IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 0021549/2021

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
(4)	DATE: 17 JULY 2023
(5)	SIGNATURE: ***ML SENYATSI***

In the matter between:

KREETIV COMMUNICATION CC RESPONDENT/PLAINTIFF

And

ANDREW JAMES HARRINGTON N.O. FIRST APPLICANT/DEFENDANT

MARIUS HOFF MULLER N.O. SECOND APPLICANT/DEFENDANT

JOHN RUSSEL MACKEY N.O. THIRD APPLICANT/DEFENDANT

INGE FRANCES PICK N.O. FOURTH APPLICANT/DEFENDANT

In their capacities as the duly appointed

Trustees for the time being of **VUNANI**

PROPERTY INVESTMENT TRUST IT

No**: 6363/2006**

KUPER LEGH PROPERTY FIFTH APPLICANT / DEFENDANT

MANAGERS (PTY) LTD

JUDGMENT

SENYATSI J

[1] This is an application for leave to a file supplementary affidavit to the extent that the applicants (defendants) intend to introduce the annexures referred to in the answering affidavit in the main application and for security of costs of R500 000 to be put up by the respondent (the plaintiff in the main case). The leave to introduce the annexures is not opposed. The application for security for costs is brought in terms of Rule 47(1) as the respondent is not trading and has admitted that it has no assets. For convenience's sake the parties would be referred to as in the main case.

[2] The plaintiff opposes the application on the ground that if the application is sustained, it would be denied its constitutional right of access to court. It contends that the amount sought to be put up as security is not just and equitable in the circumstances and that although it is an impecunious corporation, it is a registered South African close corporation and that its action is not *mala fides*, vexatious and/or frivolous. Consequently, it argues, it does not need to put up any security for costs.

[3] The plaintiff, who admitted that it has not traded since August 2020 and that its net asset value is zero, sued the defendants in their representative capacities for what it calls loss of value which it alleges is wrongful and negligent. The second claim is premised on the alleged defamation. It claims over R11 million for loss of value and R300 000 for defamation. In response to Rule 35, the plaintiff also stated that Nedbank Ltd was its sole client but does not state how its relationship came to an end.

[4] The basis for the alleged loss of value of the business is based on the ground that two investors withdrew from the transaction it was busy with to sell 20 % equity said to be worth R 1 million as each investor was prepared to acquire 10% equity in the plaintiff. The plaintiff, in its particulars of claim, states that the notification which was made during July 2020 in the credit bureau caused the two investors to withdraw from the transaction as a direct result of the adverse report concerning its alleged failure to pay rental for March, April, May and June 2020.

[5] The plaintiff avers that because of the incorrect notification and publication of an adverse report in TPN, it failed to pay Vunani Property Management. The publication was allegedly made by Kuper Legh Property Management, the fifth defendant who was the agent of Vunani Property Management. The defendants have been cited as its trustees and the fifth defendant was cited in its capacity as the agent of the other defendants.

[6] The plaintiff states in its particulars of claim that it is impecunious because it ceased its operations during August 2020 and by February 2021 its nett asset value was nil. Following the exchange of pleadings and upon admission that the plaintiff has zero nett asset value because, *inter alia*, it has become impecunious and had only one client, the defendants sought

the security for costs as stated above as they contend that the claims are *mala fide*, vexatious and frivolous with no prospect of success.

[7] The defence raised on behalf of the plaintiff by its sole shareholder is that the plaintiff should not be required to put up security as it is impecunious; the plaintiff would be deprived of its constitutional right to access to courts if the plaintiff is ordered to pay for costs and that it would be the end of the matter.

[8] The issue for determination is whether the defendants are entitled, under the circumstances, to be provided with security for costs. Rule 47(1) states that:

> "(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."

[9] Furthermore, the old Companies Act, 1973 had a provision in section 13 which states that:

> "Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given."

[10] A similar provision is found in section 8 of the Close Corporation Act No: 69 of 1984 ("the Act") which provides that:

> "When a corporation in any legal proceedings is a plaintiff or applicant or brings a counterclaim or counter application, the court concerned may at any time during the proceedings if it appears that there is a reason to believe that the corporation or, if it is being wound up, the liquidator thereof, will it 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, the security is given."

