REPUBLIC OF SOUTH AFRICA

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

Case Number: **51107/2021**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
07 MAY 2024	**ML SENYATSI**
DATE	SIGNATURE

In the matter between:

REDPATH MINING (SOUTH AFRICA) (PTY) LTD Applicant

and

SIYAKHULA SONKE EMPOWERMENT CORPORATION (PTY) LTD First Respondent

FREDERICK SAM ARENDSE Second Respondent

REDPATH AFRICA LTD Third Respondent

In re:

SIYAKHULA SONKE EMPOWERMENT CORPORATION (PTY) LTD First Plaintiff

FREDERICK SAM ARENDSE Second Plaintiff

and

REDPATH MINING (SOUTH AFRICA) (PTY) LTD First Defendant

REDPATH AFRICA LTD Second Defendant

JUDGMENT

SENYATSI, J

Introduction

[1] This is an opposed application for security for costs related to the action proceedings issued by Siyakhula Sonke Empowerment ("SSC") against Redpath Mining (South Africa) (Pty) Ltd ("RMSA") and Redpath Africa Ltd **("**RAL**")** in the main action. RMSA also seeks that the action be stayed until the security is furnished and that if the security for costs is not furnished within 15 days of the order, that the main action be dismissed with costs.

[2] In the main action, the plaintiffs ("respondents") sue the defendants and the first defendant (the applicant in this application), seeks the security for costs.

[3] In their claim A, the respondents seek the defendants in the main action to render proper financial statements and other related information as averred in the particulars of claim in the main action, of RMSA from 2007 until the date of the order of court. The basis of claim A is that the directors nominated by SSC on the board of RMSA were excluded from day to day management of RMSA with the results that management decisions by the board of RMSA were in most cases taken to the exclusion of the SSC directors with the results that RMSA always operated at a net loss despite the alleged projects that were secured as a results of the efforts of one of the SSC nominated directors for RMSA. The respondents contend that over a number of years RMSA were involved in an unlawful conduct by inter alia violating the BEE Code and were allegedly involved the process of asset stripping of RMSA for the benefit of the applicant and its eventual shareholder in Canada; the alleged violation of the BEE Code and fronting.

[4] In the alternative to Claim A, the respondents aver in the main action that they have been discriminated upon by the conduct of the defendants as averred in the particulars of claim and seek the orders in terms of section 21(2) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* ("Equality Act").[1]

[5] In regards to Claim B in the main action, the respondents allege that between February 2021 and August 2021, following several attempts to engage RMSA and its ultimate shareholders, along with the B-BBEE Commission, SSC addressed letters to certain entities that engaged with

[1] 4 of 2000.

RMSA, including those entities that contracted with RMSA on the basis of the truth and correctness of RMSA's BEE status, compliance and desire to achieve the transformation objectives, highlighting *inter alia* that RMSA had engaged in the unlawful conduct as alleged in Claim A.

[6] The respondents averred in their particulars of claim in the main action that RMSA alleged in its letter of demand that the conduct by the respondents was in violation of the written shareholders agreement between the parties as a results of which it was enforcing clause 12 of the shareholders agreement and that the offer for the entire shareholding in RMSA by SSC was deemed to be valued at a nominal value of R1.00 and that SSC's duly authorised representative was required to sign the transfer forms to effect the transfer of shares in accordance with the provisions of clause 12 of the shareholders agreement.

[7] The respondents contend in the main action that RMSA is pursuing the deemed offer process in clause 12 of the shareholders agreement in circumstances where SSC has not breached the shareholders agreement and the jurisdictional conditions foe invoking the process did not arise. They contend that RMSA has acted in breach of the shareholders agreement by so doing and despite demand, has failed to remedy and/or refused to remedy despite demand.

[8] After filing notice of intention to defend in the main action as well as notice to except to the particulars of claim by the first defendant in the main action, the applicant (first defendant in the main action), filed notice for security for costs in the sum of R 2.5 million.

