

THE REPUBLIC OF SOUTH AFRICA



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

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

Date: **19 April 2022** Signature:

CASE NO: 22573/2017

In the matter between:

DOUGLASDALE DAIRY (PTY) LTD

Applicant / Defendant

And

WILLIAM HERBERT HUNTER THYNE N.O.

Respondent / Plaintiff

Coram: NICHOLS AJ

Delivered: 19 April 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 19 April 2022.

JUDGMENT AND ORDER

[1] This interlocutory application represents another chapter in the acrimonious litigation amongst family members, either personally or via the shield of the corporate veil of a corporate entity, spanning many years and a plethora of legal proceedings.

[2] The applicant, Douglasdale Dairy (Pty) Ltd, the defendant in the main action, seeks an order, *inter alia*, that the respondent, William Herbert Hunter Thyne N.O., the plaintiff in the main action, furnish security for the defendant's costs; a stay of the action proceedings pending the provision of such security; and an order entitling the defendant to apply for the dismissal of the plaintiff's action in the event of his non-compliance with such order. For ease of reference, the parties shall be referred to as the plaintiff and the defendant in this judgment.

[3] The acrimonious litigation and the main action revolves around the immovable property occupied by the defendant. Prior to his death in January 2000, the immovable property was owned by Mr Brian Matthews (Matthews), who along with his wife and three children were the initial shareholders of the defendant. The current shareholding of the defendant has changed but is irrelevant for the purposes of this judgment.

[4] In terms of his will, Brian bequeath the immovable property to his wife, Elizabeth Anne Bragge (Bragge), subject to the condition that upon her death, the immovable property would devolve upon their sons Rowan Wauchope Matthews (Rowan) and Michael Brian Matthews (Michael), as *fideicommissories*. His will further stipulated that in terms of the *fideicommissum* Rowan would receive 60% ownership of the immovable property and Michael would receive 40% ownership.

[5] Bragge passed away on 6 September 2016 and the plaintiff was appointed as the executor of her deceased estate. The defendant currently occupies the immovable property without a lease agreement. Prior to her death Bragge successfully instituted eviction proceedings against the defendant. The Supreme Court judgment in respect of the appeal against this eviction order was delivered subsequent to Bragge's death and is reported as *Douglasdale Dairy & others v Bragge & another*¹.

[6] The plaintiff instituted the main action in his capacity as executor of the estate late Bragge, in respect of the following four claims that relate to the defendant's occupation of the immovable property and for which the aggregate total amount is approximately R12.2 million:

(a) Claim A: damages for holding over, in the form of rental, for the period 28 February 2014 to the deceased's death on 6 September 2016.

(b) Claim B: damages for holding over, in the form of rental, after the deceased's death.

¹ *Douglasdale Dairy & others v Bragge & another* (731/2017) [2018] ZASCA 68 (25 May 2018).

(c) Claim C: a claim for the civil fruits, in the form of profits, derived by the defendant from the use of the property from the termination of the lease until the death of the deceased and in respect of which the plaintiff seeks an accounting.

(d) Claim D: a claim for the civil fruits, in the form of profits, derived by the defendant after the deceased's death and in respect of which the plaintiff seeks an accounting.

[7] Subsequent to the delivery of its plea and a pre-trial conference convened in May 2019, the defendant delivered a notice in terms of Rule 47(1) of the Uniform Rules of Court on 4 November 2019. In terms of this notice the defendant demanded the sum of R300 000 as security for its costs. The grounds upon which both the notice in terms of Rule 47(1) and this opposed application are premised are briefly the following:

(a) The defendant is at risk for its costs in defending the action. The plaintiff litigates and acts as the executor of a deceased estate that is unable to pay its debts and/or is insolvent and therefore unable to satisfy any costs order that may be granted against it.

(b) The plaintiff has poor prospects of success in the main action.

(c) The plaintiff's pursuit of the main action is vexatious, reckless and/or amounts to an abuse of the process of court.

