

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
REPUBLIC OF SOUTH AFRICA

Case No. 60294/2011

In the matter between:

17/3/2014

BOOST SPORTS AFRICA (PTY) LTD

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	YES
(3) REVISED.	✓
17/3/2014	[Signature]
DATE	SIGNATURE

THE SOUTH AFRICAN BREWERIES LTD

Defendant

In re:

THE SOUTH AFRICAN BREWERIES LTD

Applicant

and

BOOST SPORTS AFRICA PTY LTD

Respondent

JUDGMENT

HASSIM AJ

The application

- [1] The defendant company seeks from the plaintiff, an *incola* of the Republic of South Africa, security for the satisfaction by the plaintiff of any adverse costs

order that may be made against it in the action I refer to later. I consider it more convenient to refer to the parties as described in the action as opposed to referring to them as described in this application.

The particulars of the plaintiff's claim

[2] On or about 21 October 2011 the plaintiff instituted an action against the defendant for payment of R12 000 000.00 (twelve million rand) as well as *mora* interest thereon. The main claim is founded in contract. The *alternative* claim is for the payment of a license fee. I interpose, to mention for sake of completeness, that an application for leave to amend the particulars of the plaintiff's claim to introduce a claim in delict is pending. That application was enrolled for hearing at the same time as this application. At the request of the parties the application was postponed *sine die*.

[3] The plaintiff avers that a particular advertising concept the, “*Fans’ Challenge Sport*” concept (“*the concept*”) vests in it; the owner ¹ thereof having ceded to the plaintiff, in writing on 21 February 2005, its rights, title and interest therein. The concept, the plaintiff avers, is unique and constitutes confidential information.

[4] The plaintiff avers that the concept, entails, *inter alia* the following²:

(a) Without the fans, professional sport would not exist.

¹ Boost Sports International Ltd.

² The precise words in the particulars of the claim are repeated.

- (b) Every sports fan has an opinion as to the way his team is managed and would relish the opportunity to have an active say therein.
- (c) Every fan believes he could be a coach.
- (d) The concept combines sport with interactive media, including mobile communication (cellular telephones), to form a unique product where the fans are actively involved in the management of the team.
- (e) Fans would be given the opportunity in off-season, festival matches to have a say and vote on team selection and, during the course of any game, to have their say and vote for player substitutions.
- (f) Voting would take place through the small message service (SMS) utilising cellular telephones.
- (g) The team coach would be obliged to implement those selections voted as if the selections were his own.
- (h) The concept is primarily suited to team sports with large, pre-existing fan bases.
- (i) A proposed event was a friendly match between Kaiser Chiefs and Orlando Pirates.
- (j) The concept would hold immense potential for the defendant due to the unique manner in which it directly engages the public and sports fans.

[5] The circumstances which gave rise to the plaintiff's claim broadly stated are that the plaintiff (through authorised representatives) during or about July and August 2006, and then again in September 2006 disclosed the concept to 2 (two) representatives³ of the defendant. Thereafter, during or about February and March 2009, Norman Minnaar, allegedly the defendant's marketing consultant⁴ was introduced to the concept by the plaintiff. The plaintiff pleads that these 2 (two) interactions resulted in the plaintiff providing to the defendant 2 (two) documents⁵, which plaintiff contends embody the concept. The one was given to Fleming during July 2006⁶ and the other to Ireland during

³ To Rob Fleming ("*Fleming*") during or about July and August 2006 and during or about September 2006, to Brian Ireland ("*Ireland*"), who the plaintiff asserts is an employee of the defendant.

⁴ The defendant disputes the alleged contact between the plaintiff's representative and Minnaar.

⁵ The logo "*Boost Sports International*" appears on both documents.

⁶ Annexure "B" was given to Fleming. It is a document consisting of 2 (two) pages. The concept is introduced in very broad terms. It is described to be a concept that "... *combines sport with interactive media and reality television to form a unique product, where [the] fans are actively involved in the management of their team. Team management options are presented to the fan base and decisions are implemented through the majority vote of the team's fans*". There are a number of options through a number of agreed media technologies for fans to vote on how a particular team is to be managed. The participation of the fans in the management of their team in this fashion generates the financial support that professional sport needs. These are elaborated upon in annexure "C". This is borne out by the e-mail communications.

September 2006⁷. These 2 (two) documents constitute annexures “B” and “C” to the plaintiff’s particulars of claim.

- [6] The plaintiff further pleads that in addition to providing annexures “B” and “C” to the defendant, the concept in detail was conveyed orally, during February and March 2009, to the marketing consultant, Minnaar.

- [7] All of these disclosures, according to the plaintiff were made in confidence and the defendant’s representatives (Fleming and Ireland and the marketing consultant) all agreed that the disclosures were confidential, constituted confidential information and could not be used without the plaintiff’s consent. The concept, according to the plaintiff, was disclosed with the intent that the parties would form a “commercial relationship to utilise the concept to their mutual financial benefit”.

- [8] It is further averred, that Fleming gave to the plaintiff “an express undertaking”⁸ that the defendant was a company with high ethical standards and one which the plaintiff could trust. The plaintiff avers that it accepted the undertaking which it understood to mean, in the context of the disclosure of the concept, that the defendant agreed that the concept constituted confidential information and that the defendant would not use the concept, directly or

⁷ Annexure “C”, the plaintiff alleges was given to Ireland. It is a document consisting of 27 (twenty-seven) pages. The defendant denies that this document was given to Ireland or to any of its employees or representatives at any time whatsoever.

⁸ I cannot see how this can be construed as an undertaking. At best for the plaintiff it was some sort of representation.

indirectly, without the plaintiff's consent. The plaintiff's case is that this constitutes the agreement between the plaintiff and defendant. In my view this is the high water mark of the oral agreement.

[9] The plaintiff pleads that the breach of the agreement rests in the defendant using the concept unlawfully on or about 1 June 2011, when it launched an event called "*BE THE COACH*" under the defendant's "*Carling Black Label*" trademark ("*the event*"), without the plaintiff's consent. The breach is pleaded to be the cause of the plaintiff suffering damages at a percentage of the gross total cost incurred by the defendant to conduct the event, which constitutes the usual alternatively, a fair and reasonable license fee which the plaintiff would have charged the defendant for using the concept to conduct the event.

[10] The breach is further particularised and consists in the following:

- (a) The event, which took place at Soccer City on 30 July 2011, was an off-season, festival match between Orlando Pirates and Kaiser Chiefs.
- (b) The event had been actively marketed on television, in the print media and on a number of websites.
- (c) The promotional material which had been posted on the Carling Black Label website contained *inter alia* the following⁹:

⁹ The style in which this is pleaded, i.e. each statement within quotation marks, suggests that each of these were separate statements.

“BE THE COACH”

“SELECT YOUR PLAYERS”

“Select the players that will compete in the Carling Black Label Cup where two football giants, Orlando Pirates and Kaiser Chiefs clash. This takes place at Soccer City on 30 July. To be the coach, buy a Carling Black Label and follow the instructions on pack.”

“PROMO RUNS: 1 JUNE-27 JULY 2011.”

“... When selection commences on June 1st you will be able to select your players by purchasing any promotional packs of Carling Black Label at participating outlets. Look for the unique underliner code on the crown, SMS to the number provided and follow instructions. You can make a selection as many times as you like, but to be an effective coach, you have to make sure that only the best players in your team make the final cut. For further information visit: www.bethecoach.co.za.”

