IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

9/9/2016

Case No: 1012/2007

In the matter between:

NEDBANK LIMITED	1st Applicant/1st Defendant
BoE BANK LIMITED	2nd Applicant/11th Defendant

and

MARTHINUS JACOBUS DE WAAL BREYTENBACH N.O.
KHATHAZILE SIMON MAHLANGU N.O.

In their capacity as joint liduiators of
HILLCREST VILLAGE (PTY) LTD
(IN LIQUIDATION) Respondent/1st Plaintiff

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

9/9/2016
DATE

SIGNATURE

JUDGMENT

HF JACOBS, AJ:

[1] The applicants (Nedbank Limited and BoE Bank Ltd)[1] apply for an order compelling the respondent company Hillcrest Village (Pty) Ltd (in liquidation)("Hillcrest") to furnish security for the applicants' costs in the sum of R500 000.00. The amount of security is not challenged but the obligation is.

[2] The notice calling for security was served between 25 November and 8 December 2010. At that stage section 13 of the Companies Act 61 of 1973 ("the 1973 Act") still applied. On the advent of the New Companies Act,[2] section 13 of the 1973 Act was repealed. In terms of the notice calling for security the applicants rely on allegations to the effect that Hillcrest would be unable to meet any adverse cost order that may be granted in favour of the applicants at the conclusion of the pending litigation. Hillcrest's inability to satisfy an adverse cost order was not challenged. In fact, it was alleged by Hillcrest that its impecuniosity was the result of conduct of staff members of the applicants and that it should not be compelled to furnish security for the applicants' costs at all.

[3] The main action was instituted by Hillcrest during 2007. Hillcrest was liquidated by way of special resolution on 18 November 2009 and was substituted in the main action by Messrs Breytenbach and Mahlangu as joint liquidators on 19 November 2010. This application in terms of Rule 47(3) to

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1 The first and eleventh defendants in the main action.

2 1 May 2011.

furnish security was instituted on 1 April 2011 and enrolled for 12 May 2011. By agreement between the parties the application was removed from the roll of 12 May 2011 to afford Hillcrest the opportunity to convene an inquiry in terms of sections 417 and 418 of the 1973 Act. That application was not brought to finality and the present application was proceeded with by the applicants. I will return to the facts gleaned from the affidavits presently. It would be convenient to refer to the legal principles applicable to applications for security first.

[4] The onus is on an applicant seeking security to persuade a Court that security should be ordered. Before *Boost*[3] and until the repeal of section 13 of the 1973-Act, a Court was vested with the discretion to order an *incola* company or its liquidator that has instituted action to furnish security for costs if there were reason to believe that the liquidated company would be unable to pay the costs of its opponent. In *Giddey*[4] the Constitutional Court stated the approach to be followed in the exercise of that discretion given section 34 of the Constitution which entrenches the right to have the dispute resolved by Courts. *Giddey* was decided under section 13 of the 1973 Act, nine years before *Boost*. The main purpose of section 13 was to ensure that companies who are unlikely to be able to satisfy an adverse costs order if unsuccessful to not institute vexatious litigation or to litigate in circumstances where they have no prospects of success thus causing their opponents

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3 *Boost Sports v SA Breweries* 2015 (5) SA 38 SCA.

4 *Giddey N.O. v J C Barnard & Partners* 2007 (5) SA 525 CC.

unnecessary and irrecoverable legal expense. A Court's discretion to order a company to furnish security is an unfettered one and the mere inability to satisfy a cost order is not sufficient a reason alone. Under common law a Court in the exercise of its discretion had to 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. In *Boost*[5] it was held that *"something"* more is required. The Supreme Court of Appeal held in *Boost*[6] that:

> *"even though there may be poor prospects of recovering costs, a Court, in its discretion, should only order the furnishing of security for such costs by an incola company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse."*

[5] In this context *"vexatious"* means *"frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant"* and vexatious proceedings would include proceedings which, although properly instituted, are continued for the sole purpose of causing annoyance to the defendant and *"abuse"* connotes a mis-use, an improper use, a use *mala fide* and a use for an ulterior motive.[7]

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5 *Boost supra* at par [15].

6 *Boost supra* at par [16].

7 *Boost supra* at [17].

[6] An action would be vexatious and an abuse of the Court process *inter alia* if it is obviously unsustainable. This must appear as a certainty and not merely as a preponderance of probability. The position is so since the common law is reluctant to limit access to court and an application for security for costs would seem to require a less stringent test than the one for the stay of vexatious proceedings.

