IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: **NO**

Date: ***22 JUNE 2022*** Signature:

Case Number: 27279/2019

In the matter between:

GILBERT MUKOMBACHOTO Applicant

And

DAVID ROSSITER First Respondent

LEAH HLARENG MAPHOSA Second Respondent

GEOMECHANICS (PTY) LTD Third Respondent

In Re:

GILBERT MUKOMBACHOTO Plaintiff

And

DAVID ROSSITER First Defendant

LEAH HLARENG MAPHOSA N.O. Second Defendant

JUDGMENT

NYATHI J

Introduction

[1] In this interlocutory application the applicant seeks to join third respondent as the third defendant in the main action. The third respondent opposes this application.

[2] The third respondent in turn seeks an order requiring the applicant to furnish security for its costs in the amount of R250 000.00 and that the applicant should be ordered to pay its costs on an attorney and client scale.

Background

[3] The applicant and the first respondent, the late Mr David Rossiter ("the deceased") established a company known as Gondwana Drilling Works Exploration (Pty) Ltd (hereinafter "Gondwana") and formalised the relationship as co-shareholders and co-directors in the said company by way of an Association Agreement.

[4] The applicant ultimately launched an application for the winding-up of Gondwana before this Honourable Court which was subsequently granted.

[5] At the instance of a provisional liquidator, a Section 415 Enquiry was held[1], where the first respondent was called upon in the presence of the applicant to testify and be cross-examined by the provisional liquidator's attorney Mr Tintinger.

[6] During the enquiry, Mr Tintinger put it to the first respondent, that the equipment provided to Gondwana in terms of the Association Agreement, by the applicant, belonged to Gondwana in liquidation and perforce the liquidators representing the company. This was not denied by the applicant.

[7] Sometime after the enquiry the liquidators visited the third respondent's premises to determine what equipment was still in its possession.

[8] The third respondent asserted an improvement lien over the said equipment and filed its claim by way of a proof of claim form in the insolvent estate of Gondwana.

[9] The applicant made an offer of R150 000.00 to purchase the equipment from the liquidators of Gondwana.

[10] The third respondent is still in possession of some of the equipment which belongs to Gondwana in liquidation.

[11] The applicant's attorney has admitted that the applicant is financially distressed.

The two applications before court

[12] Preliminarily the applicant made an application for condonation for the late service and filing of its replying affidavit. The applicant advanced an explanation for the lateness and further submitted that it has prospects of

[1] In terms of the Insolvency Act 24 of 1936.

success with its joinder application. The opposition against this application was not persisted with in the hearing. I will thus proceed on the premise that condonation was granted.

[13] Once the applicant launched its application for joinder of the third respondent ("Geomechanics (Pty) Ltd") as third defendant, the respondents countered by launching their application for an order compelling the applicant (plaintiff in the main action) to furnish security for costs in the joinder application. In the event of the plaintiff failing to furnish security for costs the respondents then seek an order simultaneously therewith that the application for joinder, and the main action be stayed until he furnishes the requisite security.[2]

[14] In the event that the Rule 47 application is successful, both the application for joinder and the main action will be in abeyance, pending the furnishing of the security sought. Having perused the heads filed by the parties, and their submissions, I propose to deal with the two applications as appears below.

The law on security for costs

[15] The concept of furnishing of security of costs in litigation is dealt with in Rule 47 of the Uniform Rules of court which provides as follows:

(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.
...

[2] Founding Affidavit of Ruan Oosthuizen Para 10.

(3) If the party from whom security is demanded contests liability to give security or if he fails …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.

(4) The Court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other Order as it may seem meet."

[16] As a rule our courts have been reluctant to order a plaintiff *incola* who is a natural person to furnish security in respect of the pending litigation. This is borne out by cases such as *Van Zyl v Euodia Trust MS (BPK)* 1983 (3) SA 394 (T) at 396B-397B., *Liquidators, Salisbury Meat Ltd v Perelson 1924 WLD.*

[17] Section 34 of the Constitution did not simplify matters for the defendant who seeks an order compelling the plaintiff to furnish security for costs. It provides:

"Access to Court

34. *Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum."*

[18] In order to secure security for costs against a natural person, the defendant is currently restricted to proving:

18.1 that the plaintiff is impecunious and would be unable to pay the defendant's costs, ***and***

18.2 that the litigation is vexatious.

[19] In order to prove that the applicant is impecunious, the respond relies on an affidavit filed by the applicant's attorney Mr Poyo, which the latter filed in a Rule 27 (1) application. Therein, Mr Poyo stated that the applicant was enduring financial difficulties; and that he was in a precarious financial position.

[20] In *South African Airways v Makwetla and Associates* [2008] ZAGPHC 357 (18 June 2008) (unreported), the plaintiff had made an admission that it was unable to pay its sub-contractors. Mavundla J held that:

"...in any event the authorities seem to suggest that the fact that a party is facing liquidation is no ground for the Court to shut the doors of court against such party."

[21] Save for making bare allegations regarding the issue of the main litigation being vexatious, no real evidence is proffered in support.

[22] In *Fisheries Development Corporation of SA Ltd v Jorgensen & Another: Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others* 1979 (3) SA 1331 (W) at 1339E-F it was held that:

"In the legal sense 'vexatious' means 'frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant' (shorter Oxford English dictionary). Vexatious proceedings would also no doubt include proceedings which although properly instituted are continued with the sole purposes of causing annoyance to the defendant:

'abuse' connotes a mis-use, an improper use, a use mala fide, a use for an ulterior motive."

[23] In recent times a case in which both the above-elucidated requirements coincided was the unreported matter of *Oakbay Investments v Lurco Group South Africa (Pty) Ltd Case No: 38647/2019 ZAGJHC* delivered on 5 March 2020. Matojane J granted an order for security in this matter which concerned companies and the Companies Act was applicable.

The legal provisions relating to joinder of parties

[24] The joinder of parties in the High Court is regulated by the provisions of Rule 10. *Herbstein & Van Winsen – Civil Practice of the High Courts of S.A. 5th Edition Volume 1* states at P208 as follows:

"Parties are often joined for reasons of convenience and equity' and to avoid oppression or a multiplicity of actions… there are circumstances in which it is essential to join a party because of the interest that a party has in the matter. When such an interest becomes apparent the court has no discretion and will not allow the matter to proceed without joinder, or the giving of judicial notice of the proceedings to that party. The reason for this is that it is a principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest" [3]

[25] Similarly, the Constitutional Court held in *Matjhabeng Local Municipality v Eskom Holdings Ltd 2018 (1) SA 1 (CC)* that:

[3] The learned Authors were making reference to the decisions in Amalgamated Engineering Union v. Minister of Labour 1949 (3) SA 637 (A) and Ex parte Body Corporate of Caroline Court 2001 (4) SA 1230 amongst other decisions.

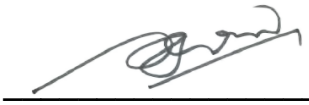
"The law on joinder is well settled. No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it."

[26] The third respondent on its own version, is holding the assets which are subject of the main action on the basis of a purported lien. The existence of an interest in the subject matter of the main action seems apparent to me.

[27] I accordingly make the following order:

1. The application in terms of Rule 47 (3) is dismissed. The applicant (Geomechanics (Pty) Ltd) is ordered to pay costs on a party and party scale.

2. The application for joinder is granted. Costs for the joinder application to be costs in the main action.



J.S. NYATHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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DATE OF JUDGMENT: 22 JUNE 2022