The defence

[11] The defendant has delivered a plea. The nub of the defence is that the concept was in the public domain, and is hence not confidential and worthy of protection that confidential information deserves.

[12] The defendant denies any undertaking by its representatives to maintain confidentiality and it denies an agreement to this effect.

[13] The defendant does not dispute that it received annexure “B” to the particulars of claim.

[14] The defendant’s case is however, that the BE THE COACH initiative was developed independently of the information relating to the concept as provided to the defendant by the plaintiff in the executive summary in July 2006.

[15] The defendant pleads that it was aware of the information relating to the concept as set out in the executive summary, prior to the date on which the defendant was contacted by the plaintiff and it further pleads that it had used the fundamental aspects of the concept, to the extent set out in the executive summary, in Castle Classic promotions, which took place in about the 1980s and 1990s. These promotions invited the general public to vote for the soccer team they supported by selecting players in each position in the team and, ultimately, through an interactive mechanism, choosing the Castle Classic team. The Castle Classic team played against the winner of the Premier Soccer League at that time.

[16] Apart from denying that Boost Sports International Ltd was at any time the owner of the rights in the concept, the defendant pleads that the concept was in the public domain prior to the date on which the executive summary relating to the concept was first provided to the defendant. The concept was not therefore proprietary to the plaintiff or its purported predecessors in title, or to any person on the date of the cession. In support of the latter averments the defendant relies on disclosures which had been made in PCT¹⁰ patent application WO 02/19206 which was published on 7 March 2002.¹¹

[17] The patent application is titled “*MANAGEMENT OF THE REAL WORLD SPORTS ORGANISATION VIA INTERACTIVE MEDIA*”. The concept is

¹⁰ An international application published under the Patent Co-operation Treaty.

¹¹ The international filing date was 17 August 2001. The applicant for the patent was Liveplanet Inc. The inventor was Bailey Michael.

stated in the application to be a method and system for managing a real world sports organisation.

[18] Mr Antonie SC who appeared for the plaintiff pointed out to me during argument that it is evident from the pleadings that the defendant concedes that it had not relied on the patent application in the development of the BE THE COACH initiative. He also pointed to me that on the defendant's version it is clear that the patent application was discovered after the defendant had received a letter of demand from the plaintiff. I am of the view that it is irrelevant that the patent application came to the defendant's knowledge as late as after June 2011. It may have been fortuitous that the patent application was discovered at all. The point, however, is that at the time when the defendant launched its BE THE COACH initiative the concept was in the public domain and objectively it was no longer confidential. A defendant incurs no liability if it uses information that had lost the characteristic of confidentiality.

[19] A discussion as to whether the concept was in the public domain, or not cannot be avoided. It is the central issue that has to be probed. As will appear later, the merits of both the claim and the defence thereto, are factors that I may take into account in deciding the application.

[20] I consider it desirable to devote some time to the patent application. Commonalities between the patent application and the plaintiff's concept will reveal whether the contended confidential information would in law qualify as confidential information. Stated differently, whether the information meets all

the elements of confidential information. It is commonalities or differences between the plaintiff's concept and the concept disclosed in the patent application which will ultimately show whether the plaintiff's claim to confidentiality, has merit or not.

[21] The plaintiff's concept is aimed at encouraging and facilitating fan involvement in a particular sport and thereby generating income. It was envisaged that this aim could be achieved if fans were given the opportunity to participate in and influence team management issues, such as the selection of the team before a game and player substitutions during the game. This would be done through a system of voting *via* interactive media devices. In this way fans could communicate their selection of players (and substitute players) for an actual event or game. The coach had to implement the selections or substitutions based on majority vote.

[22] The patent too, is aimed at facilitating involvement and control in the management of a sports organisation. Fans could through interactive media control, coach and manage real world sports teams who competed against other real world sports teams. The management of the real world sports teams will be informed by the votes submitted by fans via interactive media; an internet web page or a dial-in-number. The real world sports team would be notified of the voting result and the input received from the fans will be implemented in the strategy executed during the real world sports event. Notification devices such as pagers, telephones or wireless phones and the internet would be media of communication. I do not believe that the method of voting e.g. via cellular

telephones or other methods derogates from the essence of both concepts. I am of the view that the core elements of both concepts are largely, if not completely, the same. I am mindful of the fact that the plaintiff's concept entailed voting through SMS transmitted by cellular telephone. Although the concept in the patent application does not specifically refer to cellular telephones as a medium of interaction between the fans and the management, this medium communication is not excluded. To the contrary it appears to me there are indications to the contrary; notifications could be sent "*to devices accessible through the telecommunication interface 208 such as, by way of example, a pager, a telephone, or a wireless phone*". What is significant for me is that both concepts contemplate voting *via* similar, if not the same media.

[23] Considering the similarities I have identified, I am of the view that the concept was not confidential when it was conveyed to the defendant. Moreover the concept lacked the quality of confidentiality and it could therefore in the first place not have constituted confidential information. Nor to my mind was the unique.

[24] The defendant avers that it had used the concept as far back as the 1980s and 1990s when it ran its Castle Classic promotions. The plaintiff disputes this. I am mindful of this

[25] The plaintiff's action rests on an alleged breach of an undertaking to maintain the confidentiality of the concept (contained in annexures "B" and "C") which

according to it constitutes confidential information.¹² The plaintiff bears the onus to show that the information constitutes confidential information deserving of protection in law. In my view, the plaintiff has *prima facie* not done so. The defendant, on the hand has *prima facie* shown that the concept was in the public domain as far back as 7 March 2002.

[26] It must follow as a matter of logic that if the concept was in the public domain it could not have constituted confidential information at the time it was allegedly disclosed to the defendant. It goes without saying that once information loses the element or characteristic of confidentiality, it cannot be regained. Confidentiality cannot be restored even if a person promises not to divulge it: a secret once out; is no longer a secret.¹³ If information is not confidential, it does not deserve protection.¹⁴

[27] The House of Lords in *O. Mustad & Son v Dosen and Another* [1964] 1 W.L.R (HL) faced the same issue which presents here. In that case the appellant was the owner of confidential information. It sought to restrain a former employee from divulging the confidential information to a third party. An interdict (injunction) was granted by Rowlatt J, who heard the action. The Court of

¹² Harms: Amler's Precedents of Pleading (7th ed) p. 108 sets out the elements of information that is considered confidential information. Information is considered to be confidential if: (i) it is useful- that is, if it involves and is capable of application in trade or industry; (ii) objectively determined it is not public knowledge or public property but is known to a restricted number of persons; (iii) is objectively, of economic value to the plaintiff."

¹³ *O. Mustad & Son v Dosen and Another* [1964] 1 W.L.R (HL).

¹⁴ *Cf. Alum-Phos (Pty) Ltd v C Spatz* [1997] 1 All SA 616 (W) at p. 623-624.

Appeal set the interdict aside. The appellant unsuccessfully appealed to the House of Lords. The appellant failed in its appeal because an application had been made in Germany in 1925 for a patent in respect of matter which consisted essentially of the information alleged by the appellant to be confidential. On 22 January 1926 a convention application was made in the United Kingdom on behalf of the appellant based on the German application. On 31 May 1926, the specification was available to the public and the patent received a number. The respondent contended that, that published the secret to the world. The House of Lord's *ratio* for dismissing the appeal is found in the following statement in the speech:

“Of course, the important point about the patent is not whether it was valid or invalid, but what it was that it disclosed, because after the disclosure had been made by the appellants to the world, it was impossible for them to get an injunction restraining the respondents from disclosing what was common knowledge. The secret, as a secret had ceased to exist.”