(d) In consequence of the sale by the plaintiff of the claims that form the subject matter of the main action, the plaintiff is in reality a nominal plaintiff. The ultimate beneficiary of the main action is immune from a costs order in favour of the defendant and the deceased estate is insolvent and/or impecunious.

[8] It is trite that a court has a discretion whether or not to order a party to provide security for costs and this includes ordering an *incola* plaintiff to furnish security.² The general principles regarding the furnishing of security for costs as stated in *Ecker v Dean*³ are:

'The Court has inherent jurisdiction to prevent abuse of its process by staying proceedings or ordering security in certain circumstance, but as pointed out by Solomon JA in Western Assurance Company v Caldwell's Trustee 1918 AD at 274 this power ought to be sparingly exercised and only in very exceptional circumstances.'

² *Vanda v Mbuqe and Mbuqe* 1993 (4) SA 93 (TK) at 94G-J; *Argentarius No.1 (Pty) Ltd v South African Financial Exchange and Others* [2012] ZAGPJHC 136 (25 July 2012) para 7.

³ *Ecker v Dean* 1938 AD 102 at 111.

[9] In the exercise of its unfettered discretion to order a party to furnish security for costs, I am mindful that a court should not adopt a predisposition either in favour of or against granting security. The potential injustice to a plaintiff who will be prevented from pursuing her claim by an order for security must be weighed and balanced against the prejudice and loss to the defendant if no security is ordered and he is unable to recover his costs of successfully defending the action.⁴

[10] It is trite that an *incola* plaintiff will generally only be ordered to furnish security if he is unable to satisfy a potential costs order and the main action is vexatious or reckless or amounts to an abuse of court process.⁵ It is apparent from the notice in terms Rule 47(1) and the papers that the defendant does contend that the plaintiff is unable to satisfy a potential costs order and that the main action amounts to an abuse or is vexatious or reckless.

[11] In order to contextualise the parties arguments regarding the deceased's estate's alleged insolvency, the plaintiff's prospects of success and whether the deceased estate will be able to satisfy any costs order awarded against it, it is necessary to have regard to the merits of the main action.

[12] An action may be regarded as vexatious if it is obviously unsustainable, frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant.⁶ As stated by Mudau J in *N and Another v D In re: D v N and Another*:

*'In an application for security for costs a court does not have to be convinced as a matter of certainty that the matter is incapable of succeeding but rather as a probability. The test whether an action is vexatious on the grounds that it is unsustainable can therefore be summarised as follows: the applicant does not have to establish this as a certainty; a court should not undertake a detailed investigation of the case nor attempt to resolve the dispute between the parties. This would be tantamount to pre-empting the trial court, in this case the court seized with the variation application. Rather, the court in a security for costs application brought upon these grounds, should merely decide on a preponderance of probabilities whether there are any prospects of success.'*⁷

⁴ *Shepstone & Wylie and Others v Geyser* NO 1998 (3) SA 1036 (SCA) at 1045I-1045A.

⁵ *Ramsamy NO and Others v Maarman NO and Another* 2002 (6) SA 159 (C) at 172I – 173G; *MTN Service Provider (Pty) Ltd v Afro Call* 2007 (6) 620 SCA para 15.

⁶ *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime v MV Visvliet* 2008 (3) SA 10 (C) para 9.

⁷ *N and Another v D In re: D v N and Another* (2018/16715) [2021] ZAGPJHC 428 (17 September 2021).

[13] In *Douglasdale*⁹ the SCA reiterated and confirmed the principle that the rights of a fiduciary terminate automatically upon fulfilment of the condition. Ownership passes to the *fideicommissary* heirs on the death of the fiduciary and not to the fiduciary's estate.¹⁰ The court further held that as an executor, the plaintiff had no entitlement to the immovable property, notwithstanding the fact that there was no lease in existence for him to rely on.¹¹ A fortiori the plaintiff's claim B and D are unsustainable with no prospects of success since they are premised on claims that allegedly arose after the death of the fiduciary.