[11] There is no comparable section in the new Companies Act 71 of 2008 (the new Act). However, our courts have made pronouncement on this point after the promulgation of the new Act.[1] The requirement for security for costs can therefore in appropriate circumstances be ordered.

[12] The onus is on the party seeking security for costs to convince the Court that security should be ordered.[2] Rule 47 governs the procedure to be followed in case a party in the legal proceedings seeks the Court to order that security for costs be provided. In Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd [3] it was held as follows regarding security for costs:

> "A similar provision was to be found in s 13 of the Companies Act 61 of 1973, which read:

[1] See Hiatas & Others v Port Wild Props 12 (Pty) Ltd 2011 (5) SA 562 (GSJ); Ngwenda Gold (Pty) Ltd & Another v Precious Prospect Trading 80 (Pty) Ltd unreported case number 2011/31664 (GSJ); Genesis on Fairmount Joint Venture v KNS Construction (Pty) Ltd & Others unreported judgment, 28 November 2012, case number 2012/36204, SGJ; Siemens Telecommunications (Pty) Ltd v Datagenics (Pty) Ltd 2013 (1) SA 65 (GNP); Hennie Lambrechts Architects v Bombenero Investments (Pty) Ltd 2013 (2) SA 477 (FB); Maigret (Pty) Ltd (in liquidation) v Command Holdings Ltd & Another 2013 (2) SA 481 (WCC)
[2] See Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) at para 10.
[3] Supra

> 'Where a company or other body corporate is plaintiff in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.'

[9] Section 216 (and its successor, s13, which mirrors provisions in certain other Commonwealth jurisdictions),[4] meant that the issue under the common law whether an impecunious *incola* company can be required to give security for the costs of proceedings instituted by it, was left unresolved. The object of s13 was to protect persons against liability for costs in regard to any action instituted by bankrupt companies.[5] Its main purpose was to ensure that companies, who were unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, did not institute litigation in circumstances where they had no prospects of success thus causing their opponents unnecessary and irrecoverable expenses. As is apparent from s13, if a company ordered to provide security for costs was unable to do so, it could have been prevented from proceeding with its action. The section, like its predecessor s 216 of the 1926 Act, vested a court with a discretion to order a company that had instituted an action to furnish security for costs

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[4] See eg s 726(1) of the United Kingdom Companies Act, which provides:

'(1) Where in England and Wales a limited company is plaintiff in an action or other legal proceedings, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.'

[5] Hudson & Son v London Trading Company Ltd 1930 WLD 288 at 291; D R Harms Civil Procedure in the Superior Courts (2014) para B47.16.

if there was reason to believe that it would be unable to pay the costs of its opponent.

[10] The phrase 'if it appears that there is reason to believe' in s 13 placed a much lighter burden of proof on an applicant for security.[6] In terms of s 13, a two-stage enquiry was required. At the initial stage, and in order to discharge the onus, the applicant for security had to adduce facts on which the court could conclude that there was reason to believe that the plaintiff would be unable to satisfy an adverse costs order. If the court could not come to such a conclusion that was the end of the matter and the application was bound to be refused. However, if the court was satisfied that a case had been made out, it had, at the second stage, to decide, in the exercise of its discretion, whether or not to order the company to furnish security. (See MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd 2007 (6) SA 620 (SCA) at 622H)." The passages quoted restate the history behind the need to order security for costs in appropriate circumstances.

[13] Whether or not security for costs should be ordered by court depends on the facts of each case and in the discretion of Court.[7] The Court has inherent jurisdiction to order a litigant to give security for the costs of the other side when it is satisfied that the litigation is vexatious.[8] Thus, Curlewis CJ (four other judges concurring) in the Appellate Division said the following:

> "In Western Assurance Co v Caldwell's Trustee 1918 AD 262 this Court laid down that a Court of law had inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the process

[6] D R Harms op cit.
[7] Western Assurance Co v Caldwell's Trustee 1918 AD 262.
[8] Ecker v Dean 1937 AD 254. For the meaning of 'vexatious action' outside the parameters of the Vexatious Proceedings Act 3 of 1956, see Fitchet v Fitchet 1987 (1) SA 450 (E) at 454B–C.