[underlining inserted]

The application for security

[28] The plaintiff, an *incola* company, does not dispute that it does not have the financial resources to satisfy any adverse costs order that may be made against it in the action. Notwithstanding this concession the plaintiff disputes that it is liable to furnish security to the defendant. The plaintiff's candour is probably the consequence of the comfort it believes it enjoys, since the defendant's

statutory right to security has been taken away by the repeal of the Companies Act, No 61 of 1973 (“*Companies Act, 1973*”).

The legal position: Statutory right to security

[29] In disavowing liability to provide security the plaintiff calls in aid the common law rule which protects a plaintiff who is an *incola* of the Republic of South Africa (“*an incola plaintiff*”) from having to furnish to a defendant security for the satisfaction of any adverse costs order that may be made in the action.

[30] The general common law principle is that “*nobody but a peregrinus could be called upon, under any circumstances, to give security for costs.*”¹⁵

[31] The common law rule was however not absolute. It recognised exceptions which were based on the court’s inherent jurisdiction to prevent an abuse of its process.¹⁶ In order to do so,¹⁷ and in cases where the court was satisfied that litigation is vexatious and reckless¹⁸ it could order an *incola* plaintiff to provide security for any adverse costs order.

¹⁵ *Mears v Pretoria Estate and Market Co., Ltd* 1907 TS 951 at 956.

¹⁶ *Ecker v Dean* 1937 AD 254 at 259.

¹⁷ *Western Assurance Co v Caldwell’s Trustee* 1918 AD 262.

¹⁸ *Ecker v Dean* 1938 AD 102 at 110; *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525.

- [32] In 1926,¹⁹ all *incola* plaintiff companies were exposed to having to provide security to a defendant where there was credible evidence that there was reason to believe that the company will be unable to satisfy an adverse costs order.
- [33] The object of section 216 of the Companies Act No.46 of 1926 (“*the Companies Act, 1926*”) as well as section 13 of the now repealed Companies Act, 1973, was to protect defendants sued by bankrupt companies.²⁰ These statutes conferred upon all defendants, sued by *incola* plaintiff companies who may be unable to satisfy an adverse costs order, the right to demand security from that company.
- [34] In terms of the common law plaintiffs who were *incolae* of the Republic of South Africa were generally protected from having to provide security for the costs of the defendant, regardless of the former’s financial circumstances. Section 216 of the Companies Act, 1926 and section 13 of the Companies Act, 1973 were both a complete departure from the common law which allowed a defendant to demand security from an *incola* plaintiff (a natural person) only as an exception and under limited circumstances. There was no common law rule in terms of which security could be demanded from an *incola* plaintiff company. The obvious reason is that an entity akin to a limited liability

¹⁹ There were statutes that pre-dated the Companies Act, 1926 which contained similar provisions. Cf. *Brink v Liquidator United farming Corporation of South Africa, Ltd* 1913 CPD 371.

²⁰ *Hudson & Son v London Trading* 1930 WLD 288.

company did not exist at common law. This is no surprise: South African company law was derived from the English law.

[35] Later in this judgment I deal again with the common law position regarding the circumstances under which an *incola* plaintiff could be compelled to provide security for costs. I consider this indispensable because since the repeal of the Companies Act, 1973, two questions arise. Firstly whether an *incola* plaintiff company can be compelled to provide to a defendant security for costs and secondly whether a defendant may invoke the common law in this regard.

[36] Before venturing into a discussion of the common law precepts of applications for security for costs I wish to deal with the applications for security for costs brought under section 13 of the Companies Act, 1973 as well as its predecessor, section 216 of the Companies Act, 1926.

[37] Over many decades a body of law developed as to how a court should approach applications for security for costs against companies. The nature of the court's discretion and the manner in which it should be exercised has been extensively explored by the courts from time to time. 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. The judicial pronouncements regarding applications brought under both section 126 and section 13, at the very least, provide guidance on how a court should approach an application for security

for costs against an *incola* plaintiff company, if such a right is found to be available to a defendant.

[38] Section 216 of the Companies Act, 1926 provided as follows:

“Costs in actions by limited companies

Where a limited company is plaintiff...in any legal proceedings, the Court having jurisdiction in the matter may at any stage, if it appears by credible testimony that there is reason to believe that the company...will be unable to pay the costs of the defendant ...if successful in his defence require sufficient security to be given for those costs and may stay all proceedings till the security is given.”

[39] Section 13 of the Companies Act, 1973 provided as follows:

“Security for costs in legal proceedings by companies and bodies corporate.-

Where a company or other body corporate is plaintiff in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate..., will be unable to pay the costs of the defendant ...if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.”

[40] It is important for a court when considering the statutory position against the common law position to bear in mind that even where the defendant discharged the onus which rested on him in applications under the Companies Act, 1926 and the Companies Act, 1973, namely that there is reason to believe that the plaintiff company will be unable to pay an adverse costs order, the court was not obliged to make such order; it retained it the discretion to decide whether to do so or not.

[41] The provisions of section 216 and section 13 mirror each other. The cases which dealt with applications for security for costs under the Companies Act,

1926 remained good law in determining such applications brought under the Companies Act, 1973.

- [42] Once the defendant had demonstrated that there is reason to believe that the plaintiff company will be unable to pay an adverse costs order, the courts found (prior to the decision of the Supreme Court of Appeal in *Shepstone & Wylie and others v Geyser NO*²¹) that they could only exercise their discretion not to order security for costs if special circumstances existed for them to do so.²² Courts were generally inclined towards granting such applications.²³

- [43] The court in *Trust Bank van Afrika Bpk v Lief and Another*²⁴ expressed this in the following way:

“The body of law which has grown up around this section [i.e. section 216] was thoroughly reviewed in *Fraser v Lampert NO 1951 (4) SA 110 (T)* a decision of three Judges....In *Kruger Stores (Pty) Ltd v Kopman and Another 1957 (1) SA 645 (W)* the effect of section 216 was again examined in the light of previous decisions. From the two decisions, incorporating as they do points from previous cases, the following principles can be distilled. The court will not deprive a defendant who is being sued by a company of the benefit of the section unless special circumstances exist. The court will lean towards security. The Court will consider what the financial position of the company will be when it loses the action....The Court will not enquire fully into the merits of the contemplated litigation and form an opinion of the plaintiff's prospects of success, but the nature of the claim and the defence are not irrelevant. The defendant (the applicant for security) ought to specify his defence.”

²¹ 1998 (3) SA 1036 (SCA).

²² *Fraser v Lampert NO 1951 (4) SA 110 (T)* which has been consistently applied *inter alia* in the decision of the full bench of the then Transvaal Provincial Division-*Trust Bank van Afrika Bpk v Lief and Another 1963 (4) SA 752 (T)*.

²³ *Trust Bank van Afrika Bpk v Lief and Another* at 754H.

²⁴ *Trust Bank van Afrika Bpk v Lief and Another* at 754H-755A.

