REPUBLIC OF SOUTH AFRICA

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

Case Number: 42818/2021

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

31 August 2023 _____
DATE SIGNATURE

In the intervention application between:

JOHANNES JACOBUS HENDRIK STEYN First Applicant

GUNTER DONALD FREYER Second Applicant

In re

SINGLE DESTINATION ENGINEERING (PTY) LTD First Applicant

GUARDIAN INTEGRATED SYSTEMS CC Second Applicant

And

THEO VAN DEN HEEVER N.O. First Respondent
NURJEHAN ABDOOL GAFAAR OMAR N.O. Second Respondent
THEA CHRISTINA LOURENS N.O. Third Respondent
in their capacity as the joint liquidators
of Skincon Calibrate (Pty) (Ltd) (in liquidation)

JUDGMENT

MIA, J

[1] The respondents in the application for security for costs are applicants in an intervention application. They appealed against the judgment and order delivered on 12 April 2023 by this court that upheld an application ordering them to provide security for costs. The parties are referred to herein as they appeared in the application for security for costs. The respondents' appeal is based on the court having erred both in fact and in law. The grounds of appeal were set out extensively in a long list and will not be repeated. The applicants opposed the application.

[2] Counsel filed heads of argument and I am indebted to counsel in view of the heads of argument having been of assistance herein.

[3] Counsel appearing for the respondents argued that the court exercised a strict and narrow discretion in determining the security for costs. He argued essentially that primarily there were two factors which the court over-emphasised whilst not having regard to other factors which ought to have and which did not carry significant weight with the court. In furtherance of this submission, it was argued that the court considered and placed more weight on the respondents' positions as *peregrini* and that they have funds available to cover the security for costs. Furthermore, counsel continued the court did not have regard to the application to intervene where the respondents raised factual disputes.

[4] In the application to intervene the respondents averred that the applicants misled the court regarding the urgency and the reasons for seeking the information. They declared they required documents to prove their claims at a meeting of creditors when this was not the position. They also indicated that they required the information urgently whilst this was not so. They did not

seek the information for themselves but for a different litigant proceeding against the company in liquidation. In that application, the issues were to be determined in favour of the respondents if they were granted leave to join and they would be the respondents in the application. Counsel thus argued that it would not be appropriate in the present matter to grant costs against them as the respondents.

[5] A further oversight that counsel raised was that the applicant relied on the decision in *Den Norske Bank ASA v MV Ocean King, Her Owners and all Other Parties interested in her(Sheriff) for the District of the Cape and Others Intervening) (No 1)*[1]*,* which counsel argued was relevant and appeared not to have been considered by the court because it was not mentioned in the judgment and was not distinguished by the court as not being applicable. It was also argued that the court did not agree with the *MV Ocean King* decision where the facts were similar to the present matter. Counsel argued that in that matter the court found that the court in the *MV Ocean* case did not require the respondents to file security for costs as they were respondents in the intervention application. Counsel did point out that both parties were foreign litigants in the *MV Ocean King* case. Counsel submitted, however, that if the court were not persuaded on the legal issue then leave was sought that the appeal to be determined by a Full Court of this Division

[6] On the facts, it was argued that it appeared that the court assumed there was a judgment against the respondents and there may have been confusion regarding the identity of the litigants. The respondents, the directors, were to be distinguished from the company Skincon Calibrate (Pty) (Ltd) (in liquidation). The judgment against the company in liquidation was in any event obtained in error it was argued. The identities of the company in liquidation and the respondents who have the funds to cover any costs ordered against them are to be differentiated. The two identities ought not to be conflated. The factors mentioned in paragraph 16 of the court's judgment namely the domicile of the respondents should not have been accorded as much weight as appears to have been accorded, counsel submitted.

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[1] *Den Norske Bank ASA v MV Ocean King, Her Owners and all Other Parties interested in her(Sheriff) for the District of the Cape and Others Intervening) (No 1)*1997(4) SA 345 (C)

[7] A further ground raised by counsel was based on *Mystic River Investments 45 (Pty) Ltd & Another v Zayeed Paruk Inc & Others*[2]*.* Counsel placed reliance on the *Mystic* decision as authority for their view that the applicants were not as a matter of course entitled to security for costs in view of the Supreme Court of Appeal's finding in *Mystic River*. The Supreme Court of Appeal's decision in *Mystic River*, it was argued was the authority for this court to exercise its discretion to grant an order for security for costs after an investigation into the circumstances where the equity and fairness to both litigants dictate that such an order be made. The Court in *Mystic River* held that each case must be decided upon consideration of all relevant circumstances and particularly as was the respondents' concern without adopting a predisposition either in favour or against granting security for costs.

[8] This counsel submitted did not imply that a court would exercise its discretion in favour of peregrine sparingly which he argued the court did in the present matter. In *Shepstone & Wylie* the court noted 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 a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security*"*

[9] It was submitted that this court held a predisposition favouring security for costs and the applicants were not entitled to such security for costs. Counsel argued that the law did not support the applicant being granted security for costs.

