

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NUMBER : 3353/2022**

**In the matter between:**

**WERNER CAWOOD N.O. (IN HIS CAPACITY AS THE  
BUSINESS RESCUE PRACTITIONER OF THE FIRST  
RESPONDENT)**

**First Applicant**

**GERHARDUS HAGER DREYER N.O. (IN HIS CAPACITY  
AS DIRECTOR OF THE FIRST RESPONDENT)**

**Second Applicant**

**and**

**REUBEN DE BEER**

**Respondent**

*In re:*

**REUBEN DE BEER**

**Applicant**

**and**

**EXPRESS BUSINESS CAPITAL (PTY) LTD (IN**

**First Respondent**

**LIQUIDATION)**

**GERT DE WET N.O. (IN HIS CAPACITY AS THE LIQUIDATOR OF THE FIRST RESPONDENT)**      Second Respondent

**JOHNINE MADDOCKS (HOPE) N.O. (IN HER CAPACITY AS THE LIQUIDATOR OF THE FIRST RESPONDENT)**      Third Respondent

**WERNER CAWOOD N.O. (IN HIS CAPACITY AS THE BUSINESS RESCUE PRACTITIONER OF THE FIRST RESPONDENT)**      Fourth Respondent

**GERHARDUS HAGAR DREYER N.O. (IN HIS CAPACITY AS DIRECTOR OF THE FIRST RESPONDENT)**      Fifth Respondent

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**ORDER**

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- (a) The application brought by the First Applicant for security for costs under case number: 3353/2022 is dismissed.
- (b) The First Applicant is ordered to pay the costs of the application on an attorney and client scale.
- (c) The application brought by the Second Applicant for security for costs under case number: 3353/2022 is dismissed.
- (d) The Second Applicant is ordered to pay the costs of the application on an attorney and client scale.

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## JUDGMENT

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**MEYER AJ**

**[1]     INTRODUCTION**

- 1.1     The First and Second Applicants (*“the Applicants”*) apply for an order that the Applicant in the main application (the Respondent herein), provide security for the costs of the First Applicant in the amount of R250 000.00 and in respect of the Second Applicant, an amount of R100 000.00, respectively.
- 1.2     The Applicants launched separate applications for security in accordance with the provisions of Rule 47(3) of the Uniform Rules of Court (*“the rules”*) which applications were enrolled for hearing simultaneously, given the similarity in the relief sought, moreover the applications involved the same parties in the main application brought under the same case number.

**[2]     BACKGROUND**

- 2.1     The First Applicant (the Fourth Respondent in the main application) was appointed as the business rescue practitioner of Express Business Capital (Pty) Ltd (the First Respondent in the main application), now in liquidation.
- 2.2     The Second Applicant (the Fifth Respondent in the main application) is identified as a director of Express Business Capital (Pty) Ltd (*“EBC”*).

- 2.3 On 7 February 2022, the Respondent caused a copy of the main application to be filed and served on *inter alia* the Applicants<sup>1</sup>. The First Applicant filed a notice of intention to oppose the relief claimed under the main application on 18 February 2022<sup>2</sup>. The Second Applicant only filed a notice of intention to oppose the relief claimed under the main application on 25 May 2022<sup>3</sup>.
- 2.4 It is noted that insofar as the relief claimed by the Respondent is concerned under the main application, such relief is not opposed by the Second and/or the Third Respondents, namely the duly appointed liquidators of the First Respondent (EBC).
- 2.5 On 10 May 2022, the First Applicant issued a notice in terms of Rule 47(1) of the rules<sup>4</sup>.
- 2.6 On 24 May 2022, the First Applicant issued an application for security which application was brought in accordance with the provisions of Rule 47(3) of the rules<sup>5</sup>.
- 2.7 On 25 May 2022, the Second Applicant issued a notice in terms of Rule 47(1) of the rules<sup>6</sup>.

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<sup>1</sup> CaseLines 001 – 357 to 001 – 358.

<sup>2</sup> CaseLines 004 – 1 to 004 – 2.

<sup>3</sup> CaseLines 004 – 3 to 004 – 4.

<sup>4</sup> CaseLines 007 - 1 to 007 – 5.

<sup>5</sup> CaseLines 007 – 6 to 007 – 9 and 007 – 86.

<sup>6</sup> CaseLines 008 – 1 to 008 – 3.