[44] Hefer JA in Shepstone & Wylie and others v Geyser NO²⁵ speaking for the court departed from the string of earlier decisions in this regard. Hefer JA rejected the principle that “*a defendant ... should not be deprived of [the benefit of seeking security for costs] unless special circumstances exist*”.²⁶ The Supreme Court of Appeal criticised this approach. It opined that it was wrong “[b]ecause a court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security”.²⁷

[45] The Supreme of Appeal endorsed the approach of Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 at 540a-b, namely, that “[a] 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 unable to recover from the plaintiff the costs which have been incurred by him in his defence of the

²⁵ 1998 (3) SA 1036 (SCA).

²⁶ Cf. *Fraser v Lampert NO* 1951 (4) SA 110 (T).

²⁷ At p.1045 I.

claim.”, as being the preferred and correct approach.²⁸ This approach was reaffirmed by the court in *Zietsman v Electronic Media Network and others*.²⁹

[46] While it has been found that the court will not “enquire fully” into the merits of the plaintiff’s claim and form an opinion of the prospects of success, the nature of the claim and the defence thereto are not irrelevant considerations and are factors to be taken into account.³⁰ Whether it is practicable to assess a party’s prospects of success will depend on the nature of the dispute which presents in a particular case.³¹

[47] What the court is not required to do in an application for security is to attempt to resolve the dispute. In *Davidson’s Bakery (Pty) Ltd v Burger* 1961 (1) SA 589 (O) Klopper J stated:

“...Daar kan gevalle wees waar die Hof sekuriteits stelling sal verleen al word dit slegs bevind dat die kanse van welslae op die aksie alleen twyfelagtig is sonder dat dit gesê kan word dat dit geen vooruitsigte van sukses inhou nie”³²

[48] In *Waste Tech (Pty) Ltd and another v Van Zyl and Glanville NNO* 2000 (2) SA 400 (SE) at 404A-C Chetty J referring to Halsbury volume 37 lists some

²⁸ At p.1046 A-C.

²⁹ 2008(4) SA 1 (SCA) at par 13. The principle is good notwithstanding that the application for security was brought under section 17 (2) of the Patents Act 57 of 1978.

³⁰ Cf. *Trust Bank van Afrika Bpk v Lief and Another* at p.755A, *Exploitative-en Bellegingsmaatschappij Argonauten 11 BV and Another v Honig* [2012] 2 All SA 22 (SCA) at p. 21 par 20.

³¹ *Zietsman v Electronic Media Network and others* 2008 (4) SA 1 (SCA) at par. 21.

³² At p. 593E.

factors for a court to consider in adjudicating an application for security for costs. They are the following:

- “1. Whether the Plaintiff's claim is made in good faith and is not a sham.
2. Whether the plaintiff has a reasonably good prospect of success.
3. Whether there is an admission by the Defendant on the pleadings or otherwise that money is due.
4. Whether there is a substantial payment into court or an open offer.
5. Whether the application for security was being used repressively or, for example to stifle a genuine claim.
6. Whether the Plaintiff's want of means, especially in the case of a limited company, has been brought about by conduct of the Defendant such as delaying payment.
7. Whether the application for security was made at a late stage.”

[49] It is trite that the court has an unfettered discretion in deciding applications for security. No list is a closed one nor, can it be.

[50] In any event any closed list will fly in the face of the decision in *Shepstone & Wylie and others v Geyser NO*.

[51] If I were to summarise the approach of courts to applications for security for costs it would be that even if a defendant demonstrates that the plaintiff company would not be able pay an adverse costs order, the court has to in the exercise of its discretion carry out a balancing exercise; weighing on the one hand the injustice to the plaintiff if it is prevented from pursuing a proper claim by an order for security and weighing on the other hand the injustice to the

defendant if no security is ordered. Questions going to the merits of the claim and defence are some of the factors that a court may have regard to when deciding an application for security.

- [52] What other factors should be taken into account would be dictated by the peculiar facts and circumstances of a given case.

The legal position: The common law right to claim security

Vexatious claims

- [53] While the general rule of our common law is that an *incola* plaintiff cannot be compelled to furnish security for costs, there are recognised exceptions thereto. One such exception is vexatious and reckless claims.³³ The exception flows from the High Court's inherent jurisdiction to prevent abuse of its process. One the methods of halting or preventing the abuse, is to require a vexatious litigant to provide security.

The issues

- [54] In deciding whether I should order the plaintiff to provide security I have to consider the following questions:

- (a) Whether there is any basis in law to order an *incola* plaintiff company to furnish security? ("The defendant's right to claim security.");

³³ *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 274, *Ecker v Dean* 1937 AD 254 at 259; and *Ecker v Dean* 1938 AD 102 at 111; *Zietsman v Electronic Media Network and Others* at par. 4

- (b) If so:
 - (i) whether the failure by the defendant to expeditiously demand security is a bar to this application? (“The delay issue.”);
 - (ii) whether the application is aimed at committing the plaintiff under oath to a version before the trial? (“The ulterior motive issue.”)
 - (iii) whether the plaintiff’s claim is vexatious or unmeritorious? (“the vexatious claim issue.”);
 - (iv) whether the plaintiff’s constitutional right, under section 34, to have the action resolved by the application of law decided in a fair and public hearing before a court will be infringed (“The limitation on the right of access to courts”).
- (c) Whether there are material disputes which cannot be resolved on the papers and without the benefit of oral evidence?

Are there material disputes of disputes of fact?

[55] I consider it appropriate to dispose of this issue before considering the other issues.

[56] I have examined the alleged disputes of fact. I am not persuaded that in truth there is a real dispute of fact which cannot satisfactorily be determined without the aid of oral evidence or determined on the conspectus of the evidence.

The right to demand security from an *incola* plaintiff company

- [57] Prior to the enactment of the Companies Act, 1926, a defendant had no statutory right to demand security from a plaintiff company.
- [58] Section 216 of the Companies Act, 1926 and section 13 of the Companies Act, 1973 were both aimed at protecting litigants against liability for costs of litigation instituted by impecunious companies.³⁴ An order for security for costs against plaintiff companies was a means of deterring companies from pursuing vexatious claims or claims with poor prospects of success and in this way, defendants were protected against unnecessary and irrecoverable legal expenses.³⁵
- [59] With the repeal of section 13 of the Companies Act, 1973, defendants brought to court by companies of doubtful financial strength lost the protection they had previously enjoyed against incurring unnecessary and irrecoverable legal expenses. The Companies Act, 71 of 2008 (“*the Companies Act, 2008*”) contains no provision akin to section 13.
- [60] The common law did not afford defendants the right to demand security from an *incola* plaintiff company.³⁶ With the repeal of section 13 of the Companies

³⁴ *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* [2008] 4 All SA 50 SCA par 10. (Also reported at 2009(2) SA.166 (SCA)).

³⁵ *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* [2008] 4 All SA 50 (SCA) at par 10.

³⁶ *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 (T) at p. 396 G-H. It is no surprise that our common law did not confer upon a defendant the right to demand security from *incola*

Act, 1973 by the Companies Act, 2008 plaintiff companies are once again immune to a demand for security for costs. The question is whether a defendant, notwithstanding the absence of a statutory right to do so, can demand security from a plaintiff company. Mere impecuniosity of a plaintiff company no longer entitles a defendant as of right to demand security; something more is required. In my view the absence of a statutory right does not deprive a defendant of the right to demand security from an *incola* plaintiff company where the defendant is brought to court to defend a vexatious or unmeritorious claim. A defendant's right to claim security stems from the court's inherent jurisdiction to regulate its own process and prevent its abuse by discouraging vexatious or unmeritorious claims by ordering a plaintiff to file security.³⁷

[61] Since the enactment of the Companies Act, 2008 the courts have on a number of occasions been called upon to decide whether a defendant may demand security from an *incola* plaintiff company.

