IN THE LABOUR COURT OF SOUTH AFRICA REPORTABLE

HELD AT CAPE TOWN

CASE NO.: C664/2006

In the matter between :

SEDICK SEPTEMBER First Applicant

MOGAMAT KARRIEM Second Applicant

and

MUDDFORD INTERNATIONAL SERVICES LIMITED Respondent

In re :

MUDDFORD INTERNATIONAL SERVICES LIMITED Applicant

and

THE METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL First Respondent

COMMISSIONER SUZANNA HARVEY Second Respondent
SEDICK SEPTEMBER Third Respondent
MOGAMAT KARRIEM Fourth Respondent

JUDGMENT DELIVERED ON 28 NOVEMBER 2007

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[1] This is an application to compel Respondent to furnish security for the Applicants' costs in the review application instituted by Respondent impugning the award of the Arbitrator, Suzanna Harvey issued on 29 August 2006 and varied on 18 November 2006. Applicants, moreover, are seeking security for the amount of compensation awarded in their favour by the

Arbitrator. The application is being opposed by Respondent.

[2] The background to the matter briefly is that the Applicants were previously employed to perform work at the instance of Respondent on a floating rig, *"The Dalia"* which was moored in the Cape Town harbour during 2006. Applicants commenced employment on 8 June 2006 on the basis that they would work 12 hour shifts 7 days per week while the ship remained in Cape Town harbour, which was anticipated to have been for a period of about 3 months. When they reported for duty on 19 June 2006 they were informed by the security personnel at the Portnet security gate that their security passes had been revoked. They were accordingly prevented from rendering any further services. The Applicants regarded this action as a dismissal. Applicants referred the dismissal dispute to the Metal and Engineering Industries Bargaining Council under whose auspices the subsequent arbitration was conducted.

[3] In terms of the variation award of 18 November 2006 each of the Applicants was granted compensation in the amount of US $7497.00 less statutory deductions for tax, to be paid on or before 10 September 2006. The arbitration proceedings were conducted in the absence of Respondent who had failed to appear on the stipulated date.

[4] Respondent launched a review application in respect of the award which review is being opposed by the Applicants. On 23 August 2007 Applicants demanded security from Respondent with regard to both the costs in the pending review application as well as the total amount of the award.

[5] It is common cause between the parties that in principle Applicants enjoy the right to claim security for the cost of the review application on the basis that the Respondent is a peregrinus. It is also not in contention that this Court is empowered to grant orders for payment of security for costs **(Mafuyeka v CCMA & Others (1999) 9 BLLR 953 (LC))**.

[6] The rules of this Court unlike the High Court rules, do not expressly regulate the procedure with regard to applications for security for costs. In terms of rule

11(3), this Court is empowered to regulate its own procedure in matters not expressly covered by the rules. It is expedient in the circumstances to approach the matter on the basis of the relevant provisions in the High Court rule 47 which regulates applications for security for costs in that Court.

[7] The sole basis upon which Respondent is opposing the claim for security for costs (apart from a dispute concerning the quantum of such security) is that Applicants had unduly delayed in bringing the application which justifies that the application be dismissed **(Buttner v Buttner 2006(3) SA 23 (SCA) at paras [38] – [40]; ICC Car Importers (Pty) Ltd v A. Hartrodt SA (Pty) Ltd 2004(4) SA 607 (W); Wallace N.O. v Rooibos Tea Control Board 1989(1) SA 137 (C))**.

[8] The review application was launched on 11 October 2006 and the rule 7A(8)(b) notice was served and filed on 18 February 2007. Applicants' answering papers were served and filed on 18 July 2007 followed by an application for condonation for the late filing of the answering papers which was served and filed on 23 August 2007. Due to the late filing of the answering papers the review application was set down for hearing on the unopposed roll on 28 August 2007. The present application for security for costs was served and filed on 27 August 2007 and set down for hearing on 28 August 2007 being the date, as aforesaid, assigned to the matter on the unopposed roll. The application was eventually heard on 23 October 2007.

[9] In the matter of **Buttner v Buttner *supra*** the application for security for costs was filed close to the date for hearing the appeal and the application was eventually heard together with the appeal. In dismissing the application for undue delay, the Supreme Court of Appeal held that it was misconceived and futile to launch an application for security for costs at a time when most of the costs had already been incurred.

[10] The above consideration does not apply in the present matter where the review application will be heard in due course. Respondent has indicated that it

would be prejudiced should the application for security for costs be granted. It does not, however, aver that it is unable to provide any security. It is clear that Respondent would not suffer any real prejudice should an order be granted compelling it to provide security for costs. In all the circumstances the delay in bringing the application for security for costs is not such as to justify the refusal of the application.

[11] Insofar as the quantum of the security for costs is concerned Applicants claim the amount of R75 000 in the notice of motion while Respondent adopted the stance that an amount of R25 000 would be reasonable and adequate. Having considered the matter, I am of the view that an amount of R50 000 would be fair and equitable in this regard.