- 2.8 On 30 May 2022, the Respondent caused a notice to oppose the First Applicant's Rule 47(3) application<sup>7</sup>. On 10 June 2022, the Respondent caused a notice of intention to oppose the Rule 47(3) application brought by the Second Applicant<sup>8</sup>.
- 2.9 On 10 June 2022, the Respondent caused a notice of intention to oppose the Rule 47(3) application which was brought by the Second Applicant<sup>9</sup>.
- 2.10 On 14 June 2022, the Respondent filed his answering affidavit to the First Applicant's application which was brought in accordance with the provisions of Rule 47(3) of the rules<sup>10</sup>.
- 2.11 On 14 June 2022, the Respondent filed his answering affidavit to the Second Applicant's application which was brought in accordance with the provisions of Rule 47(3) of the rules<sup>11</sup>.
- 2.12 The main application brought by the Respondent was enrolled for hearing on the unopposed motion court roll on 27 May 2022. The hearing of the main application was postponed in light of the late opposition filed by the Applicants.

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<sup>7</sup> CaseLines 012 – 1 to 012 – 3

<sup>8</sup> CaseLines 015 – 1 to 015 – 4.

<sup>9</sup> CaseLines 015 – 1 to 015 – 4.

<sup>10</sup> CaseLines 019 – 134 to 019 – 135.

<sup>11</sup> CaseLines 018 – 52 to 018 – 53.

- 2.13 On 27 May 2022, Janse van Nieuwenhuizen J with whom the hearing of the unopposed main application vested, issued an order postponing the hearing of the application *sine die* and in turn issued directives on the future prosecution of the applications for security of costs brought by the Applicants. It must be noted that the Second Applicant was ordered to pay the wasted costs occasioned by the postponement of the main application on 27 May 2022<sup>12</sup>.
- 2.14 On 22 August 2022, notwithstanding the fact that the Respondent was not *dominus litis* in respect of the Rule 47(3) applications for security brought by the Applicants, the Respondent caused consolidated indices to be prepared and filed on behalf of the Applicants<sup>13</sup>.
- 2.15 On 10 January 2023, Davis J issued a court order wherein the Applicants were compelled to furnish heads of argument, lists of authorities and practice notes in accordance with the Practice directive 2 of 2020, read with paragraph 136 of the Courts Revised Consolidated Practice Directive dated 8 July 2022 within ten (10) days of the granting of the aforesaid order. Moreover, both the Applicants were ordered to pay the costs of the application brought by the Respondent to compel their adherence with the aforesaid directives on an attorney and client scale<sup>14</sup>.

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<sup>12</sup> CaseLines 016 – 20 to 016 – 22.

<sup>13</sup> CaseLines 018 – 1 to 018 – 6 and 019 – 1 to 019 – 4.

<sup>14</sup> CaseLines 007 – 1 to 007 – 7.

2.16 On 25 April 2023, the First Applicant caused a condonation application to be filed with the Court, wherein condonation was sought by the First Applicant for the late filing of its replying affidavit in the application for security which application, if unopposed would be heard on 2 May 2023, being the date allocated for the hearing of the opposed Rule 47(3) applications brought by the Applicants. The Respondent's legal representative did not raise an objection to the Court condoning and accepting the First Applicant's replying affidavit and contended that the averments contained therein did not advance the Applicants' position insofar as their entitlement to an order to be furnished with security for costs. The late filing of the First Applicant's replying affidavit was accordingly condoned and the replying affidavit accepted by the Court on an unopposed basis.

2.17 It is noteworthy to mention the fact that no replying affidavit was filed by the Second Applicant.

2.18 It appears from the affidavits filed by the respective parties in the applications for security when reconciled with the nature of the relief claimed in relation to the main application, as supported by the Respondent's founding affidavit<sup>15</sup> that there is a dispute of fact relating to *inter alia* the date of the winding-up order granted in relation to EBC, having regard to the nature, scope and extent of the express provisions of section

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<sup>15</sup> CaseLines 001 – 4 to 001 – 49.

348 of the Companies Act, Act 61 of 1973, together with the consequences emanating therefrom.