[62] In *Haitas and others v Port Wild Props 12 (Pty) Ltd*³⁸ the *incola* plaintiff company was ordered to provide security. I respectfully agree with the decision and the basis on which it was made.

plaintiff companies. In our common law an entity akin to a company was non-existent. Our company law is derived from English law and is sourced in statute.

³⁷ *Ecker v Dean* 1938 AD 102 at 111.

³⁸ 2011(5) SA 562 (GSJ).

[63] There are other cases where the courts have refused applications for security for costs by a defendant. One such case is *Siemens Telecommunications (Pty) Ltd v Datagenics Ltd*³⁹ where Fabricius J refused the application on the basis that our courts have no power to order an *incola* plaintiff company to provide security for costs because even though the court has the inherent jurisdiction to regulate its own process, it cannot create substantive law by extending the common law so as to confer upon a defendant the right to demand security for costs from an *incola* plaintiff company. I am respectfully unable to agree with the learned judge. In my view it is established law that the question of security for costs is one of procedure and not substantive law.⁴⁰ That being so the court has the inherent jurisdiction to prevent unmeritorious and vexatious litigation at the instance of an *incola* plaintiff company by ordering it to provide to the defendant security for costs. Another case in which the court refused an application for costs was *Ngwenda Gold (Pty) Ltd and Another v Precious Prospect Trading 80 (Pty) Ltd and Another* (unreported, case no. 2011/31664, South Gauteng High Court). The application was refused on the basis that the common law required “*something more than mere insolvency or impecuniosity*” and since no special circumstances were present and the “established common law approach to an order for security for costs should be applied.” I cannot disagree that “special circumstances” have to exist before an

³⁹ 2013 (1) SA 65 (GNP).

⁴⁰ *Mears v Pretoria Estate Co Ltd* at p.956; *Saker & Co Ltd v Grainger* 1937 AD 223 at 226-227; *Magida v Minister of Police* 1987 (1) SA 1 (A) at 12A.

incola plaintiff company can be ordered to provide security for costs. Such an approach is not only inconsistent with the decision in *Haitas and Others v Port Wild Props 12 (Pty) Ltd* where Tsoka J, in my respectful view, correctly found that each case must be decided on its own peculiar facts, it is also inconsistent with the decision in *Shepstone & Wylie and others v Geyser NO*. If a court has to find that special circumstances exist before it can order an *incola* plaintiff company to provide security, it will fetter its own discretion. In order to properly exercise its discretion the court must take account of all relevant features “without adopting a predisposition either in favour of or against granting security”.⁴¹

- [64] I am satisfied that despite the repeal of section 13 of the Companies Act, 1973 an *incola* plaintiff company can be ordered to provide to a defendant security for any adverse costs order. I can find no compelling reason why *incola* plaintiff companies should be immune from providing security for costs where the company will not be able to satisfy and adverse costs order whereas *incola* plaintiffs who are natural persons may be ordered to furnish such security. A distinction between these two classes of plaintiff will be unreasonable and irrational.

The delay in bringing the application

- [65] Delay in itself is not an automatic bar to an application for security for costs. It is but one of factors a court can take into account in determining whether to

⁴¹ *Shepstone & Wylie and others v Geyser NO* at p 1045 I-J.

deprive a defendant of the benefit of security for any adverse costs order that may be made against an *incola* plaintiff company. I accept that unreasonable delay, depending on the circumstances of a particular case may be decisive in the exercise of the court's discretion.⁴²

[66] Selke J in *Francis & Graham Ltd v East African Disposal Co, Ltd* 1950(3) SA 502 (W) found that delay is not necessarily fatal. In this regard he stated as follows:

"In the case of *The British America Assurance Co v Moretti* (1) (1936, E.C.P.D. 497) CENTLIVRES, J., considered a contention that because a long time had elapsed since the defendant could have made an application for security for costs, he was therefore out of Court. He said:

'In the case of *Lagesen v Electric Lamps Regenerators Limited* (1914, W.L.D. 76) it was laid down that although it is desirable that an application by a defendant for security as to costs should be made promptly, promptness is not essential. In that matter Mr. Justice CURLEWIS dealt with the case of *Oaten v Bentwich and Lichtenstein*, which had been decided by Mr. Justice MASON, and which suggested that, unless a defendant asked the Court promptly for an order for security as to costs, the Court should not grant such an order. Mr. Justice CURLEWIS said this: 'Though there is much to be said for the suggestion that a defendant must demand security for his costs promptly, I am not disposed to hold that because the applicant did not demand security for his claim in reconvention at the same time as he demanded security for his costs, he is thereby debarred from making the present application. If the applicant has a right to demand security for his claim in reconvention, I do not see how a delay on his part can deprive him of his right, unless the circumstances are such that the Court comes to the conclusion that he has waived that right.' That principle seems to be applicable to a case like this one where the defendant asks for security when he is sued by a person who he alleges to be a peregrinus.'

⁴² *Exploitative-en Bellegingsmaatschappij Argonauten II BV and Another v Honig* at p. 28.

With respect, I agree with this reasoning, for it seems to me that to insist in every case upon immediate demand for security for costs, and to regard delay as necessarily fatal, regardless of whether or not the circumstances indicate a waiver by the applicant, or give rise to an estoppel against him, is to erect a supposed rule of practice into an empty fetish divorced from the realities of the situation and from principle. Nor does it seem to me that Order XIV, Rule 1 of the Rules of this Court, when properly construed, sanctions any such practice. It may be, I would suppose, that a waiver is possibly to be spelled out of delay in demanding security, or that circumstances give rise to an estoppel. But nothing like this is shown to exist here; for, on the contrary, it is obvious that the applicant at no time intended to waive its right to demand security, and Mr. Henning has not been able to suggest any prejudice which the respondent would suffer as a result of the delay. And, having regard to the requirement that the notice envisaged by Order XIV Rule 1 shall indicate the amount of the security demanded, it seems to me requisite, or at least very desirable, that the party giving the notice should be in a position to estimate with reasonable accuracy the probable amount of the costs for which he desires security. So far as I can see, he only gets into that position when the claim is properly and fully formulated. In this case, that appears to me to have been when the respondent filed the particulars of his claim in reconvention on 8th October, 1949. The applicant was, I think, obviously entitled to a reasonable time to consider the bearing and implications of these particulars, and, in the circumstances, I do not see how it can fairly be said that in writing the letter of the 20th October, or in serving the notice even on November 30th, it did not take steps as soon as practicable in terms of the Rule. That being so, it seems to me that the applicant has not forfeited its right now to make this application.”⁴³

- [67] In my view the delay in bring the application was not unreasonable. After the plaintiff served its discovery affidavit, the defendant requested copies of various documents listed in the discovery affidavit. The documents were received by the defendant's attorneys on 11 March 2013. The deponent to the founding affidavit states that until this point in the proceedings, the defendant had no reason to believe that the plaintiff would not be able to pay its costs. It

⁴³

At p.505E-506E.

was only after the defendant had had an opportunity to consider documents which it intended using at the trial, that it became clear that the plaintiff has never successfully commercialised the concept despite a number of attempts to do so.⁴⁴ The deponent continues to state that, given that the plaintiff had not discovered documents showing that it had ever received an income from doing so and that the plaintiff had not entered into other commercial arrangements in respect of other marketing initiatives or sporting events, the defendant became concerned as to whether the plaintiff would be able to satisfy an adverse costs order in the event that it did not succeed in its claim. In my assessment, the impecuniosity of the plaintiff was discoverable after all relevant documents had been scrutinised. I am also not able to find that the defendant waived its right to demand security at a time in the future.

