IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED.

DATE 12/12/2014 SIGNATURE

CASE NO: A 710/2013

12/12/2014

In the matter between:

BIOCHLOR (PTY) LTD Appellant

and

G E BETZ SOUTH AFRICA (PTY) LTD Respondent

Full Court Quorum: *MOTHLE , MPHAHLELE J J, et MOSEAMO AJ*

Date of hearing: 15 October 2014

Date of judgment: 12 December 2014

JUDGMENT

MOTHLE J

INTRODUCTION:

1. This is an appeal before the Full Court, Gauteng Division, Pretoria, against the decision of Mr Acting Justice Sithole sitting in this division *("the Court a quo")*, who ordered the Appellant, a company registered in South Africa, to pay security for costs in an action it has instituted against the Respondent, also a company registered in South Africa.

2. In terms of common law, a foreign plaintiff *("peregrine")* instituting proceedings in South Africa, may, on application by a defendant in those proceedings *("incola")*, be ordered to pay security for costs, where he has no immovable property to cover the risk of costs in the event the claim does not succeed. However, an exception was made in regard to incola corporate entities. ***Section 216 of the Companies Act 46 of 1926 and Section 13 of the Companies Act 61 of 1973*** each made provision expressly for the Courts to exercise discretion as to whether *incola* corporate litigants including companies, should be ordered to pay security for costs. These statutes have been repealed and are now replaced by the Companies Act 71 of 2008 *("Act 71 of 2008")*.

3. Act 71 of 2008 does not contain a provision empowering the Court with discretion whether or not to order payment of security for costs.

4. The effect of the exclusion of that provision from Act 71 of 2008 has raised debate which resulted in different interpretations. There are court decisions in the Gauteng Division, Pretoria as well as the Gauteng Local Division, Johannesburg which attached different interpretations to the effect of the exclusion, from Act 71 of 2008, of the provision for security for costs.

5. The Full Court in this appeal is thus requested to give a ruling, firstly on the correct interpretation of the effect of the exclusion of that provision from Act 71 of 2008 and secondly, to decide whether on the merits, the Court *a quo* in this case was or was not correct in ordering the Appellant, an *incola* company, to pay security for costs.

BACKGROUND:

6. The Respondent has engaged the services of various entities in the mining industry under contract, to disinfect their mine service water for use underground. One such entity is the Appellant. The Appellant and the Respondent concluded various agreements in terms of which the Appellant would install chlorinators at mine sites owned by the Respondent's clients. A total of 7 rental agreements for chlorinators were concluded between the parties.

7. The Respondent in its version, states that it required the Appellant's chlorinators to produce exactly 5.0 kilograms of chlorine per chlorinator. The Appellant's version, however is that in terms of the agreement the requirement was that it should produce up to 5.0 kilograms chlorine in the chlorinators. This led to a dispute between the parties. On 1 July 2009, the Respondent wrote a letter to the Appellant advising it that the production capacity of the chlorinators was not in accordance with the agreed quantities and unless it is rectified within 30 days the Respondent will consider the agreement terminated.

8. Attempts to resolve the dispute between the parties bore no fruit. Consequently on 18 August 2009, the Respondent notified the Appellant that the agreement was terminated. The Appellant then issued summons alleging that the Respondent repudiated the agreements. The parties exchanged pleadings and the Respondent issued a notice in terms of Rule 47 asking the Court to rule that Appellant should pay security for costs.

9. This application for security for costs came before the Court a quo which made an order that the Appellant should pay security for costs in the amount of R900, 000.00. The Court *a quo* concluded, on the basis of evidence, that Appellant's case was vexatious and unsustainable.