[10] A further ground was raised in relation to the court's acceptance of the applicant's version of the that the respondents fled to Australia before the project commenced. It was argued that the court's displeasure was evident in that it granted a fixed amount for security for costs whilst there was no agreement in respect of the amount. Counsel submitted that the fixed amount could only be made an order of court if there was consensus. He argued there

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[2] *Mystic River Investments 45 (Pty) Ltd & Another v Zayeed Paruk Inc & Others* 2023(4) SA 500 (SCA)

was no consensus in the present matter and it was appropriate for the registrar to determine the security. This it was argued supported the view that there was an overemphasis of certain factors in comparison to others. In view thereof, it was submitted that this deserved the attention of the Supreme Court of Appeal.

[11] In response, counsel for the applicants disputed that there was an absence of consensus. He argued that the respondents' response to the first Rule 47 notice on 17 January 2022 reflected that they contested liability or obligation to furnish security for costs. Whilst the rule permitted the respondents to contest liability and quantum, they only contested their liability and not the quantum. Thus counsel submitted, the respondents under oath and on their own version, did not contest the quantum where the amount was stated as fair and reasonable and the computation was set out by the applicants. Moreover, the submission continued that, the respondents are the applicants in the application for intervention. They cannot be considered as respondents until they are joined in the intervention application, thus the submission that they are respondents and should be treated as respondents is clearly incorrect it was argued.

[12] In response to the submission relating to the court's predisposition, counsel for the applicants submitted that having regard to *Mystic River* the consideration is whether the respondents will fail in the intervention application where they are the applicants and seek leave to intervene. Whilst they may have funds those funds are in Australia, and it is effectively impossible and prohibitively expensive to pursue a cost order in Australia. The test according to *Mystic River* he reiterated, was that the decision was in the court's discretion after investigating the facts. Counsel submitted a proper interpretation of *Mystic River* having regard to *Shepstone & Wylie* demonstrated that there was no change in the test and the principles applicable had not been departed from. The SCA indicated in *Mystic River* that it did not disagree with the previous decisions namely *Shepstone & Wylie, Exploitatie* and *Magida.*

[13] He continued to argue that the balancing of factors exercise that required a discretion did not mean that the court was not permitted to place more emphasis on one factor when all the factors had been considered. In the exercise of the discretion, it was not a simple exercise of adding factors on either side of a scale so as to tip the scale but required a consideration of the factors in the exercise of the discretion. The suggestion that a factor could not enjoy greater consideration was untenable. Moreover, he argued that this court should consider and compare the view expressed in *Exploitatie* where at para 18 the Court indicated:

> "The appellants sought to avoid the general rule of practice that a *peregrinus* should provide security for an *incola*'s costs by relying on the judgment in this court in *Magida v Minister of Police*, in which an impecunious *peregrinus* was excused from providing security, and making the bald and unsubstantiated averment that the appellants —
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> '. . . will be unable to furnish security for costs, due to the (respondent) failing to honour his debts towards them the (appellants) are hardly in a position to finance their own costs . . .'.

[14] Additionally, counsel submitted that *Mystic River* restated the principles applicable that a *peregrine* pay security for the costs of an *incola* after considering the relevant facts. He argued that this court did consider all relevant facts. He argued that this court did not display a predisposition or bias as suggested by the respondents and argued that bias should lightly be attributed to a court.

[15] Regarding the suggested bias, he referred to the decision in *Benert v ABSA Bank Ltd* [3], where the Constitutional Court found that where bias was alleged 'there is a presumption of impartiality which is implicit and that judges have taken an oath office to administer justice impartially without fear, favour or prejudice in accordance with the law and the Constitution'. Moreover, 'judicial officers through their training have the ability to disabuse their minds of any irrelevant personal beliefs and predispositions'. Where the counsel for the

[3] *Benert v ABSA Bank Ltd* 2011(3) SA 92(CC)

respondents suggests that the court was biased in its application of its discretion counsel for the applicant submitted that it was incorrect.

[16] Counsel for the applicants argued furthermore, that the respondents were wrong in arguing that the *Plascon Evans* Rule[4] was applicable in the interlocutory application for security for costs which did not apply to the facts. Whilst it may have been applicable in the intervention application, the facts that were deposed to in that application could not determine the outcome of the application for security for costs. Moreover, that application was not before this court for determination and the factual disputes in the intervention application cannot be determined by this court. The allegations that were purported to be false are in the main application and have nothing to do with the application for security for costs that the present applicants seek. To the extent that the *Plascon Evans* Rule applies to factual disputes, it was submitted the court could only consider the application for security for costs as the court was not determining the application for intervention. The respondents have not been joined and are not respondents in the main application.

[17] The respondents may be granted leave to appeal where they have satisfied the court that the appeal would have reasonable prospects of success or there is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration in terms of section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013.[5] In considering whether the respondents have met the standard I have regard to the submissions above.

