IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

1/3/2016
DATE

SIGNATURE

CASE NO: 77107/2014

1/3/2016

In the matter between

AGUA CAPITAL (PTY) LTD — **Plaintiff**

and

CORLINK TWENTY FIVE (PTY) LTD — **First Defendant**

PETRUS VAN EEDEN — **Second Defendant**

GREENBRIDGE GROUP (PTY) LTD — **Third Defendant**

J U D G M E N T

MALI AJ:

[1] This is an exception by the third defendant to the plaintiff's particulars of claim on the basis that they are vague and embarrassing. The third defendant also seeks security for costs against the plaintiff.

[2] The plaintiff is a company with limited liability with Registration No 2012/069018/07, registered in terms of the provisions of the Companies Act 71 of 2008 ("the Act"). The plaintiff's address for purposes of this action is care of MacRobert Inc of MacRobert Building, corner Justice Mahomed and Jan Shoba Streets, Brooklyn, Pretoria, Gauteng Province.

[3] The third defendant is a company with limited liability with Registration No 2001/0266354/07, registered in terms of the Act. The third defendant's address for purposes of this action is care of Coetzee Attorneys, 679 Koedoeberg Road, Faerie Glen, Pretoria, Gauteng Province.

EXCEPTION

[4] In paragraphs 21-24 of the plaintiff's particulars of claim, the plaintiff alleges the following:

> *"21. The first defendant breached the first loan agreement by failing to pay the sum of R2,262,557.00 on 28 February 2014 and breached*

the second loan agreement by failing to pay the outstanding amounts in the sum of R2,192,738.00 on or before 31 May 2014.

22. *The third defendant was aware of the abovementioned cessions at all relevant times and of the aforementioned breaches as the time they occurred (sic).*

23. *In breach of the first and second cession agreements, the Third Defendant made the following payments to the First Defendant in terms of Safex agreements referred to in paragraphs 18.1 and 18.2 above:*

23.1 On 13 March 2014 the sum of:	*R500,000.00*
23.2 On 19 March 2014, the sum of:	*R800,000.00*
23.3 On 28 March 2014, the sum of:	*R250,000.00*
23.4 On 28 March 2014 the sum of:	*R77,821.30*
23.4 On 28 March 2014, the sum of:	*R299,518.58*
TOTAL	***R1,927,339.88***

In the circumstances the Third Defendant was/is obligated to pay the sum of R1,927,339.88 to the Plaintiff, which it failed to do."

[5] The complaint is that the plaintiff has failed to allege how the third defendant came to know about the purported cessions and that the plaintiff does not allege when the third defendant was made aware of the above mentioned cessions. The excipient's further complaint is that it is not pleaded who represented the third defendant when the third defendant was made aware of the purported agreements of cession. Thus, the third defendant cannot meaningfully plead due to lack of particularity.

[6] The plaintiff, furthermore, fails to plead how, where and when and who on behalf of the third defendant was made aware of the breaches of the two loan agreements allegedly committed by the first defendant. In the result, the third defendant states that the only part that remotely attempts to found a cause of action against the third defendant is the following:

> *"the third defendant was aware of the abovementioned cessions at all relevant times and of the aforementioned breaches as the time they occurred (sic)."*

[7] The respondent's/plaintiff's counter argument to the above is that the third defendant's/excipient's complaints are questions of evidence. As to who, when and where the third defendant became aware of the cessions and the breaches in question are not material facts. According to the plaintiff, what constitutes a material fact is the third defendant's knowledge of the cessions and the first defendant's breaches of the loan agreements.

[8] Rule 23(1) reads as follows:

> *"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set the matter down for hearing in terms of paragraph (f) of subrule (5) of rule (6): provided that where a party intends to take exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: provided further that*

the party excepting shall within 10 days from the one which a reply to such notice is received or from the date on which such reply is due deliver his exception."

[9] In **Jowell v Bramwell-Jones** 1998 (1) SA 836 (W) at 899 G, it was held that an exception to a pleading on the grounds that it is vague and embarrassing is not to be directed at a particular paragraph within the cause of action; it goes to the whole cause of action which must be demonstrated to be vague and embarrassing.