[9] The bases of its demand for security for costs by RMSA are alleged as follows: -

a. SSC and Mr. Arendse ("Arendse") have commenced on various proceedings against RMSA for various reliefs. It avers that for every matter where there has been a final decision or judgment, SSC and Arendse have failed to achieve substantive relief, and the decision maker or Court has on most of those occasions remarked that SSC is misusing the procedure and cannot appear capable of formulating or substantiating the claims advanced in those proceedings;

b. RMSA contends that the action proceedings is of the same ilk. It contends that those alternatives advances the same allegations that SSC and Arendse have sought to peddle in those alternatives for a and with the same sweeping and unparticularised allegations that have been repeatedly dismissed. RMSA contends that the action is frivolous and vexatious and bound to inevitably been dismissed, which, so contends RMSA furthermore, that alone would warrant an order requiring SSC to put up security for costs;

c. RMSA contends that SSC and Arendse have in other litigations refused to pay RMSA's costs order, leaving RMSA with no option to issue a writ, which had been executed at the time of the launch of the security for costs application and a *nulla bona* had been returned by the sheriff. RMSA contends that SSC is not litigating

in good faith and that it is unlikely that RMSA will be able to recover its costs if it obtains a costs award in its favour in the action;

d. RMSA contends that if the trial runs in the action proceedings, the costs will be significant. It argues furthermore that assuming that the exceptions are dismissed or SSC is granted leave to amend and files non-expiable pleadings, on the broad ambit currently pleaded in the main action by SSC any trial is likely to run for many weeks. RMSA contends that it should be protected from the prospect that it will have to incur those significant costs against a litigant that has a history of litigating vexatiously, that does not comply with a court order requiring it to pay costs and that appears not to have the financial wherewithal to do so.

e. RMSA contends furthermore that SSC lodged a complaint against RMSA with the Broad-Based Black Economic Empower Commission (B-BBEE Commission). On 21 July 2021, the B-BBEE Commission responded to its complaint to indicate its view that SSC's complaints were shareholder and director disputes and not appropriate to be addressed through the B-BBEE Commission. SSC was invited by the B-BBEE Commission to submit any information or evidence that it might have to substantiate its

complaint and another complaint was lodged by SSC with the additional allegations.

f. SSC tried to interdict the meeting of shareholders on an urgent basis without success as the meeting had taken place;

g. An application for leave to appeal the finding of the court was refused and the petition to the Supreme Court of Appeal was also refused with costs.

[10] The respondents oppose the application and contend that their action is neither vexatious nor frivolous. They contend that the security for costs is an attempt to avoid dealing with the alleged unlawful conduct by RMSA which the respondents claim in their action proceedings.

[11] SSC contends that it holds a number of investments in various companies and that the suggestion that it is impecunious has no merit. It contends that in any event, the order sought is against it only and not Arendse who has joined as a party in the action and that it has not been suggested that Arendse will not meet the cost order should same be awarded to RMSA in the action proceedings. SSC contends that on that basis alone, the application should be dismissed.

[12] Furthermore, SSC argues that the notion that it engaged RMSA in a volley of proceedings as a way to intermediate it into submission to reinstate the monthly payment is without merit. It contends its interdict application about the second rights offer meeting was not dismissed on merits but on a pre-liminary point of non-joinder of the NPC which had become a shareholder in RMSA. SSC furthermore confirms that the leave to appeal

the decision was refused and that its petition to the Supreme Court of Appeal was also refused, not because the action was frivolous. Consequently, so goes the argument, even if it is found that all the averments by RMSA are correct in so far as SSC is concerned, RMSA has Arendse to deal with and not security for costs has been sought against him. On that ground, the argument goes, the application should be dismissed.

Issues for Determination

[13] The issue to be determined to consider the application for security for costs is whether the action instituted by the respondents is vexatious and frivolous.

Legal Principles

[14] Our courts often face the application to order a litigant to provide security for costs. The court has a discretion to exercise and must ensure that the right of access to court, which is Constitutionally guaranteed,[2] is balanced with the right of legitimate litigants of access to courts against the viability and credibility of the administration of justice, which is perverted by parties that misuse judicial proceedings.[3]

[2] Section 34 of the Constitution of the Republic of South Africa of 1996
[3] *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC) para 33.