[14] The plaintiff's denial of the assertions regarding claims B and D amount to no more than a bare denial. He appears to contend that the *ratio* in *Douglasdale* is capable of an interpretation other than that referred to in the preceding paragraph. The plaintiff elected not to share his interpretation of this decision with this Court, however it is readily apparent from the annexures to both the plaintiff's opposing affidavit and the defendant's founding affidavit to this application that he accepted the *Douglasdale* decision.

[15] In the plaintiff's email of 7 August 2018, he stated '*As the SCA has settled the issue regarding when the immovable property vested with the fideicommissaries, the claim for Holding Over and Loss of Fruits post Mrs Bragge's death falls away.*' In his email of 14 November 2018, he stated '*Principally I am in agreement re the claim post Mrs Bragge's death, given the SCA judgment.*' In his letter dated 26 November 2018 and sent on 5 December 2018 in response to the request for a date to convene a pre-trial conference, the plaintiff stated

'...I am of the opinion that it may be better suited for the Pre-trial to take place after judgement is given in [the Pretoria] matter and closer to the trial date and once the papers have been amended to remove the claim post Mrs Bragge's death. I have been unable to consult with Counsel on this matter, but as previously indicated- given the SCA opinion, I hold the view that the Particulars should be amended.'

[16] The plaintiff failed to address his contemporaneous correspondence referred to above or his failure to comply with the undertaking provided at the pre-trial conference on 6 May 2019 to advise the defendant whether he intended to persist with claims B, C and

⁸ *N and Another v D In re: D v N and Another* (2018/16715) [2021] ZAGPJHC 428 (17 September 2021) para 12.

⁹ *Douglasdale* note 1 above.

¹⁰ *Douglasdale* note 1 above paras 10 – 13.

¹¹ *Douglasdale* note 1 above paras 22.

D. I agree with the defendant that, in the circumstances, the plaintiff's continued pursuit of claims B and D is at the very least reckless and vexatious and amounts to an abuse of process.

[17] The defendant also contends that claim C has no prospect of success because it is premised upon a claim by a fiduciary property owner to the civil fruits in the form of profits from its lessee, in circumstances where neither the will nor the common law makes provision for such a claim. It is clear from Matthews' will that the *fideicommissum* operated in respect of the immovable property only and not in respect of the defendant. The main action does not set out the legal basis upon which the plaintiff contends that he is entitled to a claim for the defendant's profits where the defendant is a lessee without a lease agreement. It is also contended that claim A has limited to no prospects of success particularly since the proper basis for this claim has not been set out.

[18] The plaintiff does not address these contentions at all, save to argue that it is inappropriate to address the merits of the main action in the context of an application for security for costs. The plaintiff asserted that it was irrelevant whether the claims advanced in the main action were meritorious because unsustainable claims would be subject to ordinary punitive costs orders by the court hearing the main action. That may be so, however such an order is cold comfort to a defendant if ordered against a plaintiff that is unable to satisfy any costs order made against him. This argument also ignores the fact that the very purpose of Rule 47 is to provide security to a defendant that is concerned that he may not recover his costs, punitive or ordinary, that are awarded in his favour.

[19] Additionally, when deciding whether an *incola* party should be ordered to furnish security for costs, the merits of the main action are relevant in the determination of whether an action is mala fide, vexatious or unmeritorious.¹² Although, the merits of the action alone will not be decisive and must be regarded as one of the factors to be taken into consideration. In *Zietsman v Electronic Media Network*¹³, Streicher JA stated at para 21:

'I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement 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 the each case.'

¹² *Ramsamy NO* note 5 above at 173G.

¹³ *Zietsman v Electronic Media Network* 2008(4) SA 1 (SCA).

[20] I now turn to consider the defendant's contention that the deceased estate is insolvent and/or impecunious. The plaintiff concedes that the deceased estate has financial difficulties and has faced financial challenges. He contends, however that the defendant has caused or exacerbated the financial difficulties of the deceased estate. However, allegations of the defendant being the sole cause of the plaintiff's financial position are not necessarily conclusive for a refusal of security for costs.¹⁴ Barring the allegation itself, the plaintiff advances no cogent facts or reasons to support such a conclusion.

