IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no 11418/2007

In the matter between

SILVERCRAFT HELICOPTERS (SWITZERLAND) LTD First Plaintiff

ANTARES INTERNATIONAL LTD Second Plaintiff

and

ZONNNEKUS MANSION (PTY) LTD Defendant

Case no 14624/2007

In the matter between

SILVERCRAFT HELICOPTERS LTD First Plaintiff

ANTARES INTERNATIONAL LTD Second Plaintiff

and

EXECUTIVE HELICOPTERS (PTY) LTD First Defendant

ZONNEKUS MANSION (PTY) LTD Second Defendant

GARY WALTER VAN DER MERWE Third Defendant

GARY MARK FOX Fourth Defendant

WILLIAM ANDREW OLMSTED Fifth Defendant

and

Case no 16340/2007

In the matter between

ANTARES INTERNATIONAL LTD	First Plaintiff
SILVERCRAFT HELICOPTERS (SWITZERLAND) LTD	Second Plaintiff

and

EXECUTIVE HELICOPTERS (PTY) LTD	First Defendant
ZONNEKUS MANSION (PTY) LTD	Second Defendant
GARY WALTER VAN DER MERWE	Third Defendant
GARY MARK FOX	Fourth Defendant
WILLIAM ANDREW OLMSTED	Fifth Defendant

Cover sheet

Counsel for the PLAINTIFFS	**:**	Adv G Myburgh SC Adv N Badenhorst
Instructed by	**:**	
Counsel for the DEFENDANTS	**:**	Adv MJ Fitzgerald SC
	:	Adv G Elliott
Instructed by	**:**	
Date of hearing	**:**	21 August 2008
Date of Judgment	**:**	**27 October 2008**

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EXECUTIVE HELICOPTERS (PTY) LTD	First Defendant
ZONNEKUS MANSION (PTY) LTD	Second Defendant
GARY WALTER VAN DER MERWE	Third Defendant
GARY MARK FOX	Fourth Defendant
WILLIAM ANDREW OLMSTED	Fifth Defendant

Judgment

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1. In the above three applications the defendants seek the furnishing of security from the plaintiffs. It is not in dispute that the plaintiffs, as *peregrine,* are obliged to furnish such security in respect of the two actions instituted by them and they have now tendered such security. What is in dispute, however, is whether they are obliged to furnish any security in respect of the claims in reconvention filed by the defendants in the two actions and whether they are obliged to furnish security in respect of the contempt proceedings launched against the defendants.

2. It appears from the papers, and in particular the judgement of Cleaver J, delivered on 28 November 2007 and annexed to the application for

security in the contempt proceedings, that the parties are litigating about six helicopters.

3. Antares International Ltd is a company registered in the Channel Islands with a registered address in Guernsey whilst Silvercraft Helicopters (Switzerland) Ltd is a Swiss company. Antares carries on business in the sourcing, purchasing and sale of *inter alia* new and second hand military helicopters and helicopter parts. Silvercraft is a wholly owned subsidiary of Antares and conducts the same business as Antares in relation to all transactions concluded in and business executed in Switzerland. Mr La Scala is the sole shareholder of Antares and a director of both companies.

4. Antares and Silvercraft contend that Antares is the owner of six helicopters and that at the time of delivery of the helicopters to Executive Helicopters (Pty) Ltd for either refurbishment or display, they were in the possession of Silvercraft. Antares and Silvercraft claim that they are entitled to the return of six helicopters. Executive refused to return the helicopters and, instead, asserted that it had bought and paid for the helicopters.

5. On 2 August 2007 Sholto-Douglas AJ granted an order for the attachment of two of the helicopters *pendente lite* together with ancillary relief and dismissed the application for attachment in respect of the other four helicopters.

6. On 16 October 2007 Griesel J granted in an *ex parte* application an interim order for the attachment of these four helicopters. Griesel J also granted, presumably as a rule *nisi*, an order that the respondents were in contempt of the order granted by Sholto-Douglas AJ as well as an order committing Mr Gary Walter van der Merwe, Mr Gary Fox and Mr William Olmsted to a term of imprisonment resulting from their alleged contempt.

7. The activities at the premises of Executive and Zonnekus Mansion (Pty) Ltd while the sheriff was attempting to execute the order granted by Griesel J led to the applicants applying for a further order committing the respondents for contempt of court.

8. Cleaver J, on the return day, confirmed the order for the attachment of the four helicopters and referred for the hearing of oral evidence the two contempt applications. On 24 April 2008 Hlophe JP, by agreement, postponed the hearing of both of the contempt applications to 11 November 2008.