10. The Appellant now approaches the Full Court of this Division, to appeal against the order of the Court *a quo*.

THE EFFECT OF THE EXCLUSION OF PROVISION FOR SECURITY IN THE COMPANIES ACT OF 2008:

11. Under common law an incola of the Republic cannot, as a general rule, be ordered to provide security for costs. See in this regard ***Witham v Venables***[1] **and** ***Van Zyl v Euodia Trust (Edms) Bpk***[2]

12. The rationale and general purpose of the common law principle relating to payment of security for costs is to protect the *Incola* from assuming the risk of the costs of litigation which may not be recoverable in the event the incola is successful in its defence.[3]. An order for payment of security for costs would thus be granted against the peregrine, on application by the incola in terms of Rule 47(1) of the Uniform Rules of Court.

13. Section 13 of the repealed Companies Act, 61 of 1973 and its predecessor, section 216 of the Companies Act 46 of 1926 were a departure from the general rule that an incola plaintiff/applicant should not be ordered to pay security or costs.

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[1] (1828) 1 Menz 291
[2] 1983 (3) SA 394 (T)
[3] Witham v Venables supra.

14. In ***Giddey N.O. v J C Bernard & Partners***[4] the Constitutional Court wrote thus concerning section 13:

"[7] The provision constitutes an exception to the ordinary common law rule that the plaintiffs who reside in South Africa may institute actions in our courts without furnishing security for costs. To understand how the provision should be applied it is necessary to identify its purpose. The Courts have held that the purpose of s 13 is to protect "persons against liability for costs in regard to any action instituted by bankrupt companies". 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 s 13 is to ensure that companies who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse cost 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."

[4] 2007 (5) SA 525 (CC) at paragraph 7.

15. The effect of the exclusion in Act 71 of 2008 of a provision similar to section 13 of Act 61 of 1973 continues to be a subject of debates. The courts attach different interpretations on the effect of the exclusion. There are three reported judgments in the Gauteng Division, Pretoria, which were decided after the exclusion of security for costs provision in Act 71 of 2008, namely ***Siemens Telecommunications (Pty) Ltd v Data Genetics (Pty) Ltd*** [5], ***Boost Sports Africa (Pty) Ltd v South African Breweries Ltd***[6] ***and Nelson v Rautenbach NO and Others***[7]. There are further two decisions in the Gauteng Local Division, Johannesburg, on this issue, namely ***Ngwenda Gold (Pty) Ltd and Another v Precious Prospects Trading AD (Pty) Ltd and Another***[8] ***as well as Haitas and Others v Port Wild Props 12 (Pty) Ltd.***[9]

16. The debates in some of the court decisions aforementioned, are stated and analysed in the judgment of the Full Court of the Free State Division in matter of ***Hennie Lambrechts Architects v***

[5] 2013 (1) SA 65(GNP)
[6] 2014 (4) SA 343 GP
[7] 2014 (3) SA 17 GNP
[8] Unreported judgment in case no. 31664 of 2011 delivered on 14 December 2011.
[9] 2011 (5) SA 562 (GSJ).

Bombenero Investments (PTY) Ltd,[10].The Free State Division identified four different approaches followed by the various decisions. These include the views that:

(1) The courts should regulate their own processes to guard against vexatious, reckless and unmeritorious litigation;[11]

(2) The impecunious or insolvent corporate litigants should not be denied redress simply because they lack the means to provide security for their opponent's costs;[12]

(3) Rule 47 does not create a right to apply for security for costs. It is purely procedural in kind. The court's inherent power to regulate its processes in terms of section 173 of the Constitution does not include the power to extend the common law grounds on which security for costs could be granted;[13]

(4) There is no reason why common law principles should be applied to slam the door in the face of corporate entities. There is no reason why companies should be ordered to furnish security only in exceptional circumstances.[14]

[10] Case No. A49/2013. The judgment was delivered on 20 February 2014.
[11] Haitas and Others v Port Wild Props 12 (Pty) ltd 2011 (5) SA 562 (GSJ)
[12] Ngwenda Gold (Pty) Ltd Precious Prospect Trading 80 (Pty) Ltd 2013 JDR 0379 (GSJ)
[13] Siemens Telecommunications (Pty) Ltd v Datagenetics (Pty) Ltd 2013 (1) SA 65 (GNP).
[14] Genesis On Fairmont Joint Venture v KNS Construction (Pty) Ltd and Others 20 SA and MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd 2007 (6) SA 620 (SCA).