[21] The plaintiff does not itemise the deceased estate's alleged assets or provide a value for these assets. His reference to its assets is limited to the claims in the main action; the contributions owed by the *fideicommissary* heirs towards the estate duty and the costs award payable in terms of the successful eviction proceedings instituted by Bragge. Estate duty is, however due to the fiscus and does not accrue to the deceased estate. It is also common cause that the defendant is contesting the costs award consequent upon the *Douglasdale* decision and other court decisions in the litany of litigation arising from the defendant's occupation of the immovable property. Consequently the deceased estate's ability to satisfy a costs award against it does not appear favourable.

[22] Regardless, the plaintiff also contends that the solvency of the deceased estate and its ability to satisfy an adverse costs order is rendered moot by the sale of assets and cession agreement concluded between him and Schindlers Attorneys and Notaries (Schindlers) on 7 January 2020 (the Agreement). The plaintiff concluded the Agreement in his capacity as the executor of the deceased estate. Pursuant to the Agreement, the plaintiff, *inter alia*, ceded, assigned, transferred and made over to Schindlers, out and out, the rights, obligations and interests to the result of the proceedings in the main action, whether same includes a judgment debt, cost award or any other relief granted during the course of the litigation. The sale assets were sold for the purchase price of R150 000. Schindlers waived the requirement that it be substituted as plaintiff in the main action. Therefore as it currently stands, the plaintiff pursues the main action on behalf of Schindlers, who are also his current attorneys of record.

¹⁴ *Fedgen Insurance Co Ltd v Border Bag Manufacturing (Pty) Ltd* 1995 (4) SA 355 (W) at 358G-I to 359A-D; *Bookworks (Pty) Ltd v Greater Jhb Metropolitan Council* [1999] 4 ALL SA 505 (W); 1999 (4) SA 799 (W) at 811F-I.

[23] The contention that the Agreement renders this application moot is premised upon the argument that upon a proper construction of the terms and conditions of the Agreement, it is logical to conclude that Schindlers has assumed the role of the plaintiff in the main action regardless of the fact that it has not been formally substituted as such. It is clear, so the argument proceeds, that the Agreement has Schindlers standing liable for any adverse cost order that may be granted in the main action. Therefore the Agreement is valid and binding regardless of whether it constitutes an agreement between a litigant and a third party financing the litigation for reward. The plaintiff also argued that it is always open to the defendant to seek a costs order against Schindlers as a non-party to the proceedings or as the non-party litigation funders. In both scenarios, however such costs order are only granted in exceptional circumstances and not as a general rule or in the ordinary course.¹⁵

[24] The defendant contends that proceedings that are pursued by a plaintiff as a nominee on behalf of a non-litigant third party as the ultimate beneficiary, are proceedings that may be found and held to be conducted vexatiously, recklessly or otherwise amount to an abuse. In support of this contention, the defendant referred to *Semmler v Murphy*¹⁶ where Lord Denning held that ‘...a nominal plaintiff is a man who is a plaintiff in name but who in truth sues for the benefit of another.’ After considering the facts of that matter the court in *Semmler* concluded: ‘It comes to this. If the action succeeds, the plaintiff’s brother will go off with the whole of the proceeds and let the other creditors ‘whistle’ for the money; whereas if the action fails the plaintiff will not be able to pay the costs of the defendant. It is the very kind of case in which security for costs should be ordered.’¹⁷

[25] In the unreported judgment of *Absa Bank Ltd v Schroeder*¹⁸, Victor J found that the identity of the ultimate beneficiaries who stood to benefit from the litigation was also a relevant consideration when determining whether security should be furnished. An *incola* plaintiff, who litigates in a nominal capacity and has no means to satisfy a costs order may be ordered to furnish security.¹⁹

¹⁵ *Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others* (48226/12) [2015] ZAGPJHC 62; 2015 (4) SA 299; [2015] 2 ALL SA 686 (GJ) (19 March 2015).