[7] It is not expected during the exercise of the discretion that a detailed investigation of the merits of the case should be undertaken nor is it contemplated that there should be a close investigation of the facts in issue in the main action. In *Boost*[8] the Supreme Court of Appeal approved the statement of Streicher JA in *Zietsman*[9] stating that:

> *"I am not suggesting that a Court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party's prospects of success would depend on the nature of the dispute in each case."*

[8] One of the features of this application (and the main action) is the abandon with which allegations of fraud, collusion and shamming have been levelled by and on behalf of Hillcrest. The allegations are in some instances sweeping to the effect that BoE conducted *"a sham auction"* and also repelled

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8 *Boost supra* at [19].

9 *Zietsman v Electronic Media Network Ltd & Others* 2008 (4) SA 1 (SCA) at [21].

potential purchasers from bidding at the auction when the assets of its principal debtor, WKP, took place. Hillcrest's case is, as far as the fraud, collusion and shamming allegations are concerned, based on nothing more than assertions. Assertions, whether made in pleadings, affidavits in open Court or under the guise of evidence, have no evidentiary value. It does not call for rebuttal and to place reliance on assertions of the kind under discussion in exercising a discretion is inappropriate and wrong. However, and mindful of the dictum in *Zietsman*[10] I am of the view that the proper approach to follow in determining whether the case pleaded and summarised by Hillcrest in its answering affidavit should be held to be *"vexatious, reckless or otherwise amount to an abuse"* as the applicants allege it is, would be to consider whether the allegations, if proven at trial, would make out a case in law against the applicants.

[9] Against the backdrop sketched above it is now necessary to consider the *"nature of the dispute"* in the main action.

[10] The main action dates back to 2007. The following history appears from a judgment of the SCA attached to Hillcrest's answering affidavit. On 19 October 1994 Waterkloof Projects (Pty) Ltd ("WKP") purchased Erf 1856 Waterkloof Ridge from the Pretoria Municipality ("the Municipality"). The property was to be developed as 113 residential stands and 107 cluster stands. The development was to be named the Waterkloof Boulevard. In

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10 Par [7] above.

terms of the contract between WKP and the Municipality WKP was obliged to create a nature park at a cost of not more than R2 158 000.00 on a remainder of Erf 1856. BoE guaranteed WKP's obligation in respect of the nature park and lent and advanced to WKP the sum of R14 200 000.00 to fund a turnkey development. The amount of R14 200 000.00 was secured by a mortgage bond over the land.

[11] WKP was also obliged, in terms of the lease agreement with the Municipality, to undertake the long term maintenance of the nature park at a nominal rental of R5 000.00 per annum. Development of the nature park had to commence within 60 days of 3 February 2000 (the date on which the lease was concluded) and WKP had to complete the nature park within 12 months. WKP failed to do so and on 13 October 2000 the Municipality claimed payment from BoE for the guarantee of R2 158 000.00. BoE then undertook to complete the project on behalf of WKP.

[12] WKP was entirely dependent on the funding provided by BoE to complete the development. Without such funding WKP would not have been able to meet any of its obligations. As a result of WKP's financial difficulty during 2000, BoE advanced a further loan of R10,8 million to WKP for purposes of restructuring the development. The loan was secured by a mortgage bond. Mr De la Pierre, representing WKP, requested BoE to appoint Pam Golding Properties to launch a marketing campaign in respect of the stands in the development. BoE financed all the costs of the marketing campaign. The campaign failed. Transfer of the properties could not be

effected as a result of problems with the subdivision and installation of services. BoE then foreclosed its mortgage bond. Application was made by a creditor of WKP for its liquidation. In an attempt to avoid the liquidation Mr De la Pierre, a director of Hillcrest and WKP and deponent to a supporting affidavit filed by Hillcrest in this application, was willing to conclude a sale agreement with Mr Da Silva (the seventh defendant in the main action) to undertake the completion of a substantial portion of the development. Mr Da Silva purchased the cluster stands and undertook to pay BoE the purchase price in respect of each cluster stand so purchased upon completion of building operations on the stands and the sale thereof. BoE undertook to provide services to the cluster stands. The agreement with Mr Da Silva was signed by Mr De la Pierre on 18 July 2000 and a few days later WKP also gave a general power of attorney to BoE in respect of the disposition of the remaining unsold subdivisions of Erf 1856. After conclusion of the agreement between Mr Da Silva and WKP (WKP was represented by Mr De la Pierre), WKP contended that Mr De la Pierre had no authority to conclude the agreement and refused to ratify it. By that time Mr Da Silva had already commenced with construction on some of the portions of Erf 1856. Mr De la Pierre contended that the subdivided stands on Erf 1856 had a value which BoE considered unrealistic.

[13] WKP also gave BoE a general power of attorney for the disposition of the remaining unsold portions of Erf 1856. A copy of the general power of attorney is attached to the particulars of claim as annexure "H". The general

power of attorney is dated 21 July 2000. The general power of attorney[11] admits the indebtedness of WKP to BoE and records that any surplus generated from the sale of the property shall inure for the benefit of WKP and that should any dispute arise in regard to the quantum of such surplus or the computation thereof, such dispute shall be referred to an auditor appointed by BoE who shall act as an expert and his decision in that regard shall be final and binding on all the parties concerned. BoE then applied for the liquidation for WKP.