- 2.19 In support of the relief claimed in the main application, the Respondent relies on various grounds which grounds are dealt with in detail in the Respondent's founding affidavit. Where possible, the allegations relied upon by the Respondent are supported by various supporting annexures.
- 2.20 That being said, I am mindful of the fact that no answering affidavits have to date been filed by the Applicants in the main application.
- 2.21 The First Applicant claims in his founding affidavit, filed in support of the application for security, *inter alia* that:

***"CRUX OF THE MATTER:***

11. *Mr De Beer embarks on an abuse of process with the main application. His allegations against me and the appointed liquidators, for that matter are malicious, unfounded and represent speculation and slander. The allegations are serious and represent the basis of factual disputes that will need to be dealt with by way of oral evidence in action proceedings. Therefore, the main application is nothing but a vexatious step taken against the Respondents in that application, seeking relief that already represents the status quo being the*



*liquidation of the company. The claims of Mr De Beer can be dealt with in the liquidation proceedings.*

12 *In opposing the main application against me, I gave notice of the fact that I require Mr De Beer to set security for my legal costs in the amount of R250 000.00. I know that Mr De Beer is, being an unrehabilitated insolvent at the time of the company being liquidated, in financial dire straits. I therefore need to deal with the main application at the risk of being stranded with serious legal costs and no way of recovering same...*

20 *The Respondent is an insolvent alternatively an unrehabilitated insolvent further alternatively a recently rehabilitated insolvent. The full extent of the allegations against me, forming the basis for a cost order sought against me, represent speculation and conjecture. These allegations and theories relied upon by Mr De Beer are denied. Mr De Beer's application represents vexatious litigation against me..... I have no reassurance that the Respondent will be able to settle an adverse cost order against him should I succeed in successfully defending the action against me."*

2.22 The First Applicant did not deal with the grounds relied upon by the Respondent in support of the relief claimed in the main application with sufficient particularity in his founding affidavit so as to make out a *prima facie* case in support of the security for costs claimed in the First Applicant's notice

of motion. It was incumbent upon the First Applicant, given the fact that no answering affidavit has to date been filed in the main application, to provide sufficient particularity in his founding affidavit as to why the grounds relied upon by the Respondent in support of his cause of action qualified as being vexatious, malicious, unfounded and constituted mere speculation and slander, not to mention reckless and an abuse of the legal process. The lack of particularity alluded to above was sought to be remedied by the late filing of the First Applicant's replying affidavit. I must point out that the replying affidavit is especially voluminous when reconciled with the First Applicant's founding affidavit. What the replying affidavit does *inter alia* achieve is confirmation of the existence of disputes of fact between the parties which disputes have to date not been properly ventilated.

- 2.23 That being said and insofar as the financial status/solvency of the Respondent is concerned at the time that the main application was launched and/or at the time that the current applications were launched, it is apparent from the allegations made in the Respondent's answering affidavit<sup>16</sup>, read together with the annexures relied upon that there is no basis to reasonably infer the Respondent's inability to satisfy any adverse cost order, should such an order be made by the Court. Nor is there any basis to infer that the Respondent is insolvent or an unrehabilitated insolvent. In fact, the Respondent took the court into his confidence and made a proper disclosure of his income, assets and credit score.

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<sup>16</sup> CaseLines, Respondent's answering affidavit, pages 017 - 15 to 017 - 16.

- 2.24 It is not in dispute between the parties that the Respondent is an *incola* of this Court.
- 2.25 The position of the First Applicant described above is echoed in relation to the Second Applicant, insofar as the Second Applicant has similarly not made out a *prima facie* case entitling him to the relief claimed in the application brought for the Respondent to furnish security for costs.

[3] **LEGAL ANALYSIS**

- 3.1 Rule 47(1) provides that “*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.*”
- 3.2 It is apparent from the chronology described above (paragraph 2) that the demand for security by the Applicants was not sought as soon as practically possible after the Respondent launched the main application. Moreover, it is further apparent from the aforesaid chronology that notwithstanding the fact that the Applicants were *dominus litis* in these proceedings, the Respondent was necessitated on more than one occasion to approach the Court for certain remedial relief, the outcome of which attracted adverse cost orders against the Applicants. The aforementioned position raises concerns pertaining to the *bona fides* of the Applicants insofar as the prosecution of their application for security for costs is concerned.

