



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

REPORTABLE

Case No. 3357/2022

In the matter between:-

HOMELY PROPERTY AND BNB (PTY) LTD

Applicant/Defendant

and

TIMBER SHAVINGS CC

Respondent/Plaintiff

JUDGMENT

BANDS J:

[1] Pursuant to pending trial proceedings instituted under case number 3357/2022, the defendant, as applicant in this application, seeks an order directing the plaintiff, as respondent, to furnish security for the defendant's costs in the trial action in accordance with the provisions of section 8 of the Close Corporations Act 69 of 1984 (*"the Act"*).

Applicable legal principles

[2] Section 8 of the Act reads as follows:

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

[3] The provisions of section 8 of the Act have been interpreted in accordance with the principles which developed in relation to the, now repealed, corresponding provision in the Companies Act, 61 of 1973; section 13. Notwithstanding the omission of a counterpart from the new Companies Act, 71 of 2008, the jurisprudence, insofar as it relates to section 8 of the Act, remains applicable.

[4] Ultimately, section 8 of the Act creates a statutory exception to the ordinary common-law rule that a plaintiff who resides in South Africa, may institute legal proceedings in our courts without furnishing security,¹ as laid down in *Witham v Venables*.²

[5] The Constitutional Court, in *Giddey NO v JC Barnard and Partners*,³ in considering the purpose of section 13 of Act 61 of 1973, with the view to clarify the proper application of the statutory provision, stated as follows:

¹ *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) at para [7].

² (1828) 1 Menz 291.

³ 2007 (5) SA 525 (CC) at para [7].

“A salutary effect of the ordinary rule of costs – that unsuccessful litigants must pay the costs of their opponents – is to deter would-be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects of success are poor. Where a limited liability company will be unable to pay its debts, that salutary effect may well be attenuated. Thus the main purpose of section 13 is to ensure that companies, who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense.”

[6] The court, when approaching an application of this nature, adopts a two-stage enquiry. In the initial stage, the applicant bears the onus of establishing that there is reason to believe that the corporation, if unsuccessful, would be unable to satisfy an adverse costs order.⁴ Whilst the onus that an applicant bears is not to establish that the respondent will, as a fact, be unable to pay its/his/her costs,⁵ such reason to believe must be constituted by facts giving rise to such belief as highlighted by the court in *Vumba Intertrade CC v Geometric Intertrade CC*,⁶ with reference to *London Estates (Pty) Ltd v Nair*.⁷ A blind belief⁸ or a belief which has its foundation in “*hearsay evidence as a reasonable man ought or could not give credence to, does not suffice.*” During this stage, there exists no onus on the corporation to adduce facts for the purposes of satisfying the court of the converse, namely, that it will be able to meet such an order against it. Where an applicant is unable to discharge the onus on it/him/her, the enquiry comes to an end and the application must fail. However, if the court is satisfied that the applicant has successfully discharged the

⁴ *Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd* (20156/2014) [2015] ZASCA 93 at para [10].

⁵ *Henry v RE Designs CC* 1998 (2) SA 502.

⁶ 2001 (2) SA 1068 (W).

⁷ 1957 (3) SA 591 (D) at para [8].

⁸ Including a belief which stems therefrom.

onus, the court, during the second stage of the enquiry must decide, in the exercise of its discretion, whether or not to order the corporation to furnish security.⁹

[7] Simply put, once the requirements of section 8 of the Act have been met, the granting of the relief is discretionary.

[8] The discretion with which the court is vested, in applications for security for costs, is a strict or true discretion, and accordingly there is no numerous clausus of factors to which the court may have regard, in arriving at a decision it considers to be just in the circumstances of each case.¹⁰ Such discretion should be unfettered and accordingly, an application for security of costs should not be approached with any predisposition towards the grant or refusal of the relief. Hefer JA, in coming to this conclusion in *Shepstone & Wylie and Others v Geyser N.O.*,¹¹ which concerned an application in terms of section 13 of the Companies Act 61 of 1973, endorsed the approach articulated in *Keary Developments Ltd v Tarmac Construction Ltd and Another* as follows:¹²

“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

⁹ *Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd* (20156/2014) [2015] ZASCA 93 at para [10].

