REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Of interest to other judges

Case no: JS 448/12

In the matter between

MADS PUB & SIZZLE CC t/a THE GRAND **Applicant**

and

RAYMOND NGWENYA **First Respondent**

DUMOLUHLE NCUBE **Second Respondent**

BRIAN MAHLANGU **Third Respondent**

Heard: 14 May 2015

Delivered: 21 May 2015

Summary: Security for costs – *peregrinus* – domiciled and residing outside the jurisdiction of the Court – lack of information on financial means – security ordered

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JUDGMENT

COETZEE AJ

[1] This in an application wherein the Applicant seeks an order in the following terms:

[1.1] That the First and Third Respondents provide security for costs in the sum of R300 000,00 within ten days of date of granting of this order;

[1.2] That the proceedings be stayed until such order is complied with;

[1.3] In the event of the First and Third Respondents failing to provide the aforesaid security for costs within 10 days of the date of granting of this order the Applicant is granted leave to approach this Court on the same papers, supplemented where necessary, for an order dismissing the action instituted by the First and Third Respondents with costs.

Background

[2] The Respondents initiated proceedings in the CCMA against the applicant alleging that they had been constructively dismissed and sought 24 months' salary as compensation.

[3] The First and Third Respondents commenced the proceedings in the CCMA under the following names:

[3.1] The First Respondent was cited as Raymond Ngwenya being a South African citizen having ID No. 880202 6201 088

[3.2] The Third Respondent was cited as Brian Mahlangu, being a South African citizen having ID No 851213 5731 087

[4] Nowhere in any of the documentation submitted in the proceedings did the First or Third Respondents disclose that the names which they had adopted in the proceedings were false and that the ID numbers utilised by them were fictitious, having been obtained by them together with fraudulent identity documents.

[5] The matter remained unresolved in the CCMA and was referred to the Labour Court pursuant to the provisions of section 191 of the Labour Relations Act, No. 66 of 1995 ("the LRA").

[6] Pleadings were exchanged between the parties and in their Statements of Claim the First and Third Respondents perpetuated their conduct by persisting in citing themselves as Raymond Ngwenya and Brian Mahlangu respectively.

[7] On the first day of the trial of the matter it emerged that the identity documents of the persons described as Raymond Ngwenya and Brian Mahlangu were false and that the First and Third Respondents had simply assumed the names which were reflected in the fraudulent identity documents.

[8] An official of the Department of Home Affairs testified that the First and Third Respondents are illegal immigrants who had assumed the names Raymond Ngwenya and Brian Mahlangu in order to, amongst others, obtain employment.

[9] As a result of their illegal conduct, the Department of Home Affairs declared the First and Third Respondents to be prohibited persons and deported them from South Africa to Zimbabwe. The First Respondent was criminally charged and found guilty of fraud.

[10] Subsequent to their deportation, on 4 March 2014, the Respondents' attorney sought to amend the Statements of Claim in respect of the First and Third Respondents by substituting the citation of the First and Third respondents as follows:

[10.1] in respect of the First Respondent "MBUSI VUNDHLA ALSO KNOWN AS RAYMOND NGWENYA"

[10.2] in respect of the Third Respondent, "BHEKINKOSI DUBE ALSO KNOWN AS BRIAN MAHLANGU"

[11] In the application for amendment, the Respondents' attorneys confirmed under oath that the First and Third Respondents were *peregrini* of this Court.

[12] The application for the amendment was opposed by the Applicant on a number of grounds but was granted by the Court.

[13] On 25 March 2014, the applicant served a notice for security for costs on the respondents' attorneys of record.

[14] Although the Labour Court Rules make no provision for security for costs, it is established that this Court has jurisdiction to determine such applications.

[15] Where the Labour Court Rules are silent on a particular aspect, the Uniform Rules of Court may be applied.

Security for costs

[16] An application for security for costs is governed in the High Court by the provisions of Rule 47 of the Uniform Rules of Court.

[17] Rule 47 provides as follows:

> '(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.

(2) If the amount of security only is contested the Registrar shall determine the amount to be given and his decision shall be final.

(3) If the party from whom the security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the Registrar within ten days of the demand or the Registrar's decision, the other party may apply to Court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

(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 meet'.

[18] Section 162(1) of the Labour Relations Act, No.66 of 1995 ("the LRA") provides that a Labour Court may make an order for payment of costs according to the requirements of the law and fairness.

[19] In my view and because of the test that must be applied (as set out below) the Labour Court is not obliged to strictly follow the High Court Rule without taking into account equity and fairness to both parties.