17. In support of the grounds of appeal, the Appellant in *casu* relies on the judgment in ***Siemens Telecommunications case, supra***[15]. The Court in that case held the following view:

> "*The creation of substantive law is reserved for its inherent power to develop the common law. Section 173 of the Constitution does not enable a Court, under the mantle of regulating its own process, to impair the existing substantive rights of a litigant. Under the common law, as I have said, an incola plaintiff company has an unimpaired substantive right to pursue legal proceedings...Thus, even if a company embarked upon vexatious and/speculative action, he could not be ordered to provide security for costs.*"

18. This view was rejected in a subsequent judgment in the same Division *in* ***Boost Sports Africa case, supra***[16] where the Court had this to say:

> "*I am respectfully unable to agree with the Learned Judge. In my view it is an established law that the question of security for costs is one of procedure and not substantive law. That being so, the Court has inherent jurisdiction to prevent*

[15] 2013 (1) SA 65(GNP)
[16] 2014 (4) SA 343 GP

unmeritorious and vexatious litigation at the instance of an incola plaintiff company by ordering it to provide the Defendant security for costs."

19. There seems to be no argument that Rule 47 deals with the procedure of applying for security for costs.[17] In the *Siemens Telecommunications case,* the Court distinguishes a need to establish a substantive right which entitles a litigant to claim security for costs on the one hand and the procedural mechanism which regulates the enforcement of such right, on the other hand. The argument goes on to state that such substantive right, which existed in terms of section 13, has now been abolished. Consequently it is concluded that since in terms of common law, an incola company could not be compelled to give security for costs. This principle, in the absence of a statutory provision to the contrary, effectively protects companies from any adverse orders to pay security for costs. Thus, concludes the argument, an *incola* company, even if it embarks upon vexatious and/or speculative action, it cannot be ordered to pay security for costs.

[17] Giddey case supra, Telecommunications case supra, Nelson case supra and Boost case supra.

20. This view finds support in the dissenting judgment of Moloi J in ***the matter of Hennie Lambrechts*** *supra.*[18]The learned Judge is of the view that the omission of a provision dealing with security for costs in Act 71 of 2008 cannot be cured by a principle developed through common law. In the first place, Moloi J opines, that the previous section 13 of the repealed Companies Act offended section 34 of the Constitution. It thus cannot be revived or limited by common law but by another statute of general application, as provided for in section 36 of the Constitution. However Moloi J accepts[19] that" *the Courts have the inherent power to protect and regulate their own process and to develop the common law in the interest of justice in terms of section 173 of the Constitution and that they (the courts) when developing the common law must strive to promote the spirit, purpose and objects of the Bill of Rights as required by section 39(2) of the Constitution."*

[18] The Free State Full Court decision, case No. A49/2013 delivered on 20 February 2014.
[19] With reference to Carmichele v Minister of Safety and Security 2002 (1) SACR 79 (CC).

21. The exclusion of the provision for security for costs in Act 71of 2008 is not, in my view, a bar to any defendant litigating against an incola company to deliver an application in terms of Rule 47. A defendant in possession of evidence which supports the allegation that a plaintiff/applicant company is engaged in vexatious litigation is entitled, in terms of Rule 47, to apply for payment of security for costs. The right to litigate as protected by section 34 of the Constitution is only one side of the equation. It has to be balanced with the inherent power of the courts to regulate their process and prevent *"the risk to the defendant of an unrealisable costs order".*[20]

22. Rule 47 is the basis on which the courts regulate their own process to prevent vexatious litigation or abuse of the court process. This is inherent power derives from section 173 of the Constitution.[21]In terms of this section, the courts may develop common law principles taking into account the interest of justice. The Rule is therefore a procedural mechanism and not a substantive rights issue.

