REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. 2020/819

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

_____19 Aug 2021_____ _____

DATE SIGNATURE

In the matter between:

SCHLEYER, BARBARA First Applicant/First Defendant

SCHLEYER, ALBERT Second Applicant/Second Defendant

and

MARSCHALL, FRANZ Respondent/Plaintiff

JUDGMENT

NOCHUMSOHN (AJ)

1. This is an Application brought by the First and Second Applicants against the Respondent for payment of security for costs.

2. The First and Second Applicants are respectively the First and Second Defendants in the main action.

3. The Respondent in the security for costs application is the Plaintiff in the main action.

4. The Respondent is a *peregrinus*, resident in Germany. The Applicants seek security for their costs to be incurred in the pursuance of their defence to the main action, in the sum of R300 000.00 (three hundred thousand Rand), alternatively in an amount to be determined by the Registrar. In addition, they seek security for the costs of the claim in reconvention filed by them, which costs they also anticipate to be in the amount of R300 000.00 (three hundred thousand Rand), alternatively in an amount to be determined by the Registrar.

5. The Respondent is the owner of an immovable property situate at […], […], Gauteng ("the immovable property").

6. The Applicants are the occupiers of such immovable property and were the tenants of the Respondent in respect thereof. They have been tenants of the Respondent for many years, under several leases which have been renewed, from time to time.

7. The immovable property is owned by the Respondent and is unbonded.

8. The Applicants attached to the Application a valuation in respect of the immovable property dated 25 November 2019. In accordance with such valuation, the property was valued then at R6 750 000.00 (six million seven hundred and fifty thousand Rand).

9. The Applicants aver that as a product of Covid-19 the property has devalued inasmuch as travel restrictions have curtailed its use as a guesthouse since March 2020.

10. In addition, the Applicants aver that the property is encumbered by arrear rates amounting to some R718 244.71 (seven hundred and eighteen thousand two hundred and forty four thousand Rand seventy one cents) in respect of which the City of Johannesburg would be a preferent creditor.

11. In addition, the Applicants aver that the Respondent has not maintained the monthly rates and taxes payable to the City of Johannesburg and has been short paying by some R13 000.00 per month, totalling approximately R160 000.00 per year. In this regard the Applicants allege that by the time the action proceeds to trial there would realistically be a further two to three years of shortfall over and above the balance outstanding, with the result that they anticipate that prior to the main action being finalised, the City of Johannesburg would be owed at least R1 200 000.00 for the property.

12. The Applicants have filed a Claim in Reconvention against the Respondent in which they claim R5 123 724.98 (five million one hundred and twenty three thousand seven hundred and twenty four Rand ninety eight cents). This claim was surprisingly expressed in Euros, with the result that its quantum fluctuates daily, in accordance with the prevailing rate of exchange.

13. The Applicants point out further that there is a possibility of further creditors' claims taking precedence over those of their own in respect of the immovable property, being SARS and/or a German bank and/or the German or Swiss tax authorities.

14. Accordingly, the Applicants fear that in the event of their defence emerging successful on trial, and in the further event of their counterclaim being upheld, they would be incapable of executing upon costs orders handed down in their favour, as on their version, there would be insufficient equity in the property.

15. Converse to the position of the Applicants, the Respondent in his Answering Affidavit alleges that the Lease Agreement entered into between him and the Applicants was cancelled on 8 November 2019 and that the Applicants have remained in unlawful occupation of the property, ever since. Noteworthy to this position, there is a separate eviction application in issue, in the Johannesburg High Court.

16. The cause of action under the Respondent's claim, *qua* Plaintiff in the summons relates to unpaid rentals and ancillary claims, which unpaid rental the Respondent alleges in his Answering Affidavit to be R151 832.67. In relation to the Applicants' damages claim set out in their Claim in Reconvention, the Respondent avers that the Applicants had paid a very much reduced rental for the immovable property in order to set off the costs of renovations that were made to the property with his consent, during the course of the Lease.

17. The Respondent denies that there is any merit to the Applicants' claims, or that the Applicants will succeed in proving their damages, which he avers to be grossly inflated.

18. In response to the Applicants' claim for maintenance costs in relation to the property, the Respondent avers that in accordance with the 2009 Lease, which was later extended in 2013, the Applicants would be liable for the cost of maintaining the immovable property. Moreover, the Respondent avers that the so-called improvements effected to the property were not necessary and were done without his knowledge or consent.

19. The Respondent alleges that in his view his claims against the Applicants have a sound basis and that he enjoys a good defence to the claims raised against him in reconvention.

20. The Respondent points out, that on the Applicants' own version, the property was valued at, at least R6 750 000.00 (six million seven hundred and fifty thousand Rand). The Respondent alleges that such valuation appears to be on the low side as properties of equivalent sizes in the area are valued at a much higher rate. In this regard he points out that in 2018 the municipal valuation upon the property was R11 135 000.00 (eleven million one hundred and thirty five thousand Rand). Such valuation was subsequently reduced to R6 262 000.00 (six million two hundred and sixty two thousand Rand), so as to accord with the rezoning of the property.

21. The Respondent disputes that the trial costs in respect of which the Applicants seek security would amount to R600 000.00 (six hundred thousand Rand), or R300 000.00 (three hundred thousand Rand) each in respect of the claim and counterclaim. The Respondent points out that the Applicants have not laid any legal basis for this figure claimed in respect of security for costs.

22. *De facto,* there is no evidence before me in the form of a draft Bill of Costs settled before the Taxing Master or otherwise, to indicate that the Registrar, or any other official designated by him has fixed any anticipated amount in respect of the projected costs, both in respect of the pursuance of the Applicants' defence, or in respect of the pursuance of their Counterclaim. In the result, the figure claimed of R600 000.00 is speculative, to say the very least.