¹⁰ *Magida v Minister of Police* 1987 (1) SA 1 (A).

Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC).

McHugh N.O and Others v Wright (5641/2020) [2021] ZAWCHC 205 (19 October 2021).

¹¹ 1998 (3) SA 1036 (SCA) at 1045G-1046C.

¹² [1995] 3 All ER 534 (CA) at 540a-b.

unable to recover from the plaintiff the costs which have been incurred by him in defence of the claim.”

[9] The aforesaid dictum was later cited with approval by the Constitutional Court in *Giddey N.O. v J.C. Barnard and Partners*,¹³ which further acknowledged the need for the court to bear in mind a claimant's right in terms of section 34 of the Constitution. O'Regan J, writing for the Constitutional Court stated, at paragraph [30], that:

*“In my view, there can be no doubt that in exercising its discretion in terms of section 13, a court must bear in mind the provisions of section 34 and weigh them in the light of other factors laid before it. The balancing exercise proposed by the Supreme Court of Appeal in *Shepstone & Wylie's case* (adopted from the English case *Keary Developments Ltd v Tarmac Construction Ltd and Another*[30]) acknowledges this (albeit without express reference to the Constitution). On one side of the scale must be weighed the potential injustice to the plaintiff or applicant if it is prevented from pursuing a legitimate claim. This incorporates a recognition of the importance of the right of access to courts. On the other side of the scale must be placed the potential injustice to the defendant if it succeeds in its defence but cannot recover its costs. Relevant considerations in performing this balancing exercise will include the likelihood that the effect of an order to furnish security will be to terminate the plaintiff's action; the attempts the plaintiff has made to find financial assistance from its shareholders or creditors; the question whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff; as well as the nature of the plaintiff's action.”*

[10] More recently, the Supreme Court of Appeal in *Fusion Properties 233 CC v Stellenbosch Municipality*,¹⁴ following a consideration of the dicta in *Shepstone &*

¹³ 2007 (5) SA 525 (CC) at paras 20-22.

¹⁴ (932/2019) [2021] ZASCA 10 (29 January 2021).

Wylie and Others v Geyser N.O. and Giddey N.O. v J.C. Barnard and Partners, distilled the following three principles:

“First, a court seized with an application to compel a plaintiff or applicant to furnish security for costs retains an unfettered discretion. Second, the court needs to ‘balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against the potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its costs in the litigation’. Third, the salutary purpose of s 13 is ‘to deter would-be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects are poor’.”

[11] Insofar as the merits of the plaintiff’s case is concerned, it is sufficient for the court, in an application for security for costs, to have a fair sense of the strength and weaknesses of the parties’ respective cases. It is neither required nor expected to “undertake an in-depth analysis as a trial court would at the end of a trial”,¹⁵ or to attempt to resolve the dispute between the parties.¹⁶

[12] I accordingly proceed to adjudicate this matter on the basis set out above.

Factual background

[13] During May 2021, the parties entered into a written service agreement in terms of which the defendant, property developer, engaged the services of the plaintiff, on site, at the Wedgewood Golf Estate development. The contracted

¹⁵ *Fusion Properties 233 CC v Stellenbosch Municipality* (932/2019) [2021] ZASCA 10 (29 January 2021) at para [36].

¹⁶ *Zietsman v Electronic Media Network Ltd and Others* [2008] ZASCA 4; 2008 (4) SA 1 (SCA).

services included *inter alia* the removal of grass and rubble from 361 designated plots; the digging of foundations, inclusive of trenches;¹⁷ and the performance of rock breaking services.¹⁸ The fees payable and the manner in which payment was to be effected for services rendered, is recorded in clause 3.1 of the agreement, read together with clauses 1 to 4 of the addendum thereto, under the heading “RATES”.

[14] To properly contextualise the dispute between the parties, the respective clauses bear repetition.