[20]The Giddey judgment supra at the end of paragraph [8].
[21] The Constitution of the Republic of South Africa Act, 1996.

23. In ***Western Assurance Company v Caldwell's Trustee***[22] it was held that *"The inherent right to prevent vexatious litigation has been recognised and freely exercised in South African Courts. It is a principle which underlies the interference of our Courts with law suits where the costs of prior proceedings remain unpaid."* See also in this regard ***Ekka v Dean***[23].

24. The exercise of the discretionary powers by the courts in order to protect the incola against the risk of incurring costs of litigation which the peregrine would not be able to pay, has developed over the years. In ***Boost Sports Africa case, supra*** the Court opines thus:

"[37] ... Whether or not a plaintiff, (regardless of whether the plaintiff is a natural or juristic person) should be ordered to provide security for any adverse costs rests within the exclusive domain of the court's discretion".

25. The exclusion of a provision similar to s 13 in Act 71 of 2008 has not exempted companies from being ordered to pay security for costs. The effect of the exclusion is that the companies are now to be treated same as other litigants. In ***Maigret (Pty) Ltd (In***

[22] 1918 AD 264
[23] 1938 AD 100

Liquidation) v Command Holdings LTD and Another[24] the court expressed the view that in terms of section 13, an applicant for security for costs had "*a fairly low hurdle to cross to persuade the court to grant security.*"

26. I am thus unable to agree with the view expressed in ***Siemens Telecommunications case*** that regardless of the fact that an incola company is engaged in vexatious litigation, it cannot be ordered to make payment of security for costs.

27. The application for payment of security for costs against incola litigants may, in the discretion of the court be granted, if the court is satisfied that the main proceedings are vexatious, or are recklessly instituted or amount to an abuse of the process of the court. However this power to order an *incola* to pay security for costs must be exercised sparingly.[25]

28. There is another matter which in my view the court has to consider. This relates to the estimated costs proposed in the application for security for costs. The courts need to inquire into

[24] 2013 (2) SA 481 (WCC).
[25] MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd 2007 (6) SA 620 (SCA) at paragraph 15 and Haitas and others v Port Wild Prorps 12 (Pty) Ltd 2011 (5) SA 562 (GSJ).

the estimated cost to ensure that such costs have not been inflated to bar the plaintiff/applicant to proceed with its claim. This would apply mainly in the case of impecunious litigants who may not be able to afford litigation costs. In such an instance, the court may then refer the matter to case management, for the parties to consider alternatives that may contribute toward the reduction of costs. Included herein may be for the case manager (a judge) to call for a joint minute of experts to dispose of the need for their attendance in court. An Appeal Court in Alberta, Canada had to decide on an application for leave to appeal, lodged by a corporate plaintiff consequent to an order for payment of security for costs made by the case management judge.[26]

29. After analysing some of the decided cases on the effect of the exclusion from Act 73 of 2008 of a provision similar to section 13 of Act 61 of 1973, the Free State Full Court[27] in ***Hennie Lambrechts Architects v Bombenero Investments (PTY) Ltd supra,***[28]. concluded in paragraph 34 of their judgment as follows:

[26] Autoweld Systems Limited v CRC-Evans Pipeline International, Inc., 2011 ABCA 243.
[27] Moloi J dissenting.
[28] Case No. A49/2013. The judgment was delivered on 20 February 2014.

"[34] A finding, as a general rule, that an incola company regardless of the peculiar facts which scream for the furnishing of security is not bound to provide security would be incongruent with the spirit, purport and objects of a Constitution designed to ensure equality of all before the law. Such a finding would mean that a party, who would be gravely prejudiced by another's refusal to furnish security because of the unfortunate absence of the equivalent of section 13, would be without remedy and, thus, left to suffer considerable financial consequences of such an absence which eventuality would, in turn, offend against the principles of equality and "just and equitable decisions"."