[15] Our courts have also held that the right to access to courts requires a balance between allowing a plaintiff access to court whilst protecting the defendant against the prospect of an irrecoverable bill for legal costs.[4]

[16] In *Beinash and Another v Ernst & Young and Others*,[5] the Constitutional Court said the following regarding the balance between the right of access to courts and the need to ensure that there is no abuse of the courts process:

> "The right of access to courts protected under s 34 is of cardinal importance for the adjudication of justiciable disputes. When regard is had to the nature of the right in terms of s 36(1)(a), there can surely be no dispute that the right of access to court is by nature a right that requires active protection. However, a restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right of access for those with meritorious disputes. Indeed, as the respondents argued, the Court is under a constitutional duty to protect bona fide litigants, the processes of the Courts and the administration of justice against vexatious proceedings."

[17] The power of the courts to order that security for costs should be furnished should be exercised sparingly and in exceptional circumstances.[6] The party seeking costs bears the onus of persuading the court that security should be ordered.[7] This requires establishing that the litigation has been brought recklessly, vexatiously or is otherwise an abuse of the process of the court.[8] Once the onus is discharged, the court has a discretion to exercise on whether to grant the security of costs order.

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[4] *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) para 13.
[5] 1999 (2) SA 116 (CC) para 17.
[6] *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) para 14; *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 274.
[7] *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) para 14.
[8] *Ramsamy NO and Others v Maarman NO and Another* 2002 (6) SA 159 (C) at 173G.

[18] In *Lawyers for Human Rights v Minister in the Presidency*,[9] the Constitutional Court said the following on the meaning of vexatious and frivolous litigation:

> "What is "vexatious"? In Bisset the Court said this was litigation that was "frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant". And a frivolous complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious."

[19] By the same token, a matter may start as bona fide and end up as vexatious. In *Fisheries Development Corporation of SA Ltd v Jorgensen and Another*; *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others*,[10] the Court said the following:

> "In its legal sense vexatious means frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant (Shorter Oxford Dictionary). Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; abuse, connotes a mis-use, an improper use, a use mala fide, a use for an ulterior motive". An action is also vexatious and an abuse of process "if it is obviously unsustainable".[11]

[20] In security for costs proceedings – as opposed to stay proceedings, which are more stringent- the application need show only on a preponderance of

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[9] 2017 (1) SA 645 (CC) para 19.
[10] 1979 (3) SA 1331 (W) at 1339E-F adopted in *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) para 17.
[11] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D-E followed with approval in *Boost Sports Africa (Pty) Ltd v South Africa Breweries (Pty) Ltd* 2015(5) SA 38 (SCA) para 18.

probabilities that the main proceedings are obviously unsustainable. This does not require a detailed investigation of the merits or a close investigation of the facts. The court needs not resolve the underlying dispute but make an assessment of the prospects given the nature of the dispute in each case.[12]

[21] The court has a discretion, in which it will consider an open-ended list of factors including:

a. the nature of the claim;
b. the nature of the position of the party at the time of the application for security;
c. the probable financial position of the party if it were to lose the litigation and
d. the prospects of the claim.

[22] Once an applicant for security has established the other party's inability or reluctance to pay costs, then it is for the party opposing the security to candidly set out its financial position. It must explain whether it or cannot proceed with the litigation if the security is awarded[13] and disclose not only whether it can provide such security from its own resources but also from the resources from other parties prepared to finance the litigation, such as shareholders or related parties in companies.[14] This is because companies pose a special danger – their shareholders and directors can fund the

[12] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) paras 18-19; *Golden International Navigation SA v Zeba Maritime Co Ltd*; *Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C) para 2; *Zietsman v Electronic Media Network Ltd and Others* 2008 (4) SA 1 (SCA) para 21.
[13] *Exploitatie en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig* 2012 (1) SA 247 (SCA) para 18.
[14] *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) paras 25-26; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) para 20;

litigation and use the company as a cat's paw, but hide behind the corporate entity when an adverse costs order is subsequently made.[15]