- 3.3 That being said, I am also mindful of the fact that the failure to demand security as soon as practically possible does not amount to a waiver of the right<sup>17</sup> and that any delay in bringing an application for security is not necessarily fatal<sup>18</sup>. Such circumstances may however be a factor which the Court may take into account in the exercise of its discretion to refuse security<sup>19</sup>.
- 3.4 It is trite that a court has a discretion whether or not to order the grant of security which discretion must be exercised judicially.
- 3.5 The primary question in this regard is the prospects of the requested party, in this case the Respondent, being able to satisfy any adverse cost order made against him<sup>20</sup>.
- 3.6 It is apparent from the allegations contained in the Respondent's answering affidavit, as supported by the annexures annexed thereto that the inability to satisfy any adverse cost order against him does not pose any real issue in that the Respondent would be well placed to satisfy such an order should the Court grant an adverse order.
- 3.7 I am further mindful of the fact that Rule 47 only provides for procedural aspects and does in no way provide for the requirements that the Applicant should meet in order to succeed with an application to furnish security for costs. However, the general rule under the common law is that an *incola* of the

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<sup>17</sup> *Drakensbergpers Bpk v Sharpe* 1963 (4) SA 615 (N) at para 619.

<sup>18</sup> *Francis and Graham Ltd v East African Disposal Co Ltd* 1950 (3) SA 502 (N), at page 505 – 506.

<sup>19</sup> *B&W Industrial Technology (Pty) Ltd v Baroutsos* 2006 (5) SA 135 (W).

<sup>20</sup> *Ramsamy N.O. v Maarman N.O.* 2002 (6) SA 1 (C) at 179.

Republic of South Africa, is not required to give security for costs<sup>21</sup>. That being the case, exceptions to the general rule do exist which exceptions include *inter alia* instances where a Plaintiff/Applicant is *inter alia* an insolvent or the proceedings launched against a party are vexatious or are considered to be an abuse of process<sup>22</sup>. In such instances, the furnishing of security for costs would in the circumstances be appropriate.

- 3.8 No grounds were satisfactorily established by the Applicants with sufficient particularity to support the Applicants' position that the main application brought by the Respondent was vexatious or reckless or amounted to an abuse of process of this Court. In fact, and as already stated above, the prosecution of the applications for the furnishing of security for costs by the Applicants suggest that the prosecution thereof was not at all material times *bona fide*. Moreover, the finalisation of the applications brought by the Applicants were accompanied by protracted delays through no fault of the Respondent.
- 3.9 I cannot agree with the contention advanced on behalf of the Applicants that no corroborative information was provided to substantiate the allegations advanced under the cover of the Respondent's founding affidavit<sup>23</sup>.
- 3.10 The Applicants had ample opportunity to traverse the allegations raised by the Respondent with sufficient particularity in their respective founding affidavits

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<sup>21</sup> *Van Zyl v Evodia Trust (Edms) Bpk* 1983 (3) 394 (T) at 396B – 397B.

<sup>22</sup> Erasmus: Superior Court Practice, 2022, D636A.

<sup>23</sup> Applicants' heads of argument, paragraph 5, page 020 – 30.

and in so doing establish a sound basis for the relief claimed against the Respondent. Unfortunately, the Applicants did not set out sufficient facts to support the relief claimed, nor was the requisite evidence provided by the Applicants to support the relief sought against the Respondent.

3.11 In the result, I am not satisfied that a proper case was made out that the litigation initiated by the Respondent in the main action is vexatious and/or an abuse of process and/or that the Respondent will not be in a position to satisfy an adverse cost order should the Court be inclined to make such an order.

3.12 In the circumstances, I make the following order:

- (a) The application brought by the First Applicant for security for costs brought under case number: 3353/2022 is dismissed.
- (b) The First Applicant is ordered to pay the costs of the application on an attorney and client scale.
- (c) The application brought by the Second Applicant for security for costs brought under case number: 3353/2022 is dismissed.
- (d) The Second Applicant is ordered to pay the costs of the application on an attorney and client scale.

  
  
**M MEYER**  
**Acting Judge of the High Court**  
**Gauteng Division Pretoria**

Date of hearing: 3 May 2023  
Date of judgment: 21 September 2023

### **APPEARANCES**

For the First Applicant:

Adv LK van der Merwe  
Instructed by:  
Cawood Attorneys

For the Second Applicant:

Adv LK van der Merwe  
Instructed by:  
Dreyer & Dreyer Attorneys

For the Respondent:

Adv SLP Mulligan  
Instructed by:  
Nixon & Collins Attorneys