[68] On 25 June 2013, the defendant's attorneys in writing notified the plaintiff's attorneys that the defendant was intent on applying on an urgent basis for an order compelling the plaintiff to put up security for the costs of trial.

[69] In the plaintiff's attorneys response on 1 July 2013 they denied that the plaintiff was obliged to furnish security because an *incola* of the Republic of South Africa does not have to provide security for costs.

[70] On 8 July 2013 the defendant delivered a notice in terms of rule 47 (1). On 20 July 2013 the plaintiff's attorneys in response to the notice in terms of rule 47 (1) wrote a letter to the defendant's attorneys along the lines that the plaintiff

⁴⁴ Cf. *Wallace NO v Rooibos Tea Control Board* 1989 (1) SA 137 (C) at 144.

was of the view that it was not obliged to provide security for costs and will not be providing it either in the amount claimed or at all. The application for security for costs was delivered on 1 August 2013.

[71] Rule 47 requires a defendant to demand security for costs “*as soon as practicable after the commencement of proceedings*”. When precisely this stage arrives will differ from case to case. I cannot find in the prevailing circumstances that the defendant did not demand security “as soon as practicable” albeit that the demand was made rather late after the action had been instituted.

[72] The plaintiff has not demonstrated that had it been aware earlier that security would be required from it, attempts would have been made to raise funds or due consideration would have been given to whether the claim should be pursued or not. The plaintiff does not say that it would not have committed itself to legal costs to pursue its claim in that case.

[73] Apart from arguing that the defendant is barred from seeking security because of a perceived delay, the plaintiff argues that the defendant or (as I understand the allegation), its attorneys were grossly negligent in failing to have established earlier that the plaintiff was not a trading entity and that the concept had not been commercialised. The plaintiff contends that the defendant’s failure to take these steps was at its peril. I am unable to find any negligence, let alone gross negligence on the part of either the defendant or its attorneys.

[74] The argument that the defendant must be punished for not having been able to establish that the plaintiff was a shell, is farcical. The defendant is not at risk because of any action on its part. The source of the defendant's risk is the plaintiff's parlous financial position. The plaintiff's argument is in any event opportunistic. It wishes to seize on the late discovery of its financial position to escape an order compelling it to furnish security to the defendant. I am of the opinion that the plaintiff should not be permitted to benefit from the defendant's late discovery of its impecuniosity.

[75] In my view the defendant has satisfactorily explained why it did not demand security or apply therefore any earlier than it did. As I understand it, there was until receipt of the documents listed in the discovery affidavit no reason for the defendant to even suspect, let alone believe, that the plaintiff would not be able to pay its costs in the event of the litigation failing.

[76] I do not consider the delay a bar to the defendant seeking security for costs.

The defendant's ulterior motive

[77] The plaintiff contends that the application was aimed at derailing the trial which was set down for hearing on 25 November 2012 for a period of two weeks. On this basis the plaintiff contends that the application is *mala fides*.

[78] The plaintiff in addition claims that the application has the ulterior motive of compelling the plaintiff to commit, prior to the hearing, to a version.

[79] Both these allegations are bald and bare. They are not supported by any facts.

Is the plaintiff's claim unmeritorious and/or vexatious and/or reckless?

[80] Before I delve into the question whether the plaintiff's claim is vexatious or not I must consider when a party can be accused of embarking of vexatious litigation.

[81] I find the answer in *Hennie Lambrechts Architects v Bombenero Investments (Pty) Ltd*.⁴⁵ Thamage AJ relying on the decision in *Golden International Navigation SA v Zobo Maritime Co Ltd; Zobo Maritime Co Ltd v MV Visvliet*⁴⁶ describes an action as vexatious if it is obviously unsustainable.

[82] As I have mentioned earlier the plaintiff's claim rests in a proprietary right to confidential information and an oral agreement in terms of which undertakings were given by representatives of the defendant.

[83] For the plaintiff to succeed in its action it will have to show that the concept constituted confidential information. Proof that the concept was in the public domain would entirely defeat the plaintiff's claim.

[84] The plaintiff's concept is embodied in annexures "B" and "C" to the particulars of the plaintiff's claim. The defendant relies on the patent application which was published on 7 March 2002 to show that the concept was in the public domain.

⁴⁵ 2013 (2) SA 477 (FB).

⁴⁶ 2008 (3) SA 10 (C).

[85] In the exercise of my discretion I am entitled to have regard to the nature of the claim. I have to also consider the merits of the dispute.

[86] Baker J considered the question of how far the enquiry into the merits of the dispute can go. He was of the view that:

“How far that enquiry can go is very difficult to say. The Court cannot at this stage express an opinion as to who is going to win this case. There is a further reference to the nature of the claim in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273 (QB) at 282f by Mars-Jones J, where his Lordship said:

'In my judgment, where some reasonable assessment of the plaintiff's chances of success can be made at this interlocutory stage, and that must be comparatively rare, that would be relevant to the question of whether security for costs should be made or not, but not to the issue of quantum....'

This passage was cited with approval in *Procon (GB) Ltd v Provincial Building Co Ltd and Others* [1984] 2 All ER 368 (CA) at 375h - j.

However, to come to the most important factor in this case, and that is the discretion of the Court, it is quite clear from the Parkinson case that the discretion is very wide indeed. At 278 Mars-Jones J, whose judgment was upheld by the Court of Appeal, said:

'Counsel for Parkinson submits that the situation here is on all fours with that which existed in the *Northampton Coal case* (1878) 7 I ChD 500 and the *Pure Spirit case*, (1890) 25 QBD 235. Triplan is in precisely the same position as if it were in liquidation. Speaking for myself, if those Court of Appeal cases can be properly construed as meaning that I have no discretion to refuse to give security for costs in a case of this kind, I would limit it to cases where the company is actually in liquidation. Triplan is not. But I am not prepared to hold that such is the proper construction to be placed on those observations by those members of the Court of Appeal.'

At 279 Mars-Jones J said:

'As Kay LJ said in *Jenkins v Bushby*, "the court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion". A discretion necessarily

involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained.

And at the bottom of the same page ending that quotation from a report by one Jack Hames, a barrister who wrote an article in the Solicitors' Journal, is this:

'Either the Court has a discretion and that must be a wide discretion to take account of all relevant circumstances, or it has no discretion and the order is mandatory, so that s 447 is thus restricted. Clearly the section is not restricted and the discretion is wide'

[87] The information on the papers before me is sufficient for me to assess whether there are reasonably good prospects of the plaintiff succeeding in its claim.

[88] Having considered the similarities between the plaintiff's concept and the patent application published on 7 March 2002 I do not believe that there are reasonable prospects of the plaintiff succeeding in its claim that the concept constituted confidential information. A party's belief that information is confidential is of no consequence. The fact that the plaintiff was not, or may not have been, aware of the patent is to my mind insignificant.