Application of Principles to the Facts and Reasons

[23] It has been submitted on behalf of the respondents that there is no basis for the application for security for cost because RMSA has not shown that the litigation is vexatious and frivolous. I do not agree with the contention. Once a decision had been made to withhold the monthly payments that RMSA was making to SSC following the legal advice that the payment would be regarded as distribution, that was the beginning of various tactics adopted by SSC to force a change of mind by RMSA on the monthly payment. Instead of suing for payment, SSC, through Arendse, engaged itself in various steps which compromised Arendse as a director of RMSA.

[24] The steps taken by SSC and Arendse are well documented and the record thereof is part of this application. I need not repeat what is common cause in so far as the steps which involved letters to various parties including the Canadian based shareholders of RMSA and previous litigation proceedings are concerned. Arendse had made it clear from his conduct as a director of both SSC and RMSA, that for as long as the monthly payment is not re-instated, he would make it difficult for RMSA to do business in the Republic. Those steps, in my view, are not intended to assert SSC's rights, but are embarked upon for an ulterior purpose, which is force RMSA to balk by reversing its decision on monthly repayment.

[25] I hold the view expressed above because, since 2007 when the BEE transaction was signed and Arendse became a director and SSC was

[15] Ibid.

receiving monthly payment, there has never been any record brought before this court that the issues raised in the action proceedings were in fact raised at various board meetings. As I see it the attempts through an action proceeding to call for records that go as far back as 2007 from RMSA when Arendse was a director of the latter, is designed to embarrass RMSA and by its nature, including other failed litigious steps, amount to vexatious and frivolous litigation by SSC.

[26] Consequently, I am of the view that the applicant has succeeded to discharge the onus that the underlying action is vexatious and frivolous. There is therefore no prospect of success in the action proceedings because, as I see it, SSC's cause of action by insisting on having a record that spans almost two decades when it was ably represented on the board of RMSA by it two nominated directors smacks of abuse of court process with no prospect of success.

[27] With regards to whether SSC is an *incola* and the fear that it may not be able to pay the costs should it lose the underlying action, it has been submitted to on its behalf that it holds investments in various investments portfolios worth an estimated R 52 million. SSC has not been candid to provide evidence in support of its claim. Unlike RMSA which has provided this court with the full record of all the letters, court judgments that went against SSC, no such information was provided by SSC for its claimed R 52 million worth of investments. One would have expected its audited financial statements in support of the claimed R 52 million worth of investments showing the group performance of each portfolio. This SSC has failed to do. Accordingly, its claim remains just a claim. It follows therefore that the applicant is at the risk of not having its legal cost order paid should it succeed to defend the underlying claim.

F. Order

[28] The following order is made:

a. The first respondent, being the plaintiff in the underlying claim under the case number of this application, is directed to furnish security for costs in favour of the applicant in an amount to be determined by the Registrar within 15 days from the date of such determination;

b. The action proceedings is hereby stayed until the aforesaid security has been furnished by the first respondent in the amount, from and manner directed by the Court;

c. In the event that the first respondent fails to comply as directed in (a) within 15 days of the order, the action shall be stayed forthwith and the applicant is granted leave to approach the Court on the same papers (supplemented, if necessary) for an order dismissing the first respondent's claim in the action;

d. The first respondent is directed to pay the costs of this application, including the costs of two counsel together with any other respondent opposing this application on a joint and several basis.

ML SENYATSI

JUDGE OF THE HIGH COURT

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 08 May 2024.

Appearances:

For the applicant: Adv S Symon SC

Adv D Watson

Instructed by Kampel Kaufmann Attorneys

For the first and second respondents: Adv IV Maleka SC

Adv T Scott

Adv T Pooe

Instructed by Cliffe Dekker Hofmeyer Inc

For the third respondent: Adv J Blou SC

Adv A Friedman

Instructed by Werksmans Attorneys

Date of Hearing: 10 November 2023

Date of Judgment: 08 May 2024