

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 22196/2019

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u> <u>YES/NO</u>
(3)	<u>REVISED.</u>
	.....
	DATE
SIGNATURE	

In the matter between:

**MATEMEKU PETROLEUM (PTY) LTD**

Applicant

And

**SHELL DOWNSTREAM SA (PTY) LTD**

1<sup>ST</sup> Respondent

**ADVOCATE GARTH HULLEY SC N.O**

2<sup>ND</sup> Respondent

*IN RE:*

**SHELL DOWNSTREAM SA (PTY) LTD**

1<sup>ST</sup> Applicant

**ADVOCATE GARTH HULLEY SC N.O**

2<sup>ND</sup> Applicant

And

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**JUDGMENT**

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**MAHALELO J**

- [1] The first applicant seeks an order directing the respondent to furnish security within 10 days or such other time the court deems just in terms of Rule 47(1) of the Uniform Rules of court in the amount R 500 000,00 alternatively such amount and form as determined by the Registrar as security for costs in respect of the review application brought by the respondent.
- [2] The first applicant is of the opinion that the respondent will be unable to pay its costs if it is successful in its opposition to the review application.

**Background Facts**

- [3] On 1 April 2019 the second applicant rendered an arbitration award in favour of the first applicant. On 9 May 2019 the first applicant after due notice to the respondent obtained an order from this court making the arbitration award an order of court.
- [4] On 6 June 2019 the first applicant executed the court order by issuing a writ of execution for the recovery of the judgment debt. On 13 June 2019 the first applicant received a notice of attachment in execution which contained an inventory list compiled by the sheriff's office which indicated that the applicant's movable property which was attached by the sheriff did not satisfy the judgment debt. Shortly thereafter and on 25 June 2019 the respondent launched a review application wherein it asked the court to review and set aside the arbitral award rendered on

1 April 2019 by the second applicant in favour of the first respondent. The respondent also asks the court to grant it the option to commence fresh arbitration proceedings against the applicant.

[5] The applicant contends that respondent's review application is vexatious and made purely for the sake of delaying its payment obligations and utterly devoid of any prospects of success because of the following reasons:

(a) The award was made the order of court on 9 May 2019 prior to the applicant instituting the review application. There is no longer an award against which the respondent can direct its review. The respondent chose not to oppose the first applicant's application to make an award an order of court or challenged its validity and has never sought to rescind the court order. Accordingly, the respondent's review application is totally flawed in that it seeks to attack an arbitration award which has been made the order of court which remains binding and enforceable.

(b) The respondent's grounds for review are hopeless. Its review is nothing more than an appeal disguised as a review.

(c) The respondent's review application has been unduly delayed. The arbitration award was rendered on 1 April 2019. Section 33(2) of the Act provides that the review application should have been brought by 14 May 2019. However, the review application was only instituted on 25 June 2019. The respondent has failed to demonstrate "good cause" as required by section 38 of the Act to condone its delay.

[6] The respondent opposes the application for it to furnish security. The respondent contends that the applicant is not a party entitled to demand security for costs whether in terms of Rule 47(1) of the Uniform Rules of Court or Common Law, and the respondent is not a party liable to give security for costs. At any rate, so it is argued by the respondent, the amount required as security for costs is so outrageous such that if allowed, it would amount to denying the respondent its right of access to courts. The respondent avers that it is not a *peregrinus* but

an *incola* Company in South Africa. The averment that it does not have any prospects of success and that continued litigation will cause the first applicant not to be able to recover its costs is devoid of merit as the question of investigation and merit is the purview of the court that will finally decide on the merits of the review application.

### ***Applicable Legal Principles***

- [7] The law with regard to the furnishing of security was until 1 May 2011, determined by the Provision of Section 13 of the Companies Act 61 of 1973 and by the principles of Common Law. In terms of Section 13 of the 1973 Companies Act the respondent would have been required to furnish security for the applicant's costs but Section 13 has now been repealed and nothing was legislated in its place. In the absence of Section 13 the principles of Common Law apply.
- [8] In terms of Rule 47 of the Uniform Rules of Court, a *peregrinus* plaintiff (or respondent) who does not own unburdened movable property in the country, may be ordered to give security for costs for his action. The object of the rule is to ensure that if the *perergrine* plaintiff is unsuccessful, payments of the *incola* defendant's costs is secured. The courts have however shown a degree of reservation in granting security for costs where the *peregrinus* owns immovable property within the court's jurisdiction.
- [9] As a general rule on *incola* is not compelled to furnish security for costs. The mere fact that an *incola* will be unable to meet an adverse court order is not a basis to require security. An *incola* may in the exercise of the court's discretion, be ordered to provide security for costs in circumstances where the main action is vexatious, reckless or otherwise an abuse of the court's process<sup>1</sup>. The action is vexatious if it

