in the notice of demand. In these circumstances and contrary to the applicant's submissions, it cannot be said that the respondent's conduct is vexatious or *mala fide*.

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

Order:

The application is dismissed with costs.

MHLAMBI, J

On behalf of the applicant: Adv. J Els

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²⁶ Paragraph 29 of the Replying affidavit.