[89] The plaintiff has failed to show that the concept constituted confidential information. As I see it at least two of the requisites for information to qualify as confidential have not been established, namely that the information was useful, i.e. it involved and was capable of application in the trade or industry and that it was not in the public domain (i.e. objectively determined it must be known only to a restricted number of people).⁴⁷ The plaintiff might have believed that the concept constituted confidential information. This is

⁴⁷ *Alum-Phos (Pty) Ltd v C Spatz* [1997] All SA 616 (W) at p. 623.

irrelevant. Ordinary general information by way of example such as information, about the concept does, not become confidential just because the proprietor chooses to call it confidential.⁴⁸

[90] The plaintiff's case as I see it is that the alleged oral undertakings given by Fleming constitute the oral agreement between. The plaintiff avers that it (and significantly not it and the defendant's representative both) accepted the "undertakings" and understood them to mean, "in the context of the disclosure of the concept, that the defendant's representative accepted [that] the concept constituted confidential information and [also accepted] that the defendant was precluded from using the concept, directly or indirectly, without the plaintiff's consent". Webber's understanding of what the statements mean or meant, does not prove an agreement. A contract only comes into being when facts objectively construed yield that conclusion. To my mind it is implausible that an oral agreement came into being. This especially so, when the chain of e-mails exchanged between Fleming and Webb is given due consideration.

[91] The papers before me defendant contain correspondence in the form of e-mails exchanged between Mr Fleming and the plaintiff's representative, Webber. I have considered these e-mails. The sequence of the e-mails exchanged, in my view, does not bear out the plaintiff's version that undertakings as alleged were given by Fleming.

⁴⁸*Alum-Phos (Pty) Ltd v C Spatz* at p. 624.

[92] On 12 July 2006 the plaintiff's representative, Webber, sent to Fleming an e-mail attaching a non-disclosure agreement (NDA). Fleming refused to sign it. I consider this to be a significant factor to take into account when I assess the plaintiff's prospects of success.

[93] Fleming responded on 26 July 2006 in an e-mail which reads:

"I am not happy to sign a contract that prevents me from making use of an activity that I might have been exposed to/thought of etc. It is too restrictive. SAB is a company with high ethical standards and one you can trust.

I hope this makes sense."

[94] The response from Webber to Fleming was sent by e-mail on 28 July 2006. It contains among others, the following statement:

"We are happy to send you a 2 page summary for you to consider before [underlining inserted by author of the e-mail] any form of NDA is signed.

We have utmost respect for SABMiller, your good standing as a company and global brand, but feel that it is reasonable as well as good business practice to be able to expect at least some sort of a written undertaking that what we divulge and discuss remains highly confidential, from the perspective of both parties.

Please let me know if that is acceptable to you?"

[95] Fleming responded in the following terms:

"I'm obviously happy to see your exec summary. Let's take it from there"

[96] On 31 July 2006 Webber sent to Fleming an executive summary.⁴⁹ The covering e-mail states that the executive summary "highlights the essence of our concept and which I am sure will prove to be of interest to you"

⁴⁹ Annexure "B" to the particulars of the plaintiff's claim.

[97] Then interestingly and significantly follows a statement that justifies the inference that the concept may by then have been in the public domain:

“We are confident that any prior exposure you may have had would have indirectly come from us in any case and would not prove to be a stumbling block to us taking it forward together.

Thank you for your time and consideration and I look forward to meeting with you in the near future.”

[98] I am unable to find any undertakings, of the sort alleged by the plaintiff, in any of these communications. I have difficulty in understanding how the statement that SAB was a company with high ethical standards and one that the plaintiff could trust could have constituted an undertaking. I can equally not understand how the statement could have been understood to mean that the defendant agreed that the concept constituted confidential information and also agreed not to use the concept, directly or indirectly, without the plaintiff’s consent.

[99] I am of the view that the plaintiff has not even *prima facie* demonstrated the existence of the agreement. On the facts I am unable to find that a contract had been concluded between the parties and I am not satisfied that there are reasonable prospects that the plaintiff will succeed in doing so.

[100] I am satisfied on the information before me that there are reasonable prospects that the defendant will succeed in showing that the concept had been in the public domain since March 2002. The fact that the defendant had utilised the concept in the 1980s and 1990s is further support that the concept did not and does not constitute confidential information. I am cognisant of the dispute in

this regard. Even if I leave the disputed fact out of account, my conclusion will not be any different.

[101] I am also mindful of the plaintiff's attack on the admissibility of the patent application attached to the defendant's papers which the latter relies upon. The plaintiff has argued that the patent application constitutes inadmissible hearsay. Mr Antonie SC, appearing for the plaintiff, urged me to therefore disregard it. I am not inclined to do. I am satisfied that by virtue of section 42, section 43 (1) and section 43B of the Patents Act 57 of 1978, the patent application, is a public document and therefore at common law constitutes admissible evidence.⁵⁰ Apart from this, there was no proper objection thereto by the defendant. Nor was I presented with an application to strike out the hearsay evidence.

[102] I am also mindful of the plaintiff's contention that the plaintiff's allegation that an undertaking was given by the defendant's employees/representatives has not been properly challenged because these individuals have not made affidavits. In my opinion nothing turns on this. If the concept was in the public domain, it was not confidential and once the characteristic of confidentiality was destroyed it could not be restored. I have already expressed myself on the oral agreement.

⁵⁰ The Law of Evidence: DT Zeffert *et al* (2003), 398.

[103] Having assessed the plaintiff and defendant's respective claims, I am constrained to find that the litigation will not be sustainable and hence it is vexatious.

Will the constitutional right embodied in section 34 of the Constitution of the Republic of South Africa, 1996 be infringed by an order to provide security?

[104] This question received the attention of the Constitutional Court in *Giddey NO v J C Barnard and Partners*.⁵¹

[105] I accept, as a general proposition, that when a company is unable to provide security after being ordered to do so, it may be forced to abandon its claim. I also accept that this may affect the company's right of access to court.

[106] The court in *Giddey NO v J C Barnard and Partners* 2007 (5) 525 (CC) said that a court when determining an application for security for costs must take into consideration the provisions of the Constitution of the Republic of South Africa, 1996 ("*the Constitution*") more particularly section 34 thereof. In resolving the constitutional issue, O'Regan J found that to the extent that the right of a party to access courts would be limited by an order for security, the limitation would be justifiable in terms of section 36 of the Constitution.

[107] O'Regan J speaking for the Constitutional Court has pronounced that although the Constitution guarantees to all access to courts, for courts to function fairly they must be able and allowed to regulate legal proceedings. The rules of

⁵¹ 2007 (5) 525 (CC).

court, Justice O'Reagan, expressed "will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence". The court also found that to the extent that this may limit the right of a party to access courts, if the limitation is justifiable in terms of section 36 of the Constitution, there can be no cause for a constitutional complaint.

[108] South African courts have repeatedly stated that section 13 of Companies Act, 1973 (as well as its predecessor) was aimed at shielding persons who successfully defended actions instituted by bankrupt companies, from incurring costs that they most likely would not be able to recover from the company. The Constitutional Court agreed that this was what section 13 sought to achieve.⁵²

[109] The Constitutional Court has agreed with the Supreme Court of Appeal's decision that a court seized with an application under section 13 must balance the potential injustice to the plaintiff if it is prevented from pursuing a legitimate claim, on the one hand, against the potential injustice to a defendant who despite having successfully warded off a claim (and I must add probably at an enormous financial burden) may find that it is been deprived of the benefit of the general rule namely that costs should follow the result.