[10] In terms of Rule 18(4) of the Uniform Rules of Court,

"every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim,... with sufficient particularity to enable the opposite party to reply thereto". (own underlining)

[11] *In casu* the following is stated at page 24 at paragraph 18 titled *"THE PLAINTIFF'S CLAIM AS AGAINST THE THIRD DEFENDANT"*,

*"18.1 That on 18 December 2013 and at Pretoria, the First Defendant represented by Mr Van Eeden and the Third Defendant represented concluded a written agreement in terms of which the First Defendant sold to the Third Defendant 475 metric tons soya beans at a price of R5,280.00 per metric ton, which soya beans had to be delivered from 1 May to 30 May 2014. A copy of this agreement which is numbered E74345 is annexed as '**A5**'.*

18.2 On 24 January 2014 and at Pretoria, the First Defendant and the Third Defendant (as represented above) concluded a

*further written agreement in terms of which the First Defendant sold to the Third Defendant 375 metric tons of soya beans at a price of R6,100.00 per metric ton, which soya beans had to be delivered from 1 February to 28 February 2014. A copy of this agreement which is numbered E7452 is attached as '**A6**'."*

[12] From paragraph 19 to 21 of the amended particulars of claim, in relation to the claim against the third defendant, the contents of the paragraphs are almost entirely about the plaintiff and the first defendant's cession agreements. The contents are also about the first defendant's breaches. There is no mention of the third defendant's involvement in the cessions in any of the said paragraphs and/or even in the contracts between the first defendant and the plaintiff. At page 80, paragraph 14, titled "*Cession and Assignment*", the following is stated:

> "*14.1 The lender may cede or assign any or all of its rights in terms of this Agreement to a third party or third parties, without notice of such cession or assignment being given to the borrower.*
>
> *14.2 To the extent that any cession or assignment by the Lender results in a splitting of claims, the Borrower hereby consents to such splitting.*
>
> *14.3 The Borrower shall not pledge, assign, transfer, make over, hypothecate or in any way alienate or Encumber all or any of its rights, benefits, interest and/or obligations under this Agreement to any person without the prior written consent of the Lender.*"

[13] The above are the only statements relating to the cession in the entire pleadings except for the following statement:

"The third defendant was aware of the abovementioned cessions at all relevant times and of the aforementioned breaches as the time they occurred (sic)".

[14] Having carefully considered the pleadings, I agree they contain a statement to the effect that the third defendant was aware of the cessions and the breaches at the time they occurred. However, the material facts upon which the pleader relies for his claim are not pleaded with sufficient particularity to enable the third defendant to reply thereto. In my view, there is no intelligible link regarding the cession, pleaded against the third defendant leading to it owing the plaintiff. To assist the third to plead. It is apparent that the material fact relied upon is that the third defendant was aware of the cession. Upon reading the whole claim against the third defendant as well as reading the claims against the two other defendants, the alleged basis of awareness should at least have been pleaded.

[15] I find that the particulars of claim are vague and embarrassing to the extent of causing prejudice to the third defendant.

COSTS

[16] The third defendant has argued for costs with costs of senior counsel. It is trite law that costs follow the result. *In casu*, save for the factor of the claim amount, I do not understand on which other basis such costs should include the costs of a senior counsel. The nature of the subject matter of this exception was not complex or one which required the

special skills of senior counsel. In my view, any practising legal practitioner should have been able to argue this matter. Accordingly, I decline to exercise my discretion in this regard.

SECURITY FOR COSTS

[17] For purposes of the application for security for costs, the applicant's/third defendant's address is its principal place of business situated at 878 Rubenstein Drive, Morelata Park, Pretoria, Gauteng. The applicant conducts business as an agricultural commodity trader.

[18] The respondent is the plaintiff in the main action and its address remains the same as in paragraph 2 above.

[19] It is common cause between the parties that, on or about 18 December 2013 and 25 January 2014, the applicant and Corlink, a private profit company conducting operations in the farming industry, entered into four pre-season agreements. The agreements were in respect of which Corlink would sell to the applicant certain quantities of yellow maize and soya beans from its then anticipated crop. The applicant would procure the crop pursuant to its enterprise as a commodity trader ("the sale agreements").

