REPUBLIC OF SOUTH AFRICA

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

CASE NO: 38647/2019

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

05 MARCH 2020 **JUDGE E MATOJANE**

OAKBAY INVESTMENTS (PTY) LTD	Intervening Party
And	
LURCO GROUP SOUTH AFRICA (PTY) LIMITED	Applicant
And	
KURT ROBERT KNOOP N.O	First Respondent
JOHAN LOUIS KLOPPER N.O	Second Respondent
CHRISTOPHER KGASHANE MONYELA N.O	Third Respondent

JUANITO MARTIN DAMONS N.O	Fourth Respondent
KOORNFONTEIN MINES (PTY) LIMITED (IN BUSINESS RESCUE)	Fifth Respondent
BLACK ROYALTY MINERALS (PTY) LIMITED	Sixth Respondent
NASTOWITZ (PTY) LTD	Seventh Respondent
ESKOM HOLDINGS SOC LIMITED	Eighth Respondent
NATIONAL UNION OF MINE WORKS	Ninth Respondent
ALL AFFECTED PARTIES TO KOORNFONTEIN MINES (PTY) LIMITED (IN BUSINESS RESCUE)	Tenth Respondent

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REASONS FOR SECURITY OF COSTS ORDER

MATOJANE J

[1] On 12 December 2019, before the hearing of the main application and having heard the argument, I made an order in the following terms:

1. The applicant, Oakbay Investments (Pty) Ltd ("Oakbay") shall furnish security for costs for the first to fifth respondents in an amount of R500 000.00 (500 000 Rand).

2. Oakbay shall furnish security for costs to the first to fifth respondents within five days from the date of this order. The amount shall be paid into the trust account of the first to fifth respondents attorneys of record.

3. All further steps in the application will be suspended pending the definition of security in terms of 1 – 2 above.

4. Oakbay is to pay the cost of this application.

[2] I now proceed to deal with the reasons for the order which has been requested by Oakbay and the facts giving rise to these proceedings.

Background

[3] The first to fifth respondents, who are the Business Rescue Practitioners ("Practitioners") of the fifth respondent Koornfontein Mines" (Pty) Ltd (in business rescue) ("Koornfontein") have requested the intervening party, Oakbay to provide security for costs in terms of Rule 47 of the Uniform Rules of Court in the main application of Lurco Group South Africa (Pty) Ltd ("Lurco").

[4] The respondents sought security for adverse costs in an amount of R500 000.00 on the basis that the application was frivolous and vexatious, that the application is largely founded upon hearsay evidence and that the applicants launched the application in their capacities as joint liquidators of Westdawn Investments (Pty) Ltd (in Liquidation) which is a liquidated insolvent entity.

[5] On 1 November 2019 Lurco brought an urgent application to interdict the practitioners from implementing the adopted business rescue plan for Koornfontein and implementing any agreement with the sixth or seventh respondent in respect of the acquisition of the shares in Koornfontein.

[6] The interim interdict was sought pending the outcome of proceedings to be instituted by Lurco within 30 days, declaring as unlawful the events that occurred at the meeting held on 4 October 2019 where the business rescue plan of Koornfontein was approved. Lurco alleged that the amendment to the business rescue plan published by the practitioners by way of additional provisions was unlawful. An order setting aside the Plan and declaring that the bidding process was unlawful in light of the Plan as amended.

[7] Those proceedings have not been instituted despite the lapse of some months since the launch of the urgent application.

[8] The practitioners deposed to an answering affidavit on 13 December 2019, raising four points *in limine*. First, that there is a material non-joinder of affected persons. Second, that Lurco is not an affected person in the business rescue of Koornfontein, and it has no right to influence a vote at the meeting in terms of section 151 and 152 of the Companies Act. Third, that the founding affidavit of Lurco is devoid of admissible evidence, fourth, that there are disputes of fact which were foreseeable, and which cannot be resolved in motion proceedings.

[9] The application by Lurco is based on incorrect facts obtained by hearsay and not supported by any facts. In paragraph 50 of the founding affidavit, Lurco states:

"It appears, as the Applicant understands the sequence of events, that what transpired on 18 October 2019 was that the 4 October Plan was approved and adopted in an unamended form, but thereafter was purportedly amended to include certain additional provisions"

[10] In the answering affidavit, the practitioners have attached a transcript of the meeting, which confirms that no amendments to the Plan were introduced and approved after it had been adopted. The amendment was voted on, and the results were confirmed by an independent auditor.

[11] Lurco no longer persists with its contention that the 4 October Plan was initially approved and adopted at the section 151 meeting and only after its approval and adoption was a proposal to include the Additional Provisions made at this section 151 meeting. Lurco has conceded the main basis for its application.

[12] Lurco did not seek the court's leave or the practitioner's consent to proceed with the application. Section 133 of the Companies Act, 2008 ("the Act") provides that no legal proceedings against the company in business rescue may be commenced in any forum without the written consent of the practitioners or with the leave of the court. It follows that Lurco does not have any prospect of succeeding with the future proceedings contemplated in paragraph 3 of its notice of motion.

[13] Oakbay delivered an application to intervene in the Lurco application in November 2019. The intervention application was filed after the answering affidavit in Lurco's application was filed. In their answering affidavit, the practitioners made the point that Lurco's application was futile, and so was Oakbay's intervention. Oakbay has not joined the affected persons despite the point being raised by practitioners in the Lurco application.

[14] Oakbay like Lurco has not established the requirements for interim relief. It did not identify the prejudice it will suffer if the relief is not granted nor did it deal with the absence of a suitable alternative remedy. There is, therefore, no basis upon which the interim relief should be granted.