[14] The liquidators of WKP[12] applied to the Master for authority in terms of section 386(2A) and (2B) of the 1973 Act to sell the immovable property of WKP by way of public auction. The auction took place on 20 March 2001. No bidding interest was shown at the auction and BoE considered itself obliged to buy into the project as it was the only creditor and did so by offering a nominal amount of R100 000.00 which offer was accepted by the auctioneer on the instructions of the liquidators (second and third defendants in the main action). Shortly before the auction, on 6 March 2001, a written settlement agreement was concluded between Gilboa Properties Ltd ("Gilboa")[13], Hillcrest and other debtors of WKP and WKP and BoE. That agreement was referred to in the judgment of Streicher JA in

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11 Clause 1.1 thereof.

12 Second and third defendants in the main action.

13 Gilboa is the 12th defendant in the main action. Its name has since been changed to Absolute Holdings Ltd.

Cronje[14] as the first settlement agreement. On 24 August 2001 a second settlement agreement was concluded between the same parties in terms of which it was agreed that CMT[15] would deliver share transfer forms in respect of shares held in Gilboa to enable the liquidators of WKP to sell the shares in Gilboa on the Johannesburg Stock Exchange and that the proceeds would be applied in the reduction of the debt due to BoE. On 23 August 2002 a further settlement agreement (the third settlement agreement) was concluded in terms of which it was agreed that Hillcrest would transfer the immovable property known as Gilboa House to BoE at a price equal to an amount owing to BoE in terms of the mortgage bond over the property which was at that stage R6,9 million and that the balance of Gilboa shares would be redelivered to CMT (the second plaintiff) against transfer of the property which would absolve CMT and the other parties to the settlement agreement against transfer of the property from their obligation to pay the amount of R10 million to WKP and further from their obligations towards BoE in terms of any suretyship. Effect was given to the agreement and the First and Final Liquidation and Distribution Account of WKP was confirmed by the Master on 13 December 2002 and WKP was dissolved on 25 June 2004. BoE was the only creditor that proved a claim against WKP. The claim was in the sum of R29 297 229.13 and was secured by way of mortgage bond. The sale in execution of 20 March 2001[16] realised only R100 000.00 and a further

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14 *Cronje N.O. and Others v Hillcrest Village (Pty) Ltd and* Another 2009 (6) SA 12 (SCA) at [12].

15 The second plaintiff in the main action.

16 See para [13] above.

R720 000.00 was raised in respect of two stands separately auctioned which entitled BoE as a secured creditor to a dividend of R784 527.23 leaving it with a concurrent claim of R28 512 701.90. According to the calculations accepted by the Supreme Court of Appeal in *Cronje*[17] BoE suffered a loss of approximately R7 million in respect of the project. The auction referred to above, the three settlement agreements and the Liquidation and Distribution Account submitted by the liquidators of WKP to the Master were not challenged by Hillcrest, its directors and shareholders, the trustees of CMT (the second and third plaintiffs) at all.

[15] Some years later, during or about 2004, Mr De la Pierre got wind of the alleged involvement of banks allegedly participating in a *"repo scam"*. In the media reports (attached to the particulars of claim) reference is made in journalistic terms to conduct of banks not accounting to their clients against whom they foreclosed for profits made by the banks after the banks acquired mortgaged properties of their clients at auctions. On 12 January 2007 Hillcrest and the trustees of CMT instituted the main action. In their particulars of claim in the main action the plaintiffs allege that they first became aware of the existence of the *"repo scam"* no later than 27 January 2004. Hillcrest and the trustees of CMT also brought an application to this Court for an order:

> *"1. That the dissolution of WKP be declared void in terms of s 420 of the Companies Act 61 of 1973.*

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17 *Cronje supra* at par [13] and [14].

2. *That the Liquidation and Distribution Account be reopened.*

3. *That the Master of the High Court be ordered to appoint new liquidators to wind-up WKP."*[18]

The application was heard by Mavundla J on 18 September 2007. Judgment was handed down by Mavundla J on 29 April 2008. Judgment on appeal was handed down on 17 July 2009 by the Supreme Court of Appeal in *Cronje*.[19] The liquidation and winding-up of WKP stand. Hillcrest's main claim does not provide for a claim setting aside any of the settlement agreements, power of attorney and what resulted therefrom.

[16] According to Hillcrest's summary of its case as pleaded[20] Messrs Van Rensburg and Adams, employees or representatives of BoE, participated in a fraudulent scheme which is referred to in the pleadings as the *"repo scam"* and Nedbank identified and associated itself therewith after 1 February 2003.