[20] In *Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty),and Two Other cases*[1] the Court stated the position related to security for costs in regard to a *peregrinus* as follows:

'[26] It is trite law that the courts have a discretion to grant or refuse an application for security and, in coming to a decision, will consider the relevant facts of each case. Hardship to the *peregrinus* and financial ability to provide security are taken into account, but are not necessarily decisive. The Court should have due regard to the particular circumstances of the case

[1] 2009 (5) SA 602 (C) at para [26]

and considerations of equity and fairness to both the *incola* and the non-domiciled foreigner…'.

[21] Both parties submitted that it is thus evident that the Courts take into consideration equity and fairness in relation to both parties and does not consider only the position of the *peregrini* respondents.

[22] In *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)*,[2] the Court when considering the constitutionality of section 13 of the Companies Act with approval referred to *Magida v Minister of Police*[3] which stated the following:

> 'The applicant, a *peregrinus*, who did not own unmortgaged immovable property in the Republic was ordered to furnish security for the costs of his action. The approach until then adopted by the Courts to applications of that kind emerged from judgments such as *Saker and Co Ltd v Granger 1937 AD 223 at 227*, namely that:
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> '(T)he principle underlying this practice is that in proceedings initiated by a *peregrinus* the Court is entitled to protect an *incola* to the fullest extent'.
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> In *South African Television Manufacturing* Co *(Pty) Ltd* v *Jubati and Others*[4], it was stated that: 'There must be some special fact, inherent to the action itself, which will persuade a Court to exercise its discretion in favour of the *peregrinus...* And, finally, *Santam Insurance Co Ltd v Korste*[5], namely that: 'The reason for the rule being what it is, it follows that the Court should exercise its discretion in favour of a *peregrinus*, only sparingly and in exceptional circumstances...'.

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[2] 1997 (4) SA 908 (W)
[3] 1987 (1) SA 1 (A)
[4] 1983 (2) SA 14 (E) at 19E
[5] 1962 (4) SA 53 (E) at 56B

[23] The Labour Court in *Ganga* considered [6]an application for security for costs and conveniently summarized the principles from the previous judgements referred to therein as follows:

[23.1] When the Court exercises its discretion whether a *peregrinus* is required to furnish security for costs, it must have regard to all relevant facts as well as considerations of equity and fairness to both parties;

[23.2] The Court must consider the relevant provisions of the Constitution which include sections 34 and 39, section 9 (the right to equality before the law), and section 23 (the right to fair labour practices); and

[23.3] Common law rules which limit a litigant access to Court should be applied in appropriate circumstances.

[24] The Court in the *Ganga v St John's Parish*-case[7] referred with approval to the Supreme Court of Appeal matter of *Magida v Minister of Police*.

[25] In the *Magida*-case the following factors were considered by the Court in favour of the *peregrinus*:

[25.1] He was a labourer in East London who received legal aid and was a citizen and *incola* of South of Africa when he launched his action but became a *peregrinus* when the Ciskei became an independent State in 1981.

[25.2] He was impecunious and an order compelling him to furnish security would effectively destroy his chances of prosecuting his action against the respondent.

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[6] (2014) 35 *ILJ* 1294 (LC)
[7] See note 6

[25.3] He was economically active within the jurisdiction of the Court and thus not a *vagabundus* or *suspectus de fuga* or a dishonourable person.

[25.4] Execution of the Court's judgement was possible where the appellant resided in the then Republic of the Ciskei.

[26] The Court in *September and Another v Muddford International Services Ltd: In re Muddford International Services v Metal and Engineering Industries Bargaining Council and Others*[8] ordered an applicant employer in a review application who was a *peregrinus* to provide security for the compensation it was ordered to pay in the award on review. The Court stated that the respondent would not suffer any real prejudice if it provided security for costs and also that it was fair and equitable to do so.

[27] The Respondents relied on and referred to the facts in the unreported judgment *Sherenisa and Others v Minister of Safety and Security and Another*[9], submitting that the facts are almost identical to the case at hand. The Defendants, being the Minister of Safety and Security and the Minister of Justice, brought an application for security for costs against the second plaintiff in the main action, Ms Neliswe Sengoane. The facts are:

[27.1] Sengoane disputed that she was a *peregrinus*. The Court however, concluded, after considering the submissions, that Sengoane was not only a *peregrinus*, but "probably an illegal immigrant";

[27.2] Sengoane had nevertheless resided for two years within the jurisdiction of the Court in Kroonstad and was still living at the same address, and

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[8] (2008) 29 *ILJ* 1049 (LC)
[9] Case 2394/2009 (unreported)

[27.3] It would be possible to find her and execute upon a cost order, if any;

[27.4] She was impecunious.

[28] The Court held as follows[10]:

> 'Taking all these into consideration, I am of the view that to accede to the defendants' application will be to place obstacles in the second plaintiff's quest for justice'.