> of the Court; one of the ways of doing so is by ordering the vexatious litigant to give security for the costs of the other side, and I know of no reason why the court below should not have, and exercise, such an inherent jurisdiction.''[9]

[14] The power of the Court to order security for costs on the basis of vexatiousness is, however, exercised sparingly and only in exceptional circumstances.[10] In Fusion Properties 233 CC v Stellenbosch Municipality[11] it was held that:

> "As already mentioned, that Fusion has no assets whatsoever and indeed is impecunious, is uncontentious in these proceedings. And this is precisely what prompted the municipality to demand security for costs from Fusion by invoking s 8 of the Close Corporations Act. Section 8 has already been quoted in paragraph 13 above.
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> [20] The procedure for security and the powers of the court are regulated by Uniform rules 47(1) and 47(4), which provide:
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> '(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.
>
> . . .
>
> (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 fit.'

[9] Ecker v Dean 1937 AD 254 at 259. See also Ecker v Dean 1938 AD 102; Ecker v Dean 1940 AD 206; Caluza v Minister of Justice 1969 (1) SA 251 (N); Fitchet v Fitchet 1987 (1) SA 450 (E) at 453J–454A.
[10] Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 274; Ecker v Dean 1938 AD 102 at 111. See also Crest Enterprises (Pty) Ltd v Barnett & Schlosberg 1986 (4) SA 19 (C) at 22B–D .
[11] (932/2010[2021] ZASCA 10 (29 January 2021)

The high court rightly observed that rules 47(1) and 47(4) cater for the procedure to be adopted whenever security for costs is required and do not themselves deal with matters of substance.[12]

[21] Section 8 of the Close Corporations Act, in substance, mirrors s 13 of the Companies Act 61 of 1973.[13] Section 13 did not find its way into the 2008 Companies Act when the 1973 Companies Act was repealed and substituted by the former. Nevertheless, counsel agreed that the jurisprudence that had developed over the years in regard to the interpretation of s 13 still offers useful guidance and insights in ascertaining the object and purpose to which s 8 of the Close Corporations Act is directed."

The common feature of the passages quoted in this judgment reveals that the demand for security for costs is part of our jurisprudence.

[15] This is so, despite the provisions of section 34 of our Constitution with regards to the right to have a matter adjudicated at our Courts. The court seized with the application for security for costs and should perform a balancing act of ensuring that access to justice is not denied purely on the basis of the inability to provide security for costs.[14] It is for this reason that the court's discretion ought not to be fettered by preconceived points of departure.[15]It is important in exercising its discretion and balancing the interests of the parties that the Court should not deny justice to any of the parties on the basis of security for costs especially where any of the parties has a good case in the form of either claim or defence. The jurisprudence on security for costs has been developed to root out litigation in cases which are vexatious or frivolous.

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[12] D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket 2002 (6) SA 297 (SCA); [2003] 3 All SA 1 (A) para 9
[13] Section 13 of the Companies Act 61 of 1973
[14] Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1) 1997 (4) SA 908 (W) 919G–H; Wallace v Rooibos Tea Control Board 1989 (1) SA 137 (C) 144B–D.
[15] Cooper NNO v Mutual & Federal Versekeringsmaatskappy Bpk 2002 (2) SA 863 (O) 874B–C.

[16] In coming to a decision as to how it should exercise its discretion to order or refuse security for costs, the Court may take into consideration the nature of the claim and the defence, but the merits of the dispute are almost invariably irrelevant in deciding whether a plaintiff or applicant company should be ordered to furnish security for the costs of the proceedings. [16] In addition to the particular circumstances of the case, the Court considering whether or not security should be ordered should also have regard to considerations of equity and fairness to both parties. It may, in the exercise of its discretion enquire into the conduct of a party which has reduced the other party to penury. [17]

