

IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG)

JOHANNESBURG

CASE NO: 36204/12

DATE: 28.11.2012

10 In the matter between

GENESIS ON FAIRMOUNT JOINT VENTURE

Applicant

and

KNS CONSTRUCTION (Pty) Ltd AND OTHERS

Respondents

J U D G M E N T

WILLIS, J:

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[1] The applicant applies for security for costs in arbitration proceedings brought against the applicant by KNS Construction (Pty) Limited now in liquidation ("KNS"). The appointed liquidators are cited as the 2nd to 4th respondents. The application has been brought under Section 21 (1) (a) of the Arbitration Act 42 of 1964 read with uniform rule of court, 47 (1).

Notice in terms of Rule 47 (1) was given on 21 May 2012 (simultaneously with the delivery of the statement of defence). The respondents dispute liability for security for costs.

[2] The claim arises from a building contract concluded between the applicant and KNS prior to its liquidation during November 2006, in terms of which KNS was to perform certain construction work for the applicant as an employer. In terms of that building contract KNS was required to put up a construction guarantee in favour of the applicant.

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[3] During the course of the contract on 12 September 2008 the applicant cancelled the building contract. On the same date it called for a payment under the guarantee. This demand prompted KNS to launch application proceedings to interdict the guarantor, Lombard Insurance Company, from paying under the guarantee. That application was dismissed in this court.

[4] KNS then sought and was granted leave to appeal to the Supreme Court of Appeal but at a later stage abandoned the appeal.

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[5] The applicant bases its claim for security on the fact that KNS is not only in liquidation but clearly also hopelessly insolvent. It also alleges that neither KNS nor the joint liquidators enjoys *locus standi* to pursue the relief claimed in the arbitration, the underlying claim having been ceded to another party and also that KNS enjoys no reasonable

prospects of success in the arbitration in that the underlying issue has already been determined by KNS, by this court and that the appeal was abandoned.

[6] KNS seeks clarity in the arbitration proceedings. It is true that it is now seeking an amendment, which is somewhat flimsy with due respect. It is alleged: - "in terms of the claim and its final account, sent to the defendant on or about 1 October 2012 the defendant is liable to the claim in the amount of R61 175 185.00. A copy of the claim and its
10 final account summary is annexed hereto as SOC24."

[7] The applicant in these proceedings has objected to that amendment.

[8] I have been referred to two cases that have been quoted quite often in this particular court, the first is the one of *Haitas and Others v Port Wild Props 12 (Pty) Limited* 2011 (5) SA 562 (GSJ) decided by my brother Tsoka J and the other is the case of *Ngwenda Gold (Pty) Limited and Others v Precious Prospect Trading 80 (Pty) Limited and Others* case number 2011/31664 decided by LJ van der Merwe, AJ in
20 this court as well on 14 December 2012.

[9] I have also been referred to a very interesting article by DE Van Loggerenberg and J Malan with which we have been confronted on a few occasions in this court: "Security for costs by local companies: Back to 1909 in the Transvaal or not?" (2012) 75 THRHR 609-621.

[10] In Section 13 of the Old Companies Act 61 of 1973 there was provision expressly made for security for costs against corporate litigants. It is well known and indeed obvious that the new Companies Act contains no such provision. There is a debate that is raging as to whether this omission was a lacuna or not. I would rather not express any opinion on this matter. It is in my nature to avoid controversy in delivering judgments.

10 [11] Be that as it may, it is quite clear then that this matter has to be decided at common law. In this regard the judgment of the Supreme Court of Appeal in the case, sorry the judgment of Brand, JA in the Supreme Court of Appeal decided unanimously in *MTN Service Provided (Pty) Limited v Afro Call (Pty) Limited* 2007 (6) SA 620 (SCA) is significant. In paragraph [15] of his judgment, Brand, JA refers to the common law relating to an insolvent natural person who is an *incola*, and providing that security for costs will only be ordered in exceptional circumstances.

20 [12] Brand JA says, however, that in regard to companies there is no reason why only in exceptional circumstances security for costs should be provided.

[13] It is perfectly understandable why at common law there would be a reluctance to slam the doors of justice in the face of a poor litigant but I see no reason why the common law should be confined to preventing

corporate litigants from litigating only in vexatious and/or reckless and/or frivolous circumstances. There is no reason why the common law principle against slamming the doors of justice against widow and orphans should extend to purely commercial matters such as this.

[14] What, then, is the common law? It seems to me that we have a ready answer in the well-established principles of the exercise of a judicial discretion set out for example in the Constitutional Court in *National Coalition for Gay and Lesbian Equality & others v the Minister of Home Affairs & others* 2000 (2) SA 1 (CC) at paragraph [11]. In other words the court has a judicial discretion, which must be appropriately exercised, having regard to all the relevant facts and circumstances.

[12] When I have regard to all the relevant facts and circumstances in this particular case it seems to me that this is indeed an appropriate matter to order security for costs.

[13] Relief has been sought along these lines in prayers 1, 2, 3, 4 and 5 of the notice in motion, dated 21 September 2012. My only difficulty is that paragraph 2 provides for the said security to be fixed at R1 million (or such other amount as may be determined by the registrar). In my view it is appropriate to limit the security to an amount as may be determined by the registrar.

[14] There is an order in terms of prayers 1, 2, 3, 4 and 5 of the notion of motion, dated 21 September 2010 except that the sum of the said security shall be the amount as may be determined by the registrar of the court.

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Counsel for the applicant: Adv AO Cook SC

Counsel for the respondent Adv P van der Berg

Attorneys for the applicant: Norton Rose

10 Attorneys for the respondents TLI Incorporated.