[17] The allegations are further that BoE controlled the disbursements of the proceeds of the loan granted to WKP but mismanaged the funds which necessitated further funding by WKP in the sum of R5.1 million from BoE. According to paragraph 10 of the answering affidavit[21] WKP and BoE

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18 *Cronje, supra* at par [15].

19 *Cronje N.O. & Others v Hillcrest Village (Pty) Ltd and Another, supra.*

20 Record: par 3 p 46 – par 17.9 p 51.

21 Record: p 48.

concluded an agreement. It is not stated in the summary whether the agreement was written or oral and which of the terms of the agreement were express, implied or tacit terms. In paragraph 12 of the summary it is alleged by BoE failed to take action against the contractor (probably HA Construction Enterprises (Pty) Ltd mentioned in paragraph 10.2 of the summary), and later during November 2000 BoE negotiated excision of certain stands from the sale between BoE and Mr Da Silva mentioned above in order to sell some of the stands to the ninth defendant in the main action (Rojahn). Hillcrest states that on 26 January 2001 the value of the stands amounted to R40 million and that when BoE applied for the liquidation of WKP it inflated the indebtedness of WKP and deflated the value of the assets of WKP in order to secure a winding-up order of WKP.

[18] The summary further records that prior to the winding-up of WKP arrangements were made between BoE, represented by Mr Van Rensburg, Mr Adams and Mr Cronje (later appointed as liquidator of WKP and the second defendant in the main action), Mr Da Silva and Mr Rojahn that BoE was to obtain a winding-up order against WKP, that BoE would take the necessary steps to secure Mr Cronje to be appointed as liquidator, that upon liquidation the sale to Mr Da Silva would not be proceeded with, that Mr Da Silva would not lodge a claim against the liquidator of WKP, that Mr Da Silva would waive his builder's lien against WKP in respect of the development of 14 stands and that after liquidation certain of the stands of the development would be sold to Mr Da Silva or his nominee.

[19] The arrangements summarised above, so the summary goes, constitute collusive dealings before the liquidation of WKP in terms of section 31 of the Insolvency Act and sections 339 and 340 of the Companies Act. The summary does not address the three settlement agreements or the failure of Hillcrest (or the other plaintiffs) to challenge any of those agreements prior to the application brought before Mavundla J.

[20] It should also be noted that the following do not appear from the affidavits of Hillcrest:

[20.1] Hillcrest does not show that it (or its liquidators or members) made any attempt to raise funds to put up the security sought by the applicants. There is no evidence on its behalf that its members are prepared to offer security on behalf of Hillcrest to allow the litigation to proceed.

[20.2] I was informed that Hillcrest's legal representatives litigate in this matter on contingency, which shows that Hillcrest, its liquidators and its members who are all to benefit from the the litigation should it prove to be successful, are not at all exposed to the risk inherent in claims of the kind pleaded.

[20.3] Also relevant is the ratio between the security sought and the total quantum of the claim pleaded. The security sought is only a fraction of the total sum claimed.

[21] Hillcrest's claim in the main action, like its unsuccessful application in *Cronje*, seems to have been caused by its application of the age old logical fallacy *post hoc ergo propter hoc.*[23] The fallacy lies in coming to a conclusion based solely on temporal priority of events. It seems that Hillcrest, when it heard of the allegations concerning BoE, it used that as a ground to challenge not the individual agreements concluded during the liquidation process, but the net result thereof on the premise that the assets of WKP had been sold below value. Hillcrest's attempt to overturn the liquidation process of WKP was unsuccessful. The reasons for its failure are many and recorded in *Cronje*.[24] The liquidation process and all the transactions, settlement agreements, execution of what had been mandated by the powers of attorney cannot now be undone in the main action after an application to do so has failed. In my view Hillcrest has, after dismissal of its application for the setting aside of WKP's winding-up, no case in law as pleaded and summarised in the affidavits.

[22] In my view the main action against BoE and Nedbank is unsustainable and instituted without sufficient ground and aimed solely to annoy the applicants and amounts to an abuse and is *mala fide*. Under the circumstances I am of the view that Hillcrest should be compelled to furnish security in the sum of R500 000.00.

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23 Translated from Latin *"After this, therefore because of this"*. The following example is typical: The rooster crows immediately before sunrise; therefore the rooster causes the sun to rise.

24 *Cronje, supra.*

I make the following order:

(1) Hillcrest Village (Proprietary) Limited (in liquidation) and its joint liquidators are ordered to furnish security for the applicants' costs in the sum of R500 000.00 within 10 days from the date of service of a copy of this order on the respondent's attorney of record; and

(2) The respondent shall pay the applicants' costs which costs shall include the costs consequent upon the employment of two counsel.

HF JACOBS
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Date: 7 September 2016