[15] At common law where a plaintiff company is an *incola*, regardless of whether it is in Liquidation, it is not required to provide security for costs in proceedings instituted by it. However, a court has the discretion to order an *incola* company to furnish security for costs if the applicant for security satisfies the court that the main application is vexatious or reckless or otherwise amounts to abuse.

[16] In Boost Sports Africa (Pty) Limited v South Africa Breweries (Pty) Limited[1] at paragraph 16, the SCA held that:

> "Absent s13, there can no longer be any legitimate basis for differentiating between an *incola* company and an *incola* natural person. And as our superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings, it must follow that the former can at common law be compelled to furnish security for costs. Accordingly, even though there may be poor prospects of recovering costs, a court, in its discretion should only order the furnishing of security for such costs by an *incola* company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to abuse."

[1] 2015 (5) SA 38 (SCA)

[17] Section 13 of the Companies Act 61 of 1973 (the Old Act) empowered the court to order the plaintiff company to lodge sufficient security for a defendant's costs when the court has reason to believe that a plaintiff company would be unable to meet an adverse cost order. The court was vested with a discretion to stay the litigation until the plaintiff company furnished security for a defendant's costs.

[18] The Companies Act, 71 of 2008 (the new Companies Act) does not contain a provision similar to section 13 of the 1973 Companies Act in terms of which a court could require a company to set security for costs if there was reason to believe that the company would not be able to pay such costs if an order was made against it.

[19] In Haitas and Others v Port Wild Props 12 (Pty) Ltd[2] the plaintiff company was insolvent, with no realisable assets or cash and it had consistently stalled the finalisation of the litigation it initiated. The court made an order that security for costs be filed following from the court's inherent power to protect and regulate its own process. The court held that the overriding question must be whether the interests of justice would be served by requiring a plaintiff to file security for costs.

[20] It follows that the court has to weigh up the injustice caused to the defendant if no security for cost order is made, against the possible injustice that the plaintiff would suffer if he is prevented from instituting a claim based on a security for costs order. The court must have regard to the nature of the claim, the financial status of the *incola* and the *incola's* probable financial status, should it fail in the matter. The applicant for security for costs must also satisfy the court that the main action is vexatious, reckless or otherwise amounts to abuse.

[21] It is not in dispute that Oakbay is owned and controlled by the Gupta family and forms part of the Gupta Group of companies. It does not have an active current bank account with any South African banking institution. It is a holding company and has not traded nor had a source of income for a year. Its case is that it need not provide security as it can satisfy an adverse cost order because it paid its debts under two winding-up applications and has furnished security for costs on previous occasions.

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[2] 2011(5)SA 562

[22] Oakbay does not explain why it was unable to pay its debts upon demand before the filing of the winding-up applications, nor where it obtained the funds to pay its debts under the aforementioned two winding-up applications as it did not have a bank account.

[23] It was unable to pay an agreed fee for rental and services to the Business Rescue practitioners of Tegeta for its leased premises in the aggregate the sum of R 2 055 000.00. It was only after the business rescue practitioners had launched an application for its liquidation that the debt was paid.

[24] Oakbay again fell in arrears for the aggregate sum of R3 796 554.90 compelling the practitioners to launch another application for Oakbay's winding up. Oakbay tendered an amount of R2 600 000.00 in settlement of the practitioner's claim. The payments were received from Oakbay's attorney's account without the source of the payments being disclosed. By virtue of Oakbay not having a bank account, the payment could not have been made by Oakbay. Oakbay has not shown that it does have the means of satisfying an adverse cost order.

[25] In my view, the question to be determined by the court is whether it is fair that the person being sued by the company should be in a position of having to incur substantial costs and being at the risk of liability for the company's costs and yet have no real chance of recovering costs if the action is unsuccessful. In the present case the ultimate beneficial shareholders of the Oakbay Group, the Gupta family have fled the country, they stand to benefit from the proceedings, and face no risk of liability for costs themselves and are either unwilling or unable to provide security.

[26] The rule that unsuccessful litigants must pay the costs of their opponents is to deter would-be plaintiffs from instituting proceedings vexatiously in circumstances where the prospects of success are poor. Oakbay persists in its intervention application despite having been informed that the prospects of Lurco succeeding in the contemplated proceedings are poor. The intervention application is, in my view, frivolous and vexatious and will cause an injustice to the practitioners if no security for cost order is not made.

[27] For the above reasons, Oakbay was ordered to provide security for practitioners costs

JUSTICE K E MATOJANE
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances

Counsel for intervening party:	Advocate Mare Leathern SC Advocate L van Gass
Attorney for intervening party:	Van Der Merwe Attorneys
Counsel for applicants:	Advocate Advocate A E bham SC Advocate L Hollander
Attorney for applicants:	SVWG Inc Attorneys
Counsel for first to fifth respondents:	Advocate Panayiotis Statis SC Advocate GD Wickins
Attorney for first to fifth respondents:	Smit Sewgoolam Inc Attorneys
Counsel for sixth respondents:	Advocate John Suttner SC Advocate Johan Smit
Attorney for sixth respondents:	Edward Nathan Sonnenbergs Inc
Counsel for seventh respondents:	
Attorney for seventh respondents:	Cliffe Dekker Hofmeyr Incorporated
Counsel for eighth respondents:	Advocate Dennis Fine SC Advocate Faizel Ismail Advocate Portia Jane Daniell
Attorney for eighth respondents:	Lawtons Africa
Representative for ninth respondents:	National Union of Mine Workers