¹⁶ *Semmler v Murphy* [1967] 2 ALL ER 1967 185.

¹⁷ *Semmler* *ibid* at 187.

¹⁸ *Absa Bank Ltd v Schroeder* (32688/2009) South Gauteng High Court, Johannesburg (5 September 2013) para 14-15.

¹⁹ *Vanda* note 2 above at 94J.

[26] The plaintiff's contentions are not supported by the terms and conditions of the Agreement. Schindlers elected to waive compliance with the provisions of clause 4.1 of the Agreement that required its substitution as the plaintiff in the main action. Additionally, the plaintiff does not address the legal effect of a cession and its impact on the plaintiff's *locus standi* to continue with the proceedings.²⁰

[27] Nevertheless, it is clear that the plaintiff initiated the main action in a representative capacity as the executor of the deceased estate. Without deciding upon the validity of the Agreement, the effect of the Agreement is that the plaintiff continues to litigate in the main action, in a purely nominal representative capacity on behalf of Schindlers. In both scenarios any costs order against the plaintiff would have to come out of the deceased estate unless the defendant is able to argue that exceptional circumstances or grounds exists for the plaintiff or Schindlers to be ordered to effect payment *de bonis propriis*.²¹ In addition, failing a clear and unequivocal undertaking by Schindlers, all costs incurred by the defendant prior to the Agreement remain due by the deceased estate.²²

[28] For the reasons set out above, it is clear that the deceased estate is in a parlous financial state and I am satisfied that it will not be in a position to honour any costs award made against it. The Agreement, does not alter this position because as it currently stands the plaintiff continues to act in a nominal capacity for a third party who will ultimately benefit in the event of success but against whom the defendant will have no ordinary and direct relief in the event of the dismissal of the main action.

[29] In addition, the plaintiff's tenuous prospects of success on claim A and extremely limited to no prospects of success on claims B, C and D are relevant considerations. I take cognizance of this along with the fact that the defendant has been forced to litigate in multiple proceedings regarding the immovable property. Of the few matters that were referred to in this application, the defendant was largely successful.

[30] On a conspectus of the evidence, I am satisfied that the defendant has discharged the onus to satisfy this Court to exercise its discretion to order that security be furnished.

²⁰ *Tecmed (Pty) Limited and Others v Nissho Iwai Corporation and Another* (705/08) [2009] ZASCA 143; [2010] 3 ALL SA 36 (SCA); 2011 (1) SA 35 (SCA) (25 November 2009) para 20.

²¹ *Ramsamy NO and Others v Maarman NO and Another* 2002 (6) SA 159 (C) at 172B.

²² *Antonie v Noble Land (Pty) Ltd* (2011/33953) [2012] ZAGPJHC 292; 2014 (5) SA 307 (GJ) (21 September 2012) para 13.

[31] In the result, I make the following order:

- (a) The plaintiff is directed to furnish the defendant with security for costs in the form, amount and manner to be determined by the Registrar of this Court.
- (b) In the event that the plaintiff fails to provide security as determined by the Registrar within 20 days of the Registrar's order or determination, the main action and proceedings under case no: 22573/2017 shall be stayed and the defendant is granted leave to apply on the same papers, supplemented as necessary, for the dismissal of the main action.
- (c) The costs of this application shall be paid the plaintiff.

T NICHOLS

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Date Heard	:	10 August 2021
Date Judgement Delivered	:	19 April 2022
For the Applicant	:	Adv Hellens SC and Adv G Amm
Instructed by	:	Livingstone Crichton Attorneys Ref: C Joseph / MAT2017 Email: chrisj@lc.legal
For the Respondent	:	Adv M Crespi
Instructed by	:	Schindlers Attorneys Ref: Mr Crespi/PK/G1185 Email: Crespi-Team@schindlers.co.za