[110] The Constitutional Court held that where litigants are compelled to litigate; whether as plaintiffs or defendants they must as a matter of fairness and

⁵² *Giddey NO v J C Barnard and Partners* par. 7, p.530.

reasonableness be indemnified for costs of pursuing or defending unsuccessful proceedings.

[111] While a defendant in defending an action brought against him by insolvent plaintiff companies litigates at great cost and risk, a plaintiff company with doubtful financial strength litigates with impunity. This is neither just nor, equitable.

[112] The Constitutional Court⁵³ considered the decision by Joffe J in *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd*(1)⁵⁴. In that case the plaintiff alleged that if it was ordered to furnish security it would have to use working capital to comply with the order. The consequence of this would be that the plaintiff would have to either cease trading or abandon its action. O'Regan J, quoted the following passages from the Joffe J's judgment:

“It is clear that, in the event of its being successful, defendant will not recover its costs from the plaintiff. It is common cause that these costs will be substantial. It is noteworthy that whilst not litigating on as lavish a scale as the defendant (the defendant has engaged the services of three counsel) plaintiff has none the less engaged the services of an attorney and two counsel. Plaintiff must have made arrangements for the payment of its own legal costs. The inevitable inference that arises, is that those who stand to benefit from the litigation in the event of an award being made in favour of the plaintiff, are financing the plaintiff's litigation whilst shielding behind the plaintiff's corporate identity insofar as the defendant's costs are concerned. This consideration must weigh in favour of ordering security.”

[113] These remarks apply equally to this case.

⁵³ In *Giddey NO v JC Barnard and Partners*.

⁵⁴ 1997 (4) SA 908 (W).

[114] The costs in the main action will undoubtedly be substantial. The plaintiff is represented by senior counsel and the defendant by both senior counsel and junior counsel;

[115] I am not oblivious that the effect of an order to pay security may very well, if not certainly, put an end to the litigation. However, the Supreme Court of Appeal⁵⁵ has pronounced that the mere fact that an order for security will bring an end to a plaintiff's claim, does not in itself warrant the refusal of the application. Furthermore, it found that the mere possibility that the order will effectively terminate the litigation could not without something more, affect the court's decision. It only becomes a factor once it is established as a probability by the plaintiff. The possibility that the plaintiff may have to abandon the litigation becomes a relevant consideration only after the plaintiff has established this as a probability. Even if the plaintiff succeeds in establishing this, this is but one of many other factors that the court can take into account when deciding the application. In my opinion, the plaintiff has failed to establish as a probability, that an order for security will bring an end to its claim.

[116] In my opinion the plaintiff will not by an order requiring it to furnish security be denied the right to prosecute its claim. It must simply provide security and proceed with the action. There is no bar in this regard.

⁵⁵ *Shepstone & Wylie and others v Geyser NO.*

[117] There is no evidence that the plaintiff's four shareholders will not be able to raise funds in order to provide security. The plaintiff has made arrangements for the payment of its own legal fees by its shareholders. The shareholders claim not to have the resources to provide security to the defendant. In my view the shareholders have not been candid with the court. In my view they should have produced documents to substantiate this

[118] I am of the opinion that the shareholders must be persons of some means considering that two of them are professionals; one an architect and the other a legal advisor. Of the remaining two, one is described as an "entrepreneur". The other is an estate agent. These shareholders are content to reap the benefits of success litigation. They however want a shield to escape the consequences of an unfavourable award. In the interests of justice and fairness I cannot countenance this.

[119] In *Shepstone and Wylie and others v Geyser NO* Hefer JA remarked that "where a plaintiff company is in financial difficulties, the sharp commercial reality of such an order is that at times where the plaintiff cannot find security for costs it will not be able to pursue its action." In my view this applies aptly to the plaintiff.

[120] I disagree with the plaintiff's contention that an order requiring it to provide security for costs will deny to it the right it enjoys in terms of section 34 of the Constitution of the Republic of South Africa, 1996.

[121] The following factors in addition to the ones I have already discussed weigh in favour of an order for security:

- (i) The plaintiff has conceded that it will be unable to satisfy an adverse costs order.
- (ii) The costs in the main action are likely to be substantial. The plaintiff is represented by senior counsel and the defendant by both senior and junior counsel.
- (iii) There is no evidence before me whether the order for security would put an end to the litigation or not. The Supreme Court of Appeal in Shepstone and Wylie and Others v Geyser NO said that the mere possibility that the order for security will effectively terminate the litigation can plainly not affect a court's decision. The plaintiff has made a bald and unsubstantiated statement that the litigation will come to an end. The plaintiff has to establish this as a probability. It has elected not to produce evidence to establish this.
- (iv) I am not satisfied that the plaintiff has established that an order compelling it to provide security might very well result in it having to abandon its claim. I am somewhat surprised that the plaintiff did not disclose whether it or its shareholders have attempted to raise funds. This in my view leads to the inescapable conclusion that no such attempts were made. In the absence of such attempts the plaintiff cannot be heard to say it cannot provide security. It has not attempted to do so.

The plaintiff does not take the court into its confidence and disclose the financial strength of its shareholders. The high water mark of its candour is the statement that the shareholders do not possess sufficient assets to fund the defendant's costs and provide the amount demanded as security.

- (v) An order compelling security would not as a matter of course put an end to the litigation. Even if it does, that by itself does not provide sufficient reason for refusing an order.⁵⁶
- (vi) When the plaintiff decided to litigate it must have considered and made provision for the consequence of unsuccessful litigation. I find it inconceivable that the plaintiff would have not so. I also find it inconceivable that the plaintiff would not have known that if its action was to be dismissed it would have to pay the defendant's legal costs.

[122] I have in weighing the interests of the parties taken into account that the company and consequently its shareholders may be negatively affected by an order. In my view they must knowingly have assumed the risks that accompany litigation. Litigation is after all not for the faint-hearted

[123] Mr Antonio submitted that I should not leave out of consideration that the defendant is a listed company making huge annual profits. In my view the financial position of a defendant is irrelevant. There is no compelling reason why a public company or a large commercial enterprise should have to defend

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Shepstone and Wylie and Another v Geyser.

litigation at enormous costs and then have snatched from it the right to hold an unsuccessful plaintiff, who has chosen to litigate to do so with impunity. It is unfair to expect a successful defendant in such circumstance to have to pay its own costs.

Conclusion

[124] I can find no basis for denying the defendant protection from irrecoverable legal costs.

Order

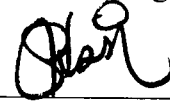
[125] In the result I make the following order:

- (i) The plaintiff is ordered to furnish security for the defendant's legal costs in the action.
- (ii) The form, amount and manner of security to be provided by the plaintiff shall be determined by the Registrar on application by the defendant to that office.
- (iii) In the event that the plaintiff fails to provide security as determined by the Registrar within 20 days of the Registrar's order or determination, the action shall be stayed forthwith and the defendant is granted leave to apply on the same papers, amplified as necessary, for the dismissal of the action.

- (iv) The plaintiff is to pay the costs of the application, including the costs occasioned by the employment of two counsel.

SK Hassim

Acting Judge of the High Court



Date of Hearing: 25, 26 and 27 November 2013

Date of order: 11 March 2014

Date of Judgment: 19 March 2014

Counsel for plaintiff: Adv. M Antonie SC

Counsel for defendant Adv P Ginsburg SC

Adv G Marriott