30. It therefore seems to me, having regard to the various shades of opinion on the question of security for cost, that the appropriate approach by the courts in considering the applications lodged in terms of Rule 47 should be as follows:

(1) The point of departure is to accept that in terms of the common law principle, the *incola* litigants should not be ordered to pay security for costs. Courts have to recognise and accept that incola litigants, including corporate entities, have a right to litigate in terms of section 34 of the Constitution;

(2)) Section 173 of the Constitution provides the courts with inherent power to regulate their process and to develop the common law, taking into account the interests of justice;

(3) In regulating their process as stated in (2) above, the courts are entitled to intervene, on application by a party in litigation and where evidence exists, against *any incola* plaintiff/applicant, to protect the court process from litigation that appears to be vexatious, or reckless, or amount to an abuse of the process;

(4) In exercising such intervention, the court may, in appropriate instances, and in its discretion, order a party in litigation to pay security for costs;

(5) The fact of insolvency or being an impecunious litigant should not, on its own, be a reason to order an incola plaintiff/applicant to pay security for costs

(6) The court's discretion must be exercised judiciously and sparingly, after having carefully balanced the right to litigate on the one hand and the need to protect court process from vexatious, or reckless or conduct that amount to abuse of court process, on the other hand;

(7) In an application in terms of Rule 47 the courts should consider all relevant factors, including the possible estimate of the costs as stated in the application. . Instead of ordering the plaintiff/ applicant to pay security for costs, the court may refer such a matter to case management for the parties, assisted by a judge, to explore options that may mitigate the costs;

31. I now turn to deal with the decision of the Court *a quo.*

32. The Appellant's grounds of appeal are based mainly at the alleged failure by the Court *a quo* to follow the *Siemens Telecommunication judgment.* Appellant submits, in the alternative, that the Court *a quo* erred in concluding that counsel for the defendant had persuaded it enough that the appellant's action was *"clearly vexatious and unsustainable".*

33. In its reasons for the decision, the Court a quo dealt with the three points in *limine* raised by appellant in response to the application in terms of Rule 47. The first point relates to failure by the Respondent to bring the application for security for costs timeously. The Court a quo accepted the explanation in the replying affidavit of the Respondent that the question of the need

for security for costs was necessary when it became apparent that the matter may be heard over 10 days with experts involved. That became apparent when the parties were preparing for trial. The Court *a quo* also accepted that in ***Exploitatie-en Beleggingsmaatschappij v Honig***[29]***the Supreme Court of Appeal*** expressed a view that a delay in lodging an application In terms of Rule 47 is not fatal.

34. The second point *in limine* objects to the allegation that the Appellant's action is vexatious. In the main action, the Plaintiff (Appellant) alleges that the Defendant (Respondent) repudiated the seven agreements which were concluded between the parties. During argument in the Court a quo, the respondent demonstrated through the contents of correspondence between the parties, which demonstration left the Court a quo with no doubt that there was no repudiation of the agreements. The Court a quo accepted that in fact the defendant (respondent on appeal) "clearly and unequivocally cancelled the agreements:

(a)As a result of the Respondent's (Plaintiff's) breach of the agreements, which is admitted by the Respondent (Plaintiff) in annexure "G16";

[29] 2012 (1) SA 247 SCA at 253A

(b) Following a reasonable notice period; and

(c)After the respondent's (Plaintiff's) failure to rectify its breach when given an opportunity to do so."

35. Consequently, the Court a quo found, on the basis of the evidence of correspondence between the parties that there was no repudiation of the seven agreements, and concluded thus *" to incur such costs in respect of a clearly vexatious and unsustainable claim, without any guarantee that an adverse costs order will be met, amounts to an abuse of process and consequently, the applicant (defendant) is entitled to an order for security for costs".*

36. The third point in limine had to do with an objection to the admissibility of the evidence of the deponent to the founding affidavit as it is alleged to be hearsay. Nothing turns on this point and it was not pursued on appeal.