[18] The application for intervention is not before this court for determination and whilst this court is aware of the application and its contents, the determination has not been made and there has been no intervention granted as yet. It is premature to argue that the respondents before this court in the application for security are respondents in the main application which has not been determined and on the respondents' version has factual disputes. I do not

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[4] *Plascon.-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 523 A at 634H-635B
[5] Section 17

venture into the main application to determine it and consider its contents applicable only to the extent it may be applicable with regard to the security for costs.

[19] I have had regard to the Supreme Court of Appeal's application of what are the relevant facts for consideration in *Mystic River.* The Court in its analysis in *Mystic River* referred to the test in *Shepstone & Wylie* and had regard to the balancing exercise pertaining to the convenience of recovering costs from a litigant in a foreign jurisdiction and the inconvenience, delay and additional costs it would entail.

[20] The Court in *Mystic River* clarified that it indicated in *Exploitatie Beleggingsmaatschappij Argonauten 11BV and another v Honig*[6] that a peregrine should provide security for an incola's costs, however it did not intend to depart from the settled principles in *Magida v Minister of Police*[7] and *Shepstone & Wylie and Others v Geyser NO* [8]. At paragraph [12] of *Mystic River* the Court said:

> "The court in *Shepstone & Wylie* left open the question as to how a discretion to order security for costs should be classified. This question has since been settled by the Constitutional Court in *Giddey NO v JC Barnard & Partners (Giddey NO*), where it set out the following guidelines to determine the extent of the appellate court's power to substitute its own determination for that of the High Court. The court held that:
> '[The court of first instance] is best placed to make an assessment of the relevant facts and correct legal principles, and it would not be appropriate for an appellate court to interfere with that decision as long as it is judicially made on the basis of the correct facts and legal principles. If the court takes into account irrelevant considerations or bases the exercise of its discretion on wrong legal principles, its judgment may be overturned on appeal. Beyond that, however, the decision of the court of first instance will be unassailable.'"

[21] In *Exploitatie*[9] the Court held:

> "if their financial status was relevant to the question of security it was incumbent upon them to take the court into their confidence and make

[6] *Exploitatie Beleggingsmaatschappij Argonauten 11BV and another v Honig* [2012] 2 All SA 22 SCA
[7] *Magida v Minister of Police* 1987(1) SA 1 (A)
[8] *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA)
[9] *Exploitatieen Beleggingsmaatschppij Argonauten 11BV and another v Honig* [2012] 2 All SA 22 SCA

> sufficient disclosure of their assets and liabilities to enable the court to make a proper assessment thereof in the exercise of its discretion. That was not done. In any event, the fact that the respondent would have to proceed against the appellants abroad if he obtained a costs order in his favour with the associated uncertainty and inconvenience that would entail, was one of the fundamental reasons a peregrinus should provide security"

[22] The principles set out in *Shepstone and Wylie* indicate the court preferred the approach in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [10] where the Court said:

> '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 the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.'

[23] When the ratio in *Shepstone & Wylie* is applied to the present matter the respondents do not complain that they are able to pay the costs. They indicate they have sufficient funds, albeit in Australia. In considering the factors, namely the applicants having to recover costs from the respondents seeking to intervene who reside in a foreign jurisdiction, the inconvenience, delay and additional costs it would entail, the aforementioned factors which I considered are all referenced in *Shepstone & Wylie.* The court indicates in *Mystic River* that "*Fairness and equity dictate that the second appellant should be ordered to provide security for costs, as he involved himself in the matter in his personal capacity so that when the moneys due to Mystic River are returned to it, he could claim his 50% share of the profit. He could have simply withdrawn from the matter in order to defeat the application for security if he was indeed litigating solely for the benefit of Mystic River."* The facts in the application for security for costs before me are not distinguishable from *Mystic River* in this aspect. On the contrary, in the present matter where the respondents seek leave to intervene, they mirror the facts in *Mystic River* where they similarly seek to join the proceedings. Similarly fairness and equity

[10] [1995] 3 All ER 534 (CA) at 540*a -b*

dictate that they be ordered to pay security for costs when applying the principle in *Sheptstone & Wylie*.

[24] The respondents have not demonstrated that this court has taken account of irrelevant considerations or bases or determined the matter on the wrong legal principles such that it may be overturned on appeal.

[25] I turn to the issue of costs. The applicants sought the costs of two counsel. The respondents argued that it was not necessary. Whilst a junior counsel argued the matter initially, I am of the view that senior counsel was required in this matter.

[26] For the reasons above I grant the following order:

1. The application for leave to appeal is dismissed with costs which shall include the costs of two counsel.

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SC MIA

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant:	Adv M.P Van Der Merwe SC Instructed by Tim Du Toit & Co Inc
For the Respondent:	Adv. N.G.D Maritz SC & Adv W.K.C Pretsch Instructed by Primerio Law Inc
Heard:	14 August 2023
Delivered:	31 August 2023