“3. FEES

3.1 *The Service Provider shall be paid for its services as determined by agreement between the parties and at such intervals as applicable, as set out in **Addendum ‘A’** attached hereto and as read as if specifically incorporated herein. The parties specifically record that any delivery of service in accordance with this agreement is subject to the parties entering into a separate deed of sale in terms of which the Company undertakes to transfer a (sic) erf no 317 to be nominated by the Service Provider, situated on the Wedgewood Estate on such terms as will be set out in the Deed of Sale and to construct a dwelling on the plot on such plan as to be determined by the Service Provider.”*

[15] What is apparent is that the agreement specifically incorporates the terms of the addendum, and accordingly, the two documents are inextricably bound and must be read together. Further apparent, is that the delivery of services in accordance with the agreement was made subject to the parties concluding a separate deed of sale in respect of the transfer of erf 317. Notwithstanding the express reference to the transfer of erf 317 in clause 3.1 of the agreement, clause 1 of the addendum

¹⁷ As and where required.

¹⁸ As and where required.

conversely refers to the transfer of a plot, the identity of which is to be nominated by the plaintiff, to the latter's nominated entity. Neither the plot nor the entity is defined.

The relevant clause reads as follows:

"RATES

1. *The Company, or its nominated agent, undertakes to transfer a plot in the Wedgewood Estate to the nominated entity of the Service Provider in lieu of part payment for the rendering of services as set out herein which plot is to be nominated by the Service Provider. In the event that the Company does not transfer the plot to the nominated entity of the Service Provider in terms of the agreement between the parties or in the event that the Company fails to build a dwelling as set out below the parties agree that the Company will pay the Service Provider an amount of R2,600.00 per plot that has been so cleared upon presentation of invoice.*

[16] The remaining related clauses in the addendum specify that:

- “2. *The Company will pay to the Service Provider, in addition to the transfer of the plot and the building of the house, an amount of R24,000.00 per month as and for running costs which amount equates to a 60%/40% split of the running costs and also includes the use of a TLB and 5 ton tip truck.*
3. *The Company, or its nominated agent, undertakes to build a dwelling on the plot set out in paragraph 1 above in accordance with an agreed plan which dwelling shall be built in accordance with the specifications of the Service Provider which value of the dwelling shall not be less than R938,600.00.*
 - 3.1 ...
4. *The parties agree that:*

- a. *The transfer of the plot shall be effected after the clearing of 100 erven or by no later than September 2021, whichever is the soonest;*
- b. *The construction of the home as (sic) specified to commence after clearing rubble from 150 erven and having the foundations dug thereon or no later than the next financial year June 2022, whichever is the soonest.”*

[17] It is common cause that the intended deed of sale has not been concluded between the parties. It is further undisputed that: (i) the plaintiff has cleared 100 plots, of which 37 have been trenched; (ii) the plaintiff has not been remunerated for the services rendered to the defendant (either by way of the transfer of a plot or by way of a payment sounding in money); and (iii) that the defendant remains liable for the payment for such services in terms of the agreement.

[18] The parties' disagreement lies in the manner in which the defendant's admitted liability is to be discharged. On the one hand, the plaintiff contends that same falls to be discharged by way of a monetary payment, whilst on the other hand, the defendant is of the view that its liability is limited to the transfer of erf 317 to the plaintiff *in lieu* of a payment sounding in money.

[19] Following the breakdown of settlement negotiations, during which the defendant tendered transfer of erf 317 to the plaintiff; alternatively, erf 342, the plaintiff issued summons during November 2022. The plaintiff claims rectification of the agreement to include payment of 15% VAT on all amounts invoiced by the plaintiff, and payment of the amount of R270,020.00, being R2,200.00 per plot cleared and R400.00 per plot trenched on the basis that: (i) the envisaged deed of

sale was not forthcoming *at the time of execution of the agreement*; (ii) the terms of transfer have not been agreed upon; and (ii) absent an agreement which complies with the Alienation of Land Act, 68 of 1981, the plaintiff is unable to claim transfer of a plot *in lieu* of the works completed, hence its claim sounding in money.

[20] Whilst the defendant accepts that the agreement, read together with the addendum thereto, falls foul of the provisions of Act 68 of 1981, it contends that the agreement was never intended to be a deed, as envisaged in section 1 of Act 68 of 1981. It further argues that on a proper construction of the agreement, the parties would conclude a deed of sale in compliance with Act 68 of 1981 *as soon as the plaintiff became eligible to receive transfer of erf 317*.

[21] Immediately apparent is that the defendant's contention regarding the timing for the conclusion of the deed of sale, in addition to being at variance with the stance adopted by the plaintiff, contradicts the clear wording of clause 3.1 of the agreement. This is one of the various issues on which the parties disagree.