[20] The sale agreements were pre-season agreements in terms of which the applicant would purchase from Corlink certain quantities of Corlink's anticipated crop. The respondent subsequently served a winding- up

application in terms of section 45 of the Companies Act of 1973. The said winding up application pursued payment by the applicant in the sum of R4,353,397.

[21] The parties later exchanged correspondence regarding the undertaking by the respondent to desist with the winding up application. As the said undertaking was not forthcoming, the applicant instituted an urgent application. Upon service of the urgent application, the respondent proceeded with the action to recover the amount alleged in the winding up application.

[22] The applicant is calling upon the respondent to furnish security for costs based on the following grounds:

22.1 the respondent does not possess any unencumbered immovable property;

22.2 the respondent does not own sufficient movable property to satisfy a costs order that may be made against the respondent;

22.3 the respondent's income is insufficient to satisfy any costs order that may be made against the respondent;

22.4 there is reason to believe that the respondent or, in the event of it being wound up, the liquidator of the respondent, will be unable

to pay the costs of the applicant if the applicant is successful in its defence to the action.

[23] Rule 47(3) of the Uniform Rules of the High Court provides:

> *"If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with."*

[24] The onus is on the party seeking security to persuade a court that security should be ordered. As was the situation under s13 in the past, a court, in the exercise of its discretion, will have regard to: the nature of the claim; the financial position of the company at the stage of the application for security; and its probable financial position should it lose the action. The distinction to be drawn between the common law and that which prevailed in terms of s13 is described thus by Brand JA in ***MTN Service Provider (Pty) Ltd*** **v** ***Afro Call (Pty) Ltd*** 2007 (6) SA 620 (SCA) paragraphs 15–16:

> "Against *an insolvent natural person, who is an incola, so it has been held, security will only be granted if his or her action can be found to be reckless and vexatious (see Ecker v Dean 1938AD 102 at 110). The reason for this limitation, so it was explained in Ecker (at 111), is that the court's power to order security against an incola is derived from its inherent jurisdiction to prevent abuse of its own process in certain circumstances. And this jurisdiction, said Solomon JA in Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 274, is a power which ... ought to be sparingly exercised and only in very exceptional circumstances. (See also eg*

Ramsamy NO v Maarman NO 2002 (6) SA 159 (C) 173F–I). In the exercise of its discretion under s13 of the Companies Act, on the other hand, there is no reason why the court should order security only in the exceptional case. On the contrary, as was stated in Shepstone & Wylie (supra) 1045I–J, since the section presents the court with an unfettered discretion, there is no reason to lean towards either granting or refusing a security order. It follows, in my view, that although bona fides of the company's claim is a consideration that may legitimately be taken into account in the exercise of the court's discretion, as one of many factors, mere bona fides in itself cannot serve as a basis to refuse security when applied under s13."

[25] **Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd** (20156/2014) [2015] ZASCA 93 (1 June 2015) states that, in terms of common law, the inability by an *incola* to satisfy a potential costs order is insufficient to justify an order of security. Something more is required. In conclusion, it was found at paragraph [16] of the *Boost* decision that:

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

[26] The applicant, in its founding affidavit, did not state that the respondent's action is vexatious. The issue of vexatious action was only raised in the

replying affidavit. It is trite that a party to an application falls or stands by his/her/its own affidavit.

[27] It is common cause that the respondent is an *incola*. Furthermore, the applicant did not adduce any evidence in respect of the respondent's probable financial position except for bald statements. The applicant has not discharged onus. Something more is required. In the result the applicant's application must fail. This application could have been prevented, particularly on the backdrop of the tacit law regarding security for costs. I fully agree with the respondent that the applicant's action must be visited with punitive costs.

ORDER

[28] The third's defendant's exception is upheld with costs excluding costs of senior counsel.

[29] The application for security for costs is dismissed with costs between an attorney and own client.

MALI AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Third Defendant/ Applicant:	Adv A G South
Instructed by:	MacRobert Incorporated
For the Plaintiff/ Respondent:	Adv MC Erasmus SC
Instructed by:	Coetzee Attorneys
Date of hearing:	13 October 2015
Date of Judgment:	01 March 2016