[12] Insofar as the application for security for the amount of compensation awarded is concerned, Applicants rely on the decision in **South African Iron & Steel Corporation Ltd v Abdulnabi 1989(2) SA 224 (T)** as well as the decision of **Magida v Minister of Police 1987(1) SA 1 (A)**. It was submitted in this regard on behalf of Applicants that an *incola* defendant is entitled to security for the amount of the judgment which may be awarded against a peregrinus plaintiff on a claim in reconvention. The following dicta at 232 H – 233 B of the judgment in the matter of **SA Iron & Steel Corporation Ltd v Abdulnabi *supra*** are pertinent in this regard :

> ***"There is no doubt that a peregrinus plaintiff can be ordered to give security for the costs of an incola defendant and also for the amount of the judgment which may be awarded against it on a claim in reconvention. In Saker & Co. Ltd v Grainger 1937 AD 223 at 226 and 227 De Wet JA dealt with this aspect as follows:***
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> > ***'It was not disputed that the question was not one of substantive law but one of practice, in which the Court has a discretion. It was laid down as far back as 1828 (Withan v Venables 1 Menzes 291) that a non-resident plaintiff who does not own in this country immovable property can be called upon to give security for the cost of the action. … It is also well-established practice that such a plaintiff can be further called upon to give reasonable security for a claim in reconvention by the resident defendant… The principle underlying this practice is that in***

proceedings initiated by a peregrinus the Court is entitled to protect an incola to the fullest extent.'

In that case, only the question of security for costs of appeal had to be considered, but the cases of Schunke v Taylor and Symonds (1891) 8 SC 104 referred to by De Wet JA; Taylor v Merrington 2 SAR 30; Prentice & Mackie v Bells Assignee 1906 TH 29 and Africair (Rhodesia) Ltd v Interocean Airway SA 1964(3) SA 114 (SR) are all authority for the proposition that a peregrinus plaintiff can be ordered to give security for a claim in reconvention."

[13] In the matter of **Magida v Minister of Police *supra* at 14 F-G** the Court held that :

"It follows that the following dictum in Saker & Co. Ltd v Grainger 1937 AD 223 per De Wet JA at 227, viz.

"The principle underlying this practice is that in proceedings initiated by a peregrinus the Court is entitled to protect an incola to the fullest extent',

should be read subject to the qualification that it is only applicable after the Court, in the exercise of its judicial discretion in accordance with the principles hereinbefore stated, had come to the conclusion that a peregrinus should not be absolved from

furnishing security for costs."

[14] In the matter of **B&W Industrial Technology (Pty) Ltd & Others v Baroutsos 2006(5) SA 135 (W)** a full bench of the Witwatersrand Local Division of the High Court surveyed the authorities relating to security for costs in respect of a counterclaim. The Court accepted for purposes of its decision that there was a practice as stated by De Wet, JA in **Saker & Co. Ltd v Grainger *supra*** that a Court may order security for the judgment on a counterclaim by an *incola* defendant against a peregrinus plaintiff. The Court concluded as follows in this regard :

"[41] My view that generally speaking security should not be ordered in respect of a claim by an incola in reconvention is in accordance with the sentiments expressed by Buchanan J in Schunke v Taylor & Symonds (1891) 8 SC 103, where he said:

> ***'But while a defendant is sufficiently protected from being unduly harassed by unfounded claims by compelling a foreign plaintiff to give full security for costs, either expressly or by being possessed of property available in case of his failing in his action, to compel such a plaintiff who follows his debtor to such debtor's domicile and sues him in his own forum, to give security for any***

amount of damages which such debtor alleges he intends to claim by way of reconvention, would open the way to a denial of justice.'

[42] I am of the view that, insofar as a practice existed to permit a Court to order security for the amount of a claim where an incola counterclaims against a peregrine plaintiff, it, in present-day circumstances, should not be followed, save perhaps in the most exceptional circumstances."

[15] In my view, the compensation award in this matter is comparable to a judgment debt in reconvention in favour of Applicants. In my view, this Court enjoys discretionary powers (where it is justified by the circumstances and if equity and fairness to both litigants so dictate) to order a peregrinus in the position of the Respondent to provide security for compensation payable in terms of an award, in review proceedings instituted to impugn such award.

[16] Having considered the matter I am of the view that it would be equitable and fair to order Respondent to provide security for payment of the compensation award. In my view the circumstances of this matter are exceptional and justify such a course. I bear in mind in this regard that the award would be rendered nugatory should the Applicants, who are both individuals with limited means, be compelled to pursue Respondent to Greece, where it is domiciled, in order to obtain satisfaction of the award. In my view, any possible prejudice that Respondent might suffer is by far outweighed by the prejudice which the Applicants would suffer should the payment of security not be ordered. Respondent has not averred that it is unable to pay the amount in question or that it is unable to provide security in the said amount.

[17] In the circumstances I make the following order :

(a) Respondent is ordered to provide security in the amount of R50 000 in respect of Applicants' costs in the pending review application instituted

by Respondent under case number C664/2006;

(b) Respondent is ordered to provide security for payment of the amount of compensation awarded in favour of Applicants in the sum of US $14 994,00;

(c) Respondent is ordered to pay Applicants' costs.

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DENZIL POTGIETER, A.J.