[22] The defendant holds the view that given its tender to pass transfer of erf 317; alternatively, erf 342, to the plaintiff, there no longer exists a *lis* between the parties and accordingly concludes that the plaintiff's claim is vexatious in nature.

[23] The applicant relies on the affidavit of Lambros Georghio Lambrou ("*Lambrou*"), a co-director of the defendant, to support its contention in respect of the plaintiff's impecuniosity, and the effect that this will have on the plaintiff's ability to pay the defendant's legal costs, should it be ordered to do so.

[24] Lambrou records that at the time of the conclusion of the agreement, the plaintiff was earning approximately R60,000.00 to R70,000.00 per month for services rendered to the defendant by the plaintiff in terms of various, unrelated agreements. When approaching the plaintiff in respect of the Wedgewood Estate development, the plaintiff's managing member, Eugene Ras ("Ras"), indicated on behalf of the plaintiff that in *lieu* of payment for services rendered, he would prefer the defendant to transfer a plot to the plaintiff, on which the defendant would construct a dwelling.

[25] Lambrou sets out as follows under the heading "*Plaintiff's Financial Situation*":

10. *I had regular contact with Ras and it became apparent that he was experiencing financial difficulties. Such financial difficulties clearly was (sic) also experienced by plaintiff.*
11. *Defendant was ready to transfer the plot to plaintiff and gave BLC Attorneys the instruction to do so. However, Ras approached me and asked me not to proceed with the transfer at that stage. He was concerned about the transfer fees to be paid, as well as the fact that he would have to start paying the monthly levy to the Home Owners Association, at that stage just more than R2,000.00 per month. I therefore instructed BLC Attorneys not to continue with the transfer of the plot.*
12. *Defendant is still willing and able to transfer the plot to plaintiff, however, plaintiff refuses to accept transfer.*

[26] Apart from the apparent confusion in the defendant's version as to whether a plot was to be transferred to the plaintiff or to Ras personally, which confusion is exacerbated if regard is had to paragraphs 35.1 and 35.2 of the replying affidavit; the plaintiff, in its answering affidavit, denied that: (i) an agreement was reached in

respect of the transfer of a property; (ii) it was discussed, agreed or intended that the plaintiff would take transfer of a property and be responsible for the payment of transfer fees and conveyancing costs, particularly since the agreement did not envisage the transfer of a plot to the plaintiff but rather to an entity to be nominated by it; and (iii) that conveyancing documents were prepared by BLC Attorneys, given the absence of a deed of sale. No evidence of such documentation was produced by the defendant in its replying affidavit, despite being called upon, expressly, by the plaintiff to do so.

[27] Lambrou goes on further to state that:

13. *Sometime thereafter Ras approached me and asked whether or not defendant would be interested in purchasing plaintiff's TLB and tipper-truck. We were not interested and I informed Ras thereof. Shortly thereafter, plaintiff abandoned the site at Wedgewood Estate. At that stage he had only cleared 100 of the 361 designated plots and only trenched 37 of the 100 plots.*
14. *Prior to that the Homeowners Association of Wedgewood asked whether or not I would be interested in clearing a fire-break of 50m around the perimeter of the estate. I approached Ras to enquire whether or not plaintiff would be interested in doing the clearing work. Ras indicated that he is interested as he would be able to sell the timber so cleared and that he would do so in lieu of remuneration. I thereafter managed to convince the Home Owners Association to clear a fire-break of 100m.*
15. *Plaintiff started clearing the fire-break by cutting down the vegetation, however failed to remove the vegetation. When plaintiff abandoned the site the firebreak was not cleared as agreed. It would cost defendant approximately R400,000.00 just to remove the vegetation already cut to clear the rest of the fire-break."*

[28] The plaintiff's managing member, in respect of the TLB and tipper-truck, pointed out that there is nothing unusual about a company seeking to sell a piece of earthmoving equipment. I agree. Whilst this aspect was conceded by the defendant in its replying affidavit, Lambrou asserted that it was strange that Ras sought to sell the equipment to the defendant. No reasons were advanced why the offer was strange, nor is it apparent to me on what basis it could possibly be so, given the industry in which the parties are actively involved and, more particularly, in light of the fact that the defendant, in terms of clause 2 of the addendum, was liable for the payment of fees for the use of the plaintiff's TLB and tipper-truck.

