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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 5151'/2013

DATE: 6/9/2016

In the matter between:

GORDON CHUNNETT

Applicant

and

LYUDMILA ROYTBAT

Respondent

and

CASE NO: 51542/2013

ROGER MOSSOM

Applicant

and

LYUDMILA ROYTBAT

Respondent

JUDGEMENT

MOTHLE J

A. *Introduction:*

1. This judgment concerns two interlocutory applications for security of costs, arising out of two separate and identical actions launched by the Respondent against the two Applicants.
2. The applications were heard simultaneously as they raised the same cause of action, involved the same Respondent and were argued by the same counsel on each side. Apart from the different names of the Applicants and the difference in the case number, the content of the notice of motion as well as the affidavits filed by both parties in each application are the same.
3. Both parties agreed that the matters should be heard together and that the judgment in one application would apply to the other.

B. Background:

4. Both Applicants each separately instituted action against the Respondent's company, TransAsia Minerals South Africa (Pty) Ltd claiming certain amounts due. After the closure of pleadings, the Applicants filed discovery affidavits in terms of Rule 35 of the Uniform Rules of Court. The Respondent in turn instituted separate actions against the Applicants during September 2013 for amounts of R500,000.00 each, alleging that the Applicants had defamed her in their discovery affidavits.
5. The Applicants are defending this action and now claim that the Respondent must make payment of security for costs in terms of Rule 47 of the Uniform Rules of this Court. The amount requested is R200,000.00 as security for costs in each action.

C. *The Evidence.*

6. The Respondent is presently residing at Suit [8..], Michael Angelo Towers Hotel, Sandton. She is a citizen of Australia, and not of the Republic of South Africa and therefore a *peregrines* of this Honourable Court.

7. She is in South Africa conducting business as Chief Executive Officer of TransAsia Minerals. She admits in her affidavit that she travels to various countries outside South Africa in the course of her business and for personal reasons. She has no immovable property registered in her name in SouthAfrica.

8. The Applicant submits that there is yet another case pending in this division where a similar application will be made. The Applicant further submits that there is evidence to show that there are other cases pending in other Courts, including the Magistrates' Court, wherein the Respondent has issued summons against various people and entities.

D. *The Applicant's contentions:*

9. The Applicant contends that:

- 9.1 The Respondent is a *peregrines* to this Court and has no immovable property that can be attached in the event a cost order is issued against her;
- 9.2 There is evidence in the various pending cases that due to the Respondent's frequent travels abroad, the trials had to be postponed. In each instance she had tendered the costs;
- 9.3 In South Africa she stays in a hotel and apart from her company's movable properties such as two motor vehicles and possibly cash in the bank, she cannot produce any guarantees that she will be able to make good of the litigation costs she had already incurred and those that she is likely to incur in the pending matters; and
- 9.4 She **is a** business woman who trades through her company in South Africa and is therefore would be able to post security for costs.

E. Respondent's contentions:

10. The Respondent contends as follows:

- 10.1 That the amount claimed as security for costs in both matters and the other matter that is before Court would be in the region of R600,000.00 which will be unaffordable and therefore amounts to a denial of access to Court;
- 10.2 She has two motor vehicles with the combined value of R775,000.00. The Applicant submits that the motor vehicles the Respondent refers to are paid up but registered in the name of the company and not in her personal name;
- 10.3 Her attorney has in his trust account R600,000.00 held on her behalf for the purpose of litigation in these matters. The Respondent does not explain the purpose of these monies in the trust account, what they are intended for and whether she intends to have this amount of R600,000.00 posted or guaranteed as security for costs;
- 10.4 She further alleges that: *"I have a bank account in South Africa with sufficient funds."* The Respondent does not attach any bank statements reflecting the alleged sufficient funds and/or proof of any movables registered in her name.

F. The Law:

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*, a person domiciled or resident in a permanent nature in the Republic,³ from assuming the risk of the costs of litigation which may not be recoverable in the event the incola is successful in its defence.⁴
13. A foreigner who is not ordinarily domiciled or resident in the Republic, and who institutes action or launches an application, and does not own unmortgaged immovable property in the Republic, may be ordered to provide security for the costs of the action.⁵
14. Rule 47 provides that a party in litigation may demand security for costs from the other by way of a notice, setting

¹ (1828) 1 Menz 291

² 1983 (3) SA 394 (T)

³ *Toumbis v Antoniou* 1999 (1) SA 636 (w).

⁴ *Witham v Venables* supra.

⁵ *Silvercraft Helicopters (Switzerland) Ltd v Zonnekus Mansions (Pty) Ltd* 2009 (5) SA 602 (C).

out the grounds upon which such security is claimed and the amount demanded. The Registrar is then empowered to decide what the amount will be in the event there is no agreement to that effect.

15. Where, however, the demand for payment of security for costs is opposed, the matter may then, by way of application be referred to Court by the party demanding security for costs, in which event, the action proceedings may have to be stayed pending the payment of security for costs. If security is not given within a reasonable time, the Court is empowered to dismiss any proceedings instituted by such party in the event the defaulting party is unable to pay the order for the payment of security for costs.

16. Counsel for the Respondent submitted in Court that the Respondent is an indigent person and as such will not be able to afford the amount demanded for security for costs. This is contrary to what the Respondent states in her opposing affidavit. In paragraphs 14, 15 and 17 thereof, the Respondent claims that she conducts business in

South Africa and owns sufficient movable property to cover the legal costs. She further refers to ownership of the motor vehicles which, as the Court has already indicated, are registered in her company's name. The Respondent also admits that she conducts frequent travels in and out of South Africa. This Court is not persuaded that the Respondent is an impecunious or indigent person who cannot afford security for costs.

17. The Respondent through her counsel further contends that in each instance where she was not present in Court and the matter had to be postponed, she tendered payment of the wasted costs. If anything, this submission confirms the risk of non-payment of costs on her part. Her tendency or inclination to tender payment of costs every time she is not available to attend trial, shall cumulatively result in a total amount that will be unaffordable in so far as the costs of the litigation is concerned. She does not deny the allegation that she is a party, either as plaintiff or defendant in a number of actions instituted and pending in various courts including the magistrate courts.

G. Conclusion:

18. Having regard to the conspectus of the evidence in these applications, I am of the view that the Respondent is liable for payment of security for costs. She has, on her own version, demonstrated an ability to pay such costs or guarantee the amounts requested. She should therefore be ordered to pay the security for costs. The amount claimed namely R200,000.00 in each action is, in the Court's view, fair and reasonable.
19. In the premises I make the following order in respect of each of the two applications before me:
1. The application succeeds;
 2. The Respondent is ordered to pay an amount of R200,000.00, as security for costs in each action *alternatively* submit to the Registrar guarantees in a total amount of R400,000.00 obtained from a registered financial institution in the Republic of South Africa;

3. The prosecution of her separate actions against the Applicants is stayed pending compliance with 2 above;
and
4. The Respondent is ordered to pay the costs of this application.

S P MOTHLE
Judge of the High Court
Gauteng Division
Pretoria

Pretoria

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