[29] I now turn to the facts of this application.

[30] The applicant in its founding affidavit seeks security for costs on the following grounds:

[30.1] The first and third respondents are *peregrini* of this Court, both being residents of Zimbabwe. This is common cause.

[30.2] They have no assets within the jurisdiction of this Court and no means of settling any adverse costs order granted against them. This is common cause.

[30.3] They are prohibited persons under the Immigration Act, 13 of 2002 and are not entitled to reside or be employed within the Republic of South Africa. This is common cause.

[30.4] In the event of a costs order being granted against the first and third respondents, there is no prospect of the applicant being able to recover said costs.

[30.5] To date, and despite requests therefor, the applicants' attorneys have failed to provide a power of attorney or any confirmation that they are mandated to act in the matter on behalf of the first and third applicants. In fact their counsel disclosed in argument

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[10] At para 20

that the attorneys of record occasionally receive messages from them through the second respondent.

[30.6] They misrepresented their identity and residential addresses in the Statements of Claim as well as the notice of intention to amend. The respondents argue that they did not with intent tried to mislead the Court but used their aliases.

[30.7] It is the applicant's contention that the proceedings are vexatious and are being orchestrated by the attorneys and not on behalf of the first and third respondents. The respondents' attorneys deny this and point out that they took on the matter on the request of the Saslaw pro bono office not knowing about the status of the respondents.

[30.8] As appears from the manner in which they have conducted themselves, the second and third respondents have no compunction to act dishonestly, to utilise fraudulent documentation and to manipulate the legal process for their own ends. It is the applicant's contention that the entire proceedings are tainted by the vexatious manner in which the first and third respondents have acted. The respondents deny this.

[30.9] There is no evidence that the names by which they are now described in the pleadings, are their correct names or whether these names are also fictitious. The respondents argue that the Department of Home Affairs have identified the two respondents as such and that according to the official records those are their lawful names and identity numbers.

[30.10] They have not pursuant to the notice provided any security and have not contested the amount thereof either. The respondents concede that they have not provided security, allege that they do not have to and if they have to say the amount is excessive.

[30.11] Having regard to the fact that the trial of this matter has already endured for a number of days and is part-heard, it is submitted that the amount of R300 000 for security for costs is reasonable. The respondents submit the amount is excessive and that the trial will continue in respect of the second respondent in any event. The applicant will incur those costs in any event and need not have recourse to security. The applicant counters by submitting that it has been deprived of two litigants from whom it may attempt to recover a cost order as they are *peregrini* with no assets in South Africa.

[30.12] The respondents did not file affidavits. Their attorney of record filed one on their behalf. The affidavit does not specifically deal with the current financial position of the respondents.

[31] The attorney in opposition to the application in essence says the following:

> '10 In summary, the respondents will contend that considering the circumstances of the case, as well as equity and fairness to the first and third respondents, the latter should be absolved from furnishing security, alternatively the amount is wholly unreasonable. This is because of the following factors:
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> '10.1. It is three years since the respondents launched their action against the Grand and the trial is in its final juncture, with one (possibly two) witness from the Grand left to testify, yet only now is this application being launched when the trial is all but concluded;
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> 10.2. The costs that the Grand is to further incur in opposing this action will continue as it is still to answer to the claim of Ncube whose action is Identical to that of the first and third respondents; and
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> 10.3. If there is an order requiring the first and third respondents to pay security for costs, this will result in

preventing them from concluding the trial proceedings concerning a legitimate claim.

11. Relevant to this whole matter of the illegality of Vundhla and Dube Is the testimony of Ncube that Phillips, the owner of the Grand, was aware of their illegal status when he employed Vundhla and Dube. Phillip has simply baldly denied this in his testimony.

12. Nothing justifies Vundhla and Dube's unlawful actions when they were in this country. However the illegal nature of their status does not nullify the employment contract between them and the Grand, nor does it destroy the constitutional protection that Vundhla and Dube enjoy. Their dignity cannot be exploited or abused simply because of their illegal or foreign status'.

[32] The respondents also contend that there was no prejudice to the applicant by the respondents having used assumed names.

[33] In the answering affidavit it is argued that they are impecunious and would not be able to meet any requirement to put up security. The affidavit does not set out the facts underlying this submission and does not provide any detail of assets or income in Zimbabwe. The deponent relies on the fact that the two respondents have pro bono representation, lost their employment in South Africa and were repatriated to Zimbabwe.

[34] It is further submitted by respondents that the costs of completing the trial will have to be incurred in any event as the second Respondent will continue with the case.

[35] The final submission is that the application has been brought very late in the day and should be dismissed for that reason alone. The Respondents rely on *Buttner v Buttner*[11] for this submission.