23. Whilst I am not called upon to determine or indicate any prospects of success in relation to either the Respondent's main claims in the action, alternatively the Applicants' defences thereto, and/or the Applicants' claims as articulated in the Counterclaim, it is nevertheless useful to have set the position out from the perspective of both parties to the action. This serves to illuminate the background and give some insight into the fairness and legitimacy of the current application for payment of security for costs.

24. It is common cause that the Respondent is a *peregrinus,* residing in Germany. As a general rule, an *incola* would have the right to seek security for their costs from a *peregrinus.* However, this general principle is rendered dependent upon the particular circumstances of each case.

25. It is common cause that the Respondent owns the immovable property, unencumbered, which on the Applicants' own version was valued in 2019 at R6 750 000.00 (six million seven hundred and fifty thousand Rand).

26. Much of the diminution of value, which the Applicants attribute to the escalated portion of rates and taxes which have not been paid, the Respondent alleges to be the fault of the Applicants. Clearly, I am not called upon to determine this dispute

of fact, in these proceedings, save to record that such dispute exists, all of which will no doubt be unravelled in evidence at the trial action.

27. The property was valued at R6 750 000.00 (six million seven hundred and fifty thousand Rand) in November 2019. Against such background, even if the Applicants are successful in both the defence to the main action and in the prosecution of their Counterclaim, there ought to be sufficient equity in the property to satisfy such claims with costs. Ms Ipser, for the Respondent, correctly argued that the Applicant is not entitled to security for its claim. Thus, even if the Applicant had been entitled to security for its costs, there is sufficient equity in the property, to satisfy any costs claim.

28. To the extent that there may be shortfall out of an attachment and sale in execution of the immovable property, it is doubtful that such shortfall would be excessive, or that the Applicants would be left without a remedy.

29. It is clear that the Respondent is not impecunious. On the contrary, he would appear to be a man of means, resident in Germany. As such, whilst it may be inconvenient, it would not be impossible for the Applicants to enforce any judgment of this court against the Respondent, in Germany.

30. Nothing very much turns upon the fact that the Respondent is eighty-three years of age. Should the Respondent pass away prior to finalisation of the action, which fear is expressed by the Applicants, there seems to be little or no reason why the Applicants would be incapable of enforcing payment for any shortfall, after exhausting all steps pertaining to execution against the immovable property, against the Respondent's deceased estate in Germany.

31. An *incola* defendant does not have an unqualified *prima facie* right to be furnished with security for costs by a *peregrine* plaintiff. Historically, our courts have refused to order a *peregrine* plaintiff to provide security for costs in the event that the plaintiff owns immovable property in South Africa, unencumbered.

32. A court is thus vested with a discretion to determine whether or not to order security for costs on consideration of the particular facts of the case. [1]

33. Factors which come into play are the ***peregrine's*** impecuniosity, whether the order compelling security would deprive him of the right to litigate against the *incola*, whether he is economically active within the jurisdiction of the court and whether the execution of the court's judgment is possible in the jurisdiction in which he resides. However, none of these factors are decisive.[2]

34. An applicant in an application for security for costs must demonstrate that there is a probability that the Respondent would be unable to pay the Applicant's costs, if awarded.[3] In *casu*, there is no evidence of any substance to suggest that the Respondent would not be in a position to pay such costs. Ms Ipser placed emphasis on this vital point in her argument, with reference to the principle established in Giddey.

35. The onus falls to be discharged by credible testimony which demonstrate that there is logical reason to believe that a *peregrinus* will be unable to pay the Applicants' costs, should it fail in the action.[4]

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[1] Shepstone & Wylie v Geyser 1998(3) SA 1036 (SCA) at 10451 / 1046 C

[2] Browns the Diamond Store v van Zyl (unreported) Johannesburg High Court Case No. 717/2015 of 5 February 2017

[3] Giddey N.O. v J C Barnard & Partners 2007 (5) SA 525 (CC) at paragraph 8

[4] FirstRand Bank Ltd v Pather 2005 (4) SA 429 (N) at 432 F to H

36. Whilst a *peregrine* plaintiff may be called upon to provide security for a claim in reconvention by an *incola* defendant, a court would be slow to conclude that considerations of fairness and equity favour the granting of such security and would only do so in exceptional circumstances, if at all.[5]

37. It is neither in accordance with modern commercial needs, nor just and equitable to impose the burden of having to provide security upon a *peregrinus* plaintiff, where the plaintiff resides in a civilised country with a civilised legal system, and where there is nothing preventing an *incola* defendant from instituting proceedings against the *peregrinus* plaintiff in his own country.[6]

38. Applying the facts of this case to the applicable legal principles set out in the aforementioned judgments, I am not satisfied that the Applicants have established a right to payment by the Respondent of security for their costs in the sum of either R600 000.00, or for any other amount.

39. In the circumstances, I make the following Order:

    39.1. The Application is dismissed;

    39.2. The Applicants are ordered to bear the cost of the Respondent in relation to this Application, upon the scale as between party and party.

NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

[5] Silvercraft Helicopters (Switzerland) v Zonnekus Mansions 2009 (5) SA 602 at paras 43 to 51

[6] BMW Industrial Technology (Pty) Ltd & others v Baroutsos 2006 (5) SA 135(W) at paras 40 and 42 as quoted in Silvercraft Helicopters (Switzerland) v Zonnekus Mansions

On behalf of Applicants:	Advocate G Hardy
Instructed by:	Claudia Privato Inc
On behalf of the Respondent:	Advocate M Ipser
Instructed by:	Schliemann Inc
Date of Hearing:	17 August 2021
Date of Judgment:	19 August 2021
Delivered via email:	19 August 2021