

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 08284/14

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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SIGNATURE

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DATE

In the matter between:

**PANAGIOTOS DINOS
LAMBROS DINOS**

**FIRST APPLICANT
SECOND APPLICANT**

And

**AGRO V.I.M SA
MATOU FRANCE VIOHAR S.A**

**FIRST RESPONDENT
SECOND RESPONDENT**

JUDGMENT

WINDELL J:

[1] The applicants seek an order directing the first respondent (*a perigrinus*) to provide security for costs which it may incur in the event that they successfully defend the action instituted against them. The first respondent opposes the application and submits that the applicants failed to make out a proper case entitling them to the order.

[2] The first respondent is a Greek company that exports various agricultural products to different countries including South Africa. It is a well-established and affluent entity with an annual turnover of €32 000 000 per year. It does not own any immovable property or any other assets in South Africa. The first respondent contends that it will be able to settle any cost order that may be granted against it, and that there is therefore no need to give any security for costs.

[3] As a rule of practice, the merits of the litigation are not considered at this stage of proceedings except in cases where it is alleged that the defence is vexatious. There is no allegation or indication that the defence is vexatious. I therefore do not intend to consider the merits or the alleged lack of *bona fides* on the applicants' part.

[4] The general rule of practice is that a *peregrinus* should provide security for an *incola's* costs. See *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig 2012 (1) SA 247 (SCA)*. This does not mean that an *incola* has a right which entitles him as a matter of course to the furnishing of security for his costs by a *perigrinus*. The court has a discretion in deciding whether or not to direct that security be furnished.

[5] In the exercise of the court's discretion all the relevant factors have to be weighed, having regard to the particular circumstances of the case as well as to considerations of equity and fairness to both the *incola* and the *peregrinus*. Hardship to the *perigrinus* and financial ability to provide security are taken into account, but are not necessarily decisive. See *Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd, and Two Other Cases 2009 (5) SA 602 (C) para [26] at 607*.

[5] It is common cause that the applicants will not be able to recover a costs order in South Africa and they would have to proceed against the first respondent in Greece.

In *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig supra*, the court held that the associated uncertainty and inconvenience that this would entail is one of the fundamental reasons why a *peregrinus* should provide security.

[6] If the *peregrinus* is impecunious and alleges that he is not able to furnish security due to his own impecuniosity, it will be a material consideration in the exercise of the court's discretion in deciding whether to absolve a *perigrinus* from furnishing security for costs. In *Magida v Minister of Police 1987(1) SA 1 (A)* an impecunious *perigrinus* was excused from providing security. The court held that no one should be compelled to furnish security beyond its means and a *perigrinus* should not, on account of his impecuniosity, be deprived of prosecuting his action against an *incola*.

[7] The facts of this matter can clearly be distinguished from the facts in *Magida supra*. The first respondent *in casu* does not allege that it would not be able to pursue its action against the applicants or that it will be affected in any way if it is ordered to put up security for costs. On the contrary, it contends that it is well able to give security, but contests that it is liable to do so.

[8] I am satisfied that there are no facts present that justify deviating from the general rule that a *peregrinus* should provide security for an *incola*'s costs. I was not persuaded to exercise my discretion in favour of the first respondent and to absolve it from furnishing security for costs.

[9] In the result the following order is made:

1. The first respondent is ordered to provide security for the costs of the applicants in an amount to be determined by the Registrar.
2. The first respondent is ordered to pay the cost of this application.
3. Draft order marked "X" made an order of court.

L.WINDELL

Judge of the South Gauteng High Court

Counsel for applicant	: Adv. L. Hollander
Counsel for respondent	: Adv. S Mc Turk
Date of hearing	: 27 January 2015
Date of judgment	: 29 January 2015