[29] I am further unable to agree with the defendant that the plaintiff's decision to abandon the site is indicative of financial distress. There exists insufficient evidence, on the facts of this matter, to justify such an inference. The plaintiff explains that it vacated the site due to non-payment by the defendant for the services rendered. Given the stage of completion of the project (that the plaintiff had cleared 100 plots); the defendant's admitted liability towards the plaintiff; and the parties' diametrically opposed views on how payment was/is to be effected, I have no reason to question the version of the plaintiff.

[30] Quite clearly, the plaintiff, at the time of the conclusion of the agreement on 1 June 2021, had no cash flow problems, having agreed to acquire property in *lieu* of payment for services rendered. The plaintiff pertinently dealt with this in its answering affidavit. The defendant, in response, conceded that: (i) the plaintiff was financially stable at the time that the agreement was concluded; and (ii) in addition to the Wedgewood Estate contract (as well as the unrelated contracts to which I have

referred in paragraph [24]), the plaintiff was, at that stage, engaged with the performance of services under various other contracts, unrelated to the defendant. The defendant, at no stage contends that it was or is the plaintiff's only source of revenue.

[31] More telling perhaps is that at some stage between the conclusion of the agreement on 1 June 2021 and the date on which the plaintiff vacated the site during April 2022, the plaintiff agreed to the performance of additional lucrative services on site in relation to the clearing of a fire-break. Once again, the plaintiff did not seek payment in cash, instead offering to sell the timber so cleared in *lieu* thereof. I say that the services were lucrative, given the defendant's contention that it would cost approximately R400,000.00 to remove the vegetation already cut and to clear the remainder of the fire-break. The inescapable conclusion is that the plaintiff, at that later stage, was not experiencing financial difficulties. The defendant is decidedly vague on the timeline, and more particularly, the date on which the fire-break clearing services agreement was entered into, and fails to state, apart from what is set out above and which amounts to no more than an opinion, what it contends occurred in the intervening period to result in a change in the plaintiff's financial position, rendering it impecunious.

[32] Faced with the plaintiff's denial of financial difficulties, the defendant, having been emphatic regarding the plaintiff's financial position in its founding affidavit was seemingly less resolute in reply, stating that whilst the plaintiff may have been financially stable at the time of entering into the agreement, "*it later seemed that plaintiff started encountering financial difficulties*". According to Lambrou, this

impression was created by the conduct of Ras and the plaintiff. He however qualified this by stating that as the defendant did not have access to the plaintiff's financial information, he (on behalf of the defendant) was unable to provide further details regarding the plaintiff's financial position. He went on to assert that nothing prevented the plaintiff from producing its financial records and/or bank statements to demonstrate its financial viability. I pause to mention that the defendant had at no stage requested such documentation from the plaintiff.

[33] Relying on *Henry v RE Designs CC*¹⁹ it was argued on behalf of the defendant that the normal method to be adopted by a close corporation, in endeavouring to resist an application of this nature is to furnish its balance sheet; alternatively, a basic set of accounts, to show that it will be able to meet an adverse cost order. Insofar as the defendant sought to rely on the plaintiff's alleged failure to justify an order for security for costs, I disagree.

[34] As stated, in the assessment of the initial stage of the enquiry, it is the defendant that bears the onus of establishing that there is reason to believe that the plaintiff, if unsuccessful, would be unable to satisfy an adverse costs order. There exists no onus on the plaintiff to adduce facts for the purposes of satisfying the court of the converse. The plaintiff's alleged failure does not assist the defendant in the present matter. An examination and consideration of the context in which the dicta was made in *Henry*, as well as in cases such as *Equitable Trust and Insurance Co of SA Ltd v Registrar of Banks*²⁰ and *Petz Products (Pty) v Commercial Electrical*

¹⁹ 1998 (2) SA 502 (C).