[17] Where it is clear that if the action fails, the company will be unable to pay the costs, there is a duty on the Court to exercise its discretion in favour of the applicant and to order security to be given. [18]The Court is not, however, bound to order security in every case where it is plain that if the action fails, the company will be unable to pay the defendant's costs: the court is entitled to consider the nature of the particular case, although it need not inquire fully into the merits and form an opinion of the plaintiff's prospects of success.[19] The Court will take into consideration the financial position of the company at the time of the application for security, what the position is likely to be if the company loses the action and the nature of the claim. [20] It is entitled to take into account the kind of action brought against the person claiming security in order to decide

[16] ICC Car Importers (Pty) Ltd v A Hartrodt SA (Pty) Ltd 2004 (4) SA 607 (W) 615.
[17] Waste-Tech (Pty) Ltd v Van Zyl and Glanville 2000 (2) SA 400 (SE) at 404C 404G–H.
[18] *Lucerne Asbestos Co Ltd v Becker* 1928 WLD 168. *Aliter* where the applicant alleges that he has a *bona fide* defence which is denied by the respondent. *Ferreira v Arlinders Ltd* 1964 (1) SA 631 (O) at 633D–E).
[19] Highlands North Investment Etc Co (Pty) Ltd v Land Values Ltd 1931 WLD 102 at 105; Trust Bank van Afrika Bpk v Lief 1963 (4) SA 752 (T) at 754–755. See also Fraser v Lampert 1951 (4) SA 110 (T) at 115; Kruger Stores (Pty) Ltd v Kopman 1957 (1) SA 645 (W) at 649; Fedgen Insurance Co Ltd v Border Bag Manufacturing (Pty) Ltd 1995 (4) SA 355 (W).
[20] Trust Bank van Afrika Bpk v Lief 1963 (4) SA 752 (T) at 754–755

whether it is right in all the circumstances to order the company to furnish security.[21]

[18] In the instant case, the plaintiff has admitted that it has ceased trading. It is also evident from the pleadings that its only customer was Nedbank. It ceased its operation during August 2020 and by February 2021, its nett asset value was nil. It alleges that it was not able to conclude investment by selling its equity to two potential shareholders who backed off the deal upon becoming aware of the adverse notification in the credit bureau which was allegedly caused by the defendants.

[19] Having regard to the principles restated above and the facts of this case, I am persuaded that the defendants have discharged the onus to prove that they are entitled to the security for costs. I am further of the view that the claim by the plaintiff has no prospect of success and therefore vexatious. I say so because it is highly unlikely that the adverse notification could have had such a catastrophic impact as to reduce a thriving company to zero. In my view, it can be reasonably inferred from the papers that the company did not have any other asset other than the book debt made up of Nedbank for what it was worth when it still rendered services to it. There is also no evidence on papers as to the size of the business it had with Nedbank and why the relationship came to an end.

[20] The only interested party who probably stands to benefit from the litigation is its sole shareholder. There is no evidence on the papers about any creditor of the plaintiff. Accordingly, it follows that the defendants are entitled to the security for costs as the plaintiff would not be able to meet the costs order should the main case go against it.

[21] Turkstra v Goldberg 1946 TPD 535. See also Beaton v SA Mining Supplies Ltd 1957 (2) SA 436 (W).

ORDER

[21] As a result, the following order is made:

(a) The application for leave to file a supplementary affidavit is granted only to the extent that the respondent intends to introduce the annexures referred to in its answering affidavit in the main application.

(b) No order as to cost is made against the plaintiff in respect of the application for leave to introduce a supplementary affidavit as the application was not opposed.

(c) The respondent (plaintiff in the action) is directed to put up security for costs in the amount of R 500 000.00 (five hundred thousand rand) in the form of a bank guarantee in favor of the applicant or any other form acceptable to the applicants.

(d) The respondent (plaintiff in the main action) is directed to pay the applicants' costs of the application in terms of Uniform Rule 47.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 17 July 2023.

DATE APPLICATION HEARD: 24 April 2023

DATE JUDGMENT HANDED DOWN: 17 July 2023

APPEARANCES

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Counsel for the Respondents: Adv R Bhima

Instructed by: Du Toit Attorneys