[11] 2006 (3) SA 23 (SCA)

[36] The Supreme Court of appeal in the *Buttner*-case in dealing with an application for costs which was brought on an urgent basis a few days before the appeal was to be heard, dismissed the application without giving reasons, save to say that as most of the costs have been incurred and the application was brought a few days before the hearing, the application was dismissed.

[37] I do not find support for the respondents' case in *Buttner* which case is distinguishable as regards the subject matter of the proceedings and the Court process.

Considerations of equity and fairness

[38] The law requires that consideration is given to fairness and equity to both parties in deciding the application.

[39] The distinguishing factors in this case are the following:

[39.1] Firstly, the conduct of the two respondents in using false identity documents and names when approaching the CCMA and this Court: The fact that their employer may have known this, as is alleged by the respondents, does not excuse them from coming to Court with false identities. While it does not preclude them from coming to Court under assumed names there was potential prejudice to the applicant in the event that it later had to execute upon any possible cost order. Their hands are not as clean as how the Court in the *Magida*-case would have wanted.

[39.2] Secondly, the fact that they are *peregrini* who are not within the jurisdiction of the Court, which jurisdiction covers the whole of South Africa. The Courts have taken into account to the advantage of a *peregrinus* the fact that a *peregrinus* unlawfully in the country was still residing within the Court's jurisdiction. This counts against the respondents as they are no longer within the

jurisdiction of the Court and any order against them cannot be given effect to.

[39.3] In this case even the addresses of the two respondents are unknown. Even their own attorney admittedly does not know where and how to contact them in Zimbabwe save occasionally to hear from them through the second respondent. They were deported to Zimbabwe and it is unknown even if they are still there as their addresses in Zimbabwe are unknown. It will be impossible to execute upon any possible cost order.

[39.4] The financial position of the two respondents is unknown. Their attorney speculates in this regard. The respondents should have taken the Court in their confidence. In the *Ganga*-matter the Court considered the fact that the *peregrinus* had access to other funding. It is for the Respondents to persuade the Court as to their financial position or lack thereof and whether they have assets in Zimbabwe or access to other funding or not. They have not done so. It cannot be stated as a fact that they will be unable to put up security if ordered to do so.

[40] In light of the above, I am of the view that there are no special circumstances to absolve the two respondents from providing security.

<u>The delay in bringing the application</u>

[41] The notice calling for security was filed on 24 March 2014. Thereafter, the Applicant waited until April 2015 to pursue the application. All that occurred in between was that the Respondents moved for the amendment which was granted, appealed against and which appeal finally was dismissed by the Constitutional Court.

[42] Applicant contends that the amendment is the reason for not pursuing the matter earlier as a successful appeal against the amendment would for all practical purposes have brought the matter to an end.

[43] While this Court follows Rule 47 procedure in the High Court, it is not bound to do so strictly. I do not see any prejudice to the respondents in that the application has been pursued only now. The part heard matter has again been set down for trial, after the parties had agreed the date, for 29 June 2015. As the respondents are represented *pro bono,* there are no adverse cost consequences for them whether or not the trial proceeds on that date.

[44] I have referred to the decision in the *Buttner*-case which is distinguishable.

The amount

[45] The Applicant asks for security in an amount of R300 000. It is not clear whether each one is required to provide security in that amount.

[46] Neither of the parties has quantified the estimated costs of the trial or the remaining part thereof. The parties asked the Court to determine an amount as the Registrar of this Court does not regularly deal with requests for security for costs.

[47] I take into account that at the trial itself, the Applicant has been represented by junior counsel.

[48] The trial is estimated to run for another day, maybe two. It has run for two days.

[49] I am of the view that a reasonable amount for each of the Respondents to provide security is R60 000.

[50] The amounts in respect of security must be paid into the trust account of the respondents' attorney of record. The security may be applied only in respect of a cost order in respect of trial costs.

[51] The security must be provided on or before 12 June 2015.

Costs

[52] I have considered whether a cost order in respect of the application is appropriate. Respondents submitted that the late launching of the application warrants a cost order. I am not inclined to make an order for costs.

Order

[53] I make the following order:

[53.1] Each respondent must provide security in an amount of R60 000.

[53.2] The amounts in respect of security must be paid into the trust account of the respondents' attorney of record. The security may be applied only in respect of a cost order in favour of the Applicant (the Respondent in the main action) for the costs of the trial if there is a cost order in favour of the Applicant.

[53.3] The security must be provided on or before 12 June 2015.

[53.4] There is no order as to costs.

Coetzee AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant:	Advocate N Redman SC
Instructed by:	S Moldt Attorneys
For the Respondents:	Advocate J T Venter
Instructed by:	Webber-Wentzel Inc