²⁰ 1957 (1) SA 689 (T)

Contractors (Pty) Ltd,²¹ is required. Whilst the aforesaid cases are often cited as authority (incorrectly so) for the proposition that a defendant is permitted, on demand, to require a plaintiff close corporation to disclose its financial statements, failing which, it will be ordered to furnish security for the defendant's costs, no such general rule exists.²²

[35] As succinctly set out by the court in *Vumba Intertrade CC* at paragraph [10] of the court's judgment:

"In Milne Sadowa Minerals (Pty) Ltd, supra, the respondent company did not dispute the allegations that it had no banking account and a share capital of only £300. It endeavoured to make out the case that it did in fact possess sufficient assets to pay the costs of any action but it disclosed no liabilities and the Court found that the value it placed on some of its assets, about which it refused to provide particularity, could not be accepted at face value.

In Equitable Trust and Insurance Co v Registrar of Banks, supra, an adverse inference was drawn as a result of the respondent's determined withholding of its financial information despite legitimate criticism of the information it had provided, and "more particularly in view of its insolvent condition in June, 1955" (at 691F).

In Petz Products v Commerical Electrical Contractors, supra, the application was one for the furnishing of additional security, the respondent not previously having contested liability to furnish security on the grounds of its provisional liquidation and the subsequent restriction of its business activities.

In Henry v RE Designs CC, supra, the court took into account various factors including the fact that the respondent had been in existence for less than a year and its financial affairs could not have been very complex or extensive, that there was a number of indications that the respondent was being less than candid with the court

²¹ [1990] 3 All SA 452 (C).

²² *Vumba Intertrade CC v Geometric Intertrade CC (supra)*.

as regards the state of its finances, and the respondent's own admission that only a few months previously, it had been unable to pay the applicant's costs."

[36] In the present matter, there exists: (i) no history of financial distress; (ii) no previous liability to furnish security for costs for any reason; (iii) no indication that the plaintiff is being less than candid with this court; and (iv) no request calling upon the plaintiff to provide financial documents, this aspect having being raised in the defendant's replying affidavit for the first time. Whilst in an appropriate case, the failure by a respondent to produce its balance sheet; alternatively, a basic set of books, may lead to a negative inference; on the facts of this matter, there exists no basis upon which such an inference can be drawn.

[37] Moreover, and on its own decisive of the present matter, not only does the defendant admit being liable to the plaintiff to the value of at least R260,000.00, the defendant does not take issue with the valuation placed on the TLB and tipper truck owned by the plaintiff, valued in excess of R1,000,000.00. In light thereof, it hardly behoves the defendant to contend that the plaintiff, if unsuccessful, will be unable to satisfy an adverse cost order where the plaintiff is possessed of sufficient exigible assets.

[38] For the above reasons, the defendant has failed to discharge the onus upon it during the first stage of the two-staged enquiry and the application must fail. The question relating to whether the proceedings are vexatious in nature is not a stand-alone enquiry but is to be properly considered as one of many factors in the exercise

of the court's discretion during the second stage of the enquiry,²³ to which stage, this court does not arrive.

[39] I might however add that even if the defendant had discharged the onus upon it, which it did not, I am in any event of the view that the litigation can hardly be said to have been embarked upon frivolously or vexatiously by the plaintiff. Various complex legal issues fall to be determined by the trial court, for example: (i) whether or not an agreement, prior to the launch of the litigation, was reached between the parties, compromising the plaintiff's claim; (ii) the nature and effect of clause 3.1 of the agreement, properly interpreted; (iii) the nature of the service agreement entered into between the parties and the effect, if any, of its lack of compliance with the Alienation of Land Act; (iv) the effect, if any, of the contradictory clauses in the agreement and the addendum thereto; and (v) ultimately, whether the plaintiff is entitled to be compensated for the defendant's admitted liability in cash or whether it is obliged to accept transfer of a property (and in which case, the identity of such property and on what terms).

[40] There exists no reason why the costs should not follow the event.

[41] In the result, the following order is issued:

1. The application is dismissed with costs.

²³ Whilst the application, on the papers before court, correctly references section 8 of the Close Corporations Act 69 of 1984; an incongruence between the legal principals applicable to applications for security for costs against close corporations, on the one hand, and those relevant to proceedings against natural persons and companies, on the other, arose on the heads of argument filed on behalf of both parties.

I BANDS

JUDGE OF THE HIGH COURT

Date heard: 10 August 2023

Date of judgment: 7 February 2024

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