9. On 21 April 2008 Traverso DJP, by agreement between the parties postponed the application for security of costs in respect of both the contempt applications to 21 August 2008, to be heard along with the two other applications for security of costs brought by the defendants in respect of the two actions.

10. It is these latter three applications for security which served before me.

11. Silvercraft and Antares duly instituted their actions for the return of the helicopters. The first action was instituted on 28 August 2007 against Zonnekus for the return of two helicopters under case number 11418/2007. In that action Zonnekus filed a claim in reconvention wherein an amount of R5 million is claimed arising from the fact that by virtue of the attachment of the two helicopters Zonnekus would have lost that amount as income from leasing the helicopters to an organisation known as “Working for Fire”, which utilises helicopters to fight fire, by the time the trial takes place.

12. The second action was instituted on 13 November 2007 by Silvercraft and Antares against Executive, Zonnekus and Messrs van der Merwe, Fox and Olmsted for the return of the other four helicopters under case number 16430/2007. In that action Zonnekus, the second defendant, filed a similar claim in reconvention, claiming there a loss of R8,7 million.

13. In both actions the defendants seek in terms of Uniform Rule of Court 47 orders directing the plaintiffs to furnish security for the defendants’ costs as well as, in terms of the common law, for an order directing the plaintiffs to furnish security both for the value of Zonnekus’ claim in reconvention as well as the costs of the Zonnekus’ claim in reconvention.

14. On 25 July 2007 a notice in terms of uniform Rule of court 47 (1) were served on the plaintiffs' attorneys in which security for the defendants' costs was requested to be furnished in the first action in the amount of R 250, 000.00. On 14 September 2007 the plaintiffs' attorneys was advised that the plaintiffs would not furnish any security.

15. On 5 December 2007 the defendants' attorneys served a notice in terms of Rule 47(1) on the plaintiffs' attorneys demanding security for the defendants' costs in the second action in the amount of R250 000.00.

16. The demands for security is made on the admitted grounds that the plaintiffs are foreign *peregrini* of the court, that the defendants are *incola* of the court and that the plaintiffs are not possessed of unmortgaged removable property situated within the jurisdiction of the court and furthermore.

17. With regard to the financial position of the plaintiffs, it is contended with reliance being placed on an e-mail of 5 October 2006 send by Mr La Scala in short, that the plaintiffs are in dire financial straits. It was submitted on behalf of the defendants that by the time they will be in a position to execute any judgment in respect of costs or the claim in reconvention – which execution will of necessity have to take place overseas – the overwhelming probability will be that the plaintiffs will have insufficient assets to satisfy same.

18. The plaintiffs dispute that the defendants have reason to believe they will be unable to satisfy any cost order on the claim in convention should one be granted against them in the action or Zonnekus' claim in reconvention, if successful; and the costs of Zonnekus' claim in reconvention if successful.

19. The plaintiffs, however, have conceded their obligation to furnish security for the defendants' costs in the action and what remains to be considered is whether Zonnekus is entitled under the common law to an order directing the plaintiffs to furnish security for both the value of its claim in reconvention as well as for the costs of its claim in reconvention.

20. In the contempt application the defendants, save for the fourth defendant, Mr Fox, require that the plaintiffs be ordered to furnish defendants with security for their costs.

21. On 12 March 2008 the defendants' attorneys served a notice in terms of uniform Rule of court 47(1) and the plaintiffs' attorneys requiring plaintiffs to provide security in the amount of R 175, 000.00. The plaintiffs did not respond to the notice.

22. There are in fact two contempt applications.

    (a) An application instituted by the plaintiffs against the defendants on 15 October 2007 for an order declaring the defendants to be in contempt of the order of court made by Sholto-Douglas

AJ on 2 August 2007 in terms of which an order was granted for the preservation of two helicopters (then) in possession of the second defendant.

(b) An application instituted by the plaintiffs as applicants against the defendants on 17 October 2007 also under the above case number, for an order declaring the defendants to be in contempt of the order of court made by Griesel J on 16 October 2007 under the same case number (the second application for contempt). The order by Griesel J was made final by Cleaver J in terms of a written judgment delivered on 28 November 2007. In terms of Cleaver J's order both the first and second applications for contempt were to be heard on a semi-urgent roll, which date was ultimately determined to be 24 April 2008. On 15 April 2008 the defendants launched an application for security for costs in respect of the contempt application – a mere four court days before the hearing of the contempt application.

23. In the event of non-compliance of any of the above orders for security, the defendants seek an order that:

(a) the proceedