IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 10315/2001

In the matter between:

B K FOYLE, ALSO KNOWN AS BERTRAM OR BERT OR B KONING 1st APPLICANT

SANTAM INSURANCE COMPANY LTD 2nd APPLICANT

and

RUDY GASTON ADELARDUS D'HOOGHE 1st RESPONDENT

CARINE JEANNINE GHISLAINE D'HOOGHE 2nd RESPONDENT

JUDGMENT

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1. This is an application brought by the Applicants (Defendants in the main action) for the furnishing of security for costs by the Respondents (Plaintiffs in the main action) in terms of Rule 47 of the High Court Rules.

2. I intend to refer to the Applicants as the Defendants and the Respondents as the Plaintiffs.

3. The summons commencing the said action in which the Plaintiffs claim damages from the Defendants was issued in December 2001, and was

served on the Defendants on the 5th December 2001.

4. On the 7th December 2001, the Defendants entered an appearance to defend the action and the First Defendant filed his plea on the 14th January 2002.

5. On the 14th January 2002, the Second Defendant noted an exception against the Plaintiffs' cause of action, but has never set the exception down for hearing.

6. On the 10th January 2002, the Defendants had served on Plaintiffs' attorney a notice in terms of Rule 47(1), calling upon the Plaintiffs to furnish security for costs in the said action, contending that the Plaintiffs are *peregrini* of the above Honourable Court.

7. It is common cause that the Plaintiffs are *peregrini* of the above Honourable Court, the First Defendant is an *incola* of this Court and the Second Defendant is a South African registered company.

8. The Plaintiffs ignored the notice in terms of Rule 47(1).

9. Some 4½ years later, on the 21st June 2006, the Defendants launched an application to compel the furnishing of security for costs in the said action.

10. Affidavits were exchanged between the parties and the matter came before

me on the 19th October 2006.

11. At the commencement of the proceedings yesterday, Mr Fourie, who appeared for the Plaintiffs, asked that the matter be postponed to enable the Plaintiffs to file a supplementary affidavit dealing with the Plaintiffs' financial position. The application was moved from the Bar without any notice of motion or supplementary affidavit in support thereof. I was informed that the reason why no affidavit was before me was because Counsel had agreed to postpone the hearing and there was accordingly no need to file any papers. I took the view that the matter should not be postponed and that it should be argued on its merits. In the result, I refused the application.

12. Mr Fourie then sought to introduce a supplementary affidavit annexed to a notice of motion in which leave was sought to introduce the supplementary affidavit. The supplementary affidavit raised the fact that the Defendants had delayed in the launch of the application for security for costs. As the affidavit contained no facts, but merely raised a legal argument, and which was in any event raised in the Heads of Argument, I declined the application and ordered the Respondents to pay the costs of the application, as was tendered in the application.

In passing, I would mention that the said notice of motion and supplementary affidavit were filed in the Court file without the leave of the Court and without the consent of the Defendants. In my view this is a practice which is to be deplored. Where a party does not have a right to file an affidavit, but is

seeking an indulgence to file such affidavit, such affidavit must be tendered from the Bar and not simply filed in the Court file.

13. The founding affidavit did not furnish an explanation as to why it took a period of 4½ years to launch the application and also failed to deal with any prejudice which might have been occasioned to the Plaintiff during the 4½ year period. In the answering affidavit, the Plaintiffs alleged that *inter alia*:-

    13.1. they have "*legal assistance insurance*";

    13.2. the present action is being conducted from abroad and is extremely expensive; and

    13.3. they are not in a position to pay security for costs and if they were so ordered, they would have to mortgage their home.

14. In the replying affidavit the Defendants alleged that the Plaintiffs "*… have not taken any active steps aimed at finalising the litigation, since close of pleadings during or about January 2002. The Respondents (the Plaintiffs) have not filed a Rule 37 Questionnaire, nor have they applied for a trial date, nor have they taken steps aimed at finalising the issues of discovery and expert witnesses.*"

15. It is common cause that during the said 4½ year period, no other pleadings

were exchanged between the parties and, as stated, the Second Defendant took no steps to enrol the exception referred to above. What caused the Defendants to launch the application "out of the blue" is not explained on the papers and the Court is "left in the dark".

16. The Plaintiffs' attempts to paint a picture of impecuniosity in their answering affidavit failed miserably. They did not set out their financial position in any detail nor furnish any detail relating to their immovable property. It was indeed not surprising that at the last hour, they attempted to file a fourth set of affidavits dealing with their financial position, and which relief, as stated, was refused to them.

17. A *peregrinus* who initiates an action against an *incola* in our courts may be ordered to furnish security for costs in the action.

See : *Alexander v Jokl & Others, 1948(3) SA 269 (W) at 272/3*

18. It seems that a *peregrinus* who avails himself of our courts may be ordered by our courts, before they lend him any aid in his action, to furnish security for the protection of the *incola*.

See : *Thomson, Watson & Company v Poverty Bay Farmers Meat Supply Company, 1924 CPD 93;* and

Saker & Company Limited v Grainger, 1937 AD 223 at

227

19. It also seems clear that an *incola*'s right to claim such security is a question of practice in which the Court has a discretion, after considering all the circumstances of the case whether to order the furnishing of such security or not.

See : *Magida v The Minister of Police, 1987(1) SA 1 (A) at 12B and 13H*

20. The question of security for costs is a matter of equity and fairness to both the *incola* and the *peregrinus* and it is no longer our law that a Court should refuse such applications "sparingly".

See : *Magida's case supra at 14D – 14F*

21. 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 the proceedings, deliver a notice*". (Underlining supplied.)

22. In the case of ***Agro Drip (Pty) Ltd v Fedgen Insurance Company Limited, 1998(1) SA 182 (W) at 189H – J***, to which case Mr van Heerden SC, who appeared for the Defendants, referred me, Streicher J. (as he then was) perhaps mistakenly referred to the fact that the application had to be brought

"*as soon as practicable after commencement of proceedings…*".

It is clear that the rule requires the notice, not the application, to be served within that time period and, in my view, the application should be launched thereafter without delay, or put another way within a reasonable time thereafter.

See : *Wallace N.O. v Rooibos Tea Control Board, 1989(1) SA 137 (C);* and
ICC Car Importers (Pty) Ltd v A Hartrodt SA (Pty) Ltd, 2004(4) SA 592 (W)

23. Mr Fourie, in opposing the application, contended that because of the 4½ year delay in the launch of the application, I should exercise the discretion vested in me and decline the relief sought. Mr van Heerden SC argued that there were no factors which indicated that there was a delay and even if there was, a delay was no automatic bar to the grant of the relief. In his argument, Mr van Heerden SC placed great reliance on the *Agro Drip case supra*, to which I will again refer hereafter.

24. It has of course been held that delay of itself is not necessarily a fatal bar to the grant of such an application.

See : *SA Iron & Steel Corporation v Abdulnabi, 1989(2) SA 224*

(T) at 236E – F

25. In my view, the fact that it took 4½ years to launch the application, from the time of the issuing of the notice, constituted a delay. Whether in a particular case a delay is reasonable or not, will largely depend on the explanation furnished for such delay.

26. In the very recent case of ***B&W Industrial Technology (Pty) Ltd & Others v Baroutsos, 2006(5) SA 135 (W) (Full Bench)***, two applications for security for costs had been dismissed by the *Court a quo* primarily on the ground of the substantial delay in bringing the applications (the delay was approximately two years). At ***p. 140 (par. 21)*** Marais J., on behalf of the Full Bench, stated "*In my view, the issue of delay was adequately raised and, in any event, should have been dealt with by the Appellants as, without explanation, the delay was prima facie unreasonable and a potential bar to the ordering of security."* (Underlining supplied.)

    Both Counsel were agreed that I am bound by that decision.

27. In my view, there was unquestionably a long delay in the launch of the application and there was a duty cast upon the Defendants to explain such delay, even though it was not raised on the papers. Having failed to do so, I am enjoined to find, as I do, that the delay was unreasonable.

28. In the *Agro Drip case supra*, the Court was concerned with an application for

security for costs in terms of Section 13 of the Companies Act, no. 61 of 1973. At ***p. 186F*** Streicher J. (as he then was) found that: "*There is every reason to believe that the Plaintiff will not be able to pay the costs…*". Having so found, he went on to state at ***p. 187B*** that: "*Even if there is no onus upon the Plaintiff to prove special circumstances, the Plaintiff… should allege facts which at least prima facie establish whatever circumstances are contended by it… militating against requiring the Plaintiff to furnish security…*". (Underlining supplied.)

29. In my view, the facts of the present case are clearly distinguishable from the *Agro Drip case*. In the present case there was, as I have found, an unreasonable delay on the part of the Defendants and in these circumstances I would find that the Defendants should have alleged facts which, at least *prima facie*, establish that during that 4½ year period, the Plaintiffs sustained no prejudice.

See : *Ferreira v Endley, 1966(3) SA 618 (EC) at 621E – F;* and ***Tarry & Company Ltd v Matatiele Municipality, 1965(3) SA 131 (EC) at 134A – C***

30. In my view, where a party delays in the launch of such an application, such party must put up facts – not only to explain the delay, but must go further and put up facts which establish at least *prima facie*, that the opposing party has not been prejudiced by the delayed application.

31. I would extend the principle enunciated by the Full Bench in the *B&W case supra* where they found that an unreasonable delay was a "potential bar" to the ordering of security. In my view, where a party has both failed to explain the delay (resulting in a *prima facie* case of unreasonable delay) and failed to put up facts concerning the absence of prejudice, a Court should be extremely loathe to order security.

32. Mr van Heerden SC placed reliance on the case of ***Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd, 1982(1) SA 398 (A) at 443F – G***, a case concerned with specific performance and the discretion vested in a Court, and submitted that the Defendants could not have said anything about prejudice in the founding papers, but the Plaintiffs should have raised the question of prejudice in their answering papers. I cannot agree with that submission. In the view I take of the matter it was for Defendants, given the facts of this case, to put up facts to establish at least *prima facie* an absence of prejudice.

33. It goes without saying that, during the said 4½ year period, the Plaintiffs must have incurred some costs. A perusal of the bill of costs put up by the Defendants reveals that, during 2005, the parties corresponded with each other concerning a possible settlement of the matter.

34. In the circumstances and due to the Defendants' failures aforesaid, I am not prepared to exercise the discretion vested in me in ordering the Plaintiffs to

furnish security for costs in the action against Defendants, notwithstanding the fact that the Plaintiffs failed on the papers to establish impecuniosity or any other ground for the refusal of the relief.

35. In the circumstances, the application is dismissed with costs.

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PINCUS A.J.

20TH OCTOBER 2006