37. In the papers before us, the Appellant argues that the Respondent delayed in raising the question of security for costs in terms of Rule 47. According to the Appellant, the matter had already appeared in Court when after it had been postponed, the

Respondent filed its plea along with an application for security for costs.

38. In terms of Rule 47, any party entitled and desiring to demand security for costs from another, has to do so as soon as practicable after the commencement of the proceedings. In reply the Respondents do not dispute that it filed its notice in terms of rule 47 after the postponement. Their version is that it transpired during the pre-trial meeting, that the Appellant intend to call experts as witnesses and estimated the matter to be heard over 10 days (two weeks) in Court. The Respondents submit that as a result of the Appellant's decision to call experts witnesses and their view that the trial will take 10 days, they were concerned about the costs implication to the trial, hence the delay to lodge the application in terms of rule 47 on the eve of the trial. It seems to me that the Respondent's explanation had merit. The delay under, the circumstances, occurred as a result of the late notice by the Appellant to call expert witnesses and it is thus not fatal.[30]

39. The Respondents also conducted a search on whether the Appellant had any immovable property as its assets and found that it does not. This question of failure by the Appellant to

[30] See Exploitatie- En Beleggingsmaatschappij v Honig 2012 (1) SA 247 (SCA).

demonstrate that it has sufficient security for costs in the event it does not succeed in its claim, was cited as one of the reasons to request security for costs in terms of Rule 47.

40. The Appellant's response to this charge was dismissive. It failed to answer the allegation that in the event their action is not successful, they will be in a position to c pay for the costs of suit if awarded against them, including among others, those of the experts the Respondent intends to call.[31]

41. The Appellant failed to advance in this court, any reasons why it should be concluded that the Court a quo did not exercise its discretion judiciously. It is a well-settled principle of our law that courts on appeal would be reluctant to interfere with the exercise of discretion by a court of first instance.[32]

42. The essence of the Appellant's contention, with reference to the authority ***in Schroeder N.O. v ABSA Bank Limited***[33] is that the action it has instituted, is one of those which, "*without the advantage of hearing evidence of all argument, be held to be incapable of succeeding.* "

[31] See paragraph 18 of the Exploitatie case supra.
[32] See Giddey supra at paragraph 22.
[33] 2010 JDR 0544 (WCC at paragraph 39)

43. It seems to me that the Court *a quo* based its decision mainly on the fact that the Appellant had conceded to the breach of the agreements, a concession which goes to the heart of its course of action. In my view, it was unnecessary for the court to consider anything else apart from the pleadings and the correspondence between the parties, in particular the letter by the appellant, attached to the documents as annexure "G6".

44. It is my view that the Court *a quo* was correct in making the decision to order the Appellant to pay security for costs. The Appellant has not demonstrated to this Court any grounds that would indicate that the Court *a quo* in exercising its discretion misdirected itself.

45. In the premises, I am of the view that the appeal should fail. In this case, the costs award should follow the result. I therefore make the following order:

1. The appeal against the order of the Court *a quo* is dismissed with costs.

S P MOTHLE
Judge of the High Court
Gauteng Division
Pretoria

I agree:

S PHAHLELE
Judge of the High Court
Gauteng Local Division
Pretoria

I agree:

P D MOSEAMO
Acting Judge of the
High Court
Gauteng Division
Pretoria

For the Appellant:

C B Garvey

Instructed by:

Strydom Bester Attorneys
Attorneys for Appellant

For the Respondent:

T Motau SC

Instructed by:

Edward Nathan Sonneburgs
Attorneys for the Respondent
c/o Ledwaba Mazwai Attorneys
Pretoria