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<sup>1</sup>.Ramsey NO V Maarman 2000(6) SA 159 (C )

is obviously unsustainable, frivolous, improper, or instituted without sufficient ground to serve only as an annoyance to the defendant.<sup>2</sup>

[10] The test whether an action is vexatious on the ground that it is unsustainable does not require a court to be convinced as a matter of certainty that the matter is incapable of succeeding but rather as a probability. The applicant therefore does not have to establish this as a matter of certainty. The court is not required to take a detailed investigation of the case nor attempt to resolve the dispute between the parties as this would amount to pre-empting the trial court. The court in a security for costs application brought on this grounds, should merely decide on a preponderance of probabilities whether there are any prospects of success.<sup>3</sup>

[11] In *Boost Sports Africa (Pty) Ltd*<sup>4</sup> the Supreme Court of Appeal provided clarity as to when a court can require an *incola* to provide security in the absence of Section 13 of the old Companies Act.

[12] In *Boost* the Supreme Court of Appeal held that absent Section 13 of the old Act in the new Act, the law no longer differentiate between an *incola* company and an *incola* person. In determining an order for security for costs the SCA stated that factors contained in Section 13 still has relevance and courts should have regard to the nature of the claim, the financial status of the *incola* and the *incola's* probable financial status should it fail in the matter. The SCA placed the onus on the party seeking security for costs to go beyond merely showing that an *incola* is unable to meet an adverse cost order and held that the applicant must satisfy the court that the main action is vexatious, reckless or otherwise amounts to an abuse.

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<sup>2</sup> *Fisheries Development Corporation of SA Ltd v Jorgeson & Another* 1979 (3) SA 1331(W)

<sup>3</sup> *Golden International Navigation SA v Zeba Maritime* 2008 (3) SA 10 (CPD)

<sup>4</sup> *Boost Sports Africa (Pty) Ltd v The South African Breweries (Pty) Ltd*

- [13] In a security for costs application “the court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff’s claim fails and defendant finds himself unable to recover from the plaintiff the costs which have been incurred by his defence of the claim.”
- [14] This approach was endorsed by the Constitutional Court in *Giddey NO v J C Barnard and Partners*<sup>5</sup> which concerned the correct Constitutional approach to a court’s discretion in granting an order for security for costs. In regard to the required balancing exercise the held: *“To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An application 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 it being unable to pursue the litigation and should indicate the nature and importance of the litigation to rebut the suggestion that it may be vexatious or without prospects of success. Equipped with this information a court will need to balance the interest of the plaintiff in pursuing the litigation against the risks to the defendant of an unrealisable cost order.”*
- [15] The fact that the respondent in this matter failed to satisfy the judgment debt in favour of the first applicant is a relevant consideration to be made. In addition, the respondent has failed to place before court the importance of the review application to rebut the suggestion that it is vexatious or an abuse of the court’s process. I therefore conclude that considerations of fairness and equity favour the granting of security as borne out by the totality of the facts. In the present matter the applicant owns no assets and by his own admission is impecunious. The prospects of the applicant recouping his costs from the respondent are

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<sup>5</sup> 2007(5) SA 525 ( CC) at para 8

slim, regard being had to his prospects of success in the review application.

[16] To refuse the applicant his right to claim security for costs under those circumstances may lead to injustice.

[17] There is no reason why costs can not follow the result.

[18] In the result the following order is made:

1. The respondent is ordered to provide the first applicant with security for the costs in the review application pending between the respondent and the first applicant the nature, form and amount to be determined by the Registrar.

2. Pending the provision of security the main application is stayed until such time as security is provided as ordered.

3. In the event the respondent failing to provide security within 30 days from the date on which the Registrar has determined the amount, the applicants are granted leave to approach the court on the same papers, duly supplemented, to apply for the dismissal of the respondent's application.

4. Costs of the application

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**M B MAHALELO  
JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**This judgment was delivered electronically by circulation to the parties legal representatives by e-mail and uploading on caselines. The date and time of hand down is 10h00 on the 2<sup>nd</sup> August 2022**

**Appearances:**

On behalf of the first applicant	: Adv Scott
Instructed by	: Clive Decker Hoffmeyer Inc
On behalf of the respondent	: Adv Mureriwa
Instructed by	: Motala Attorneys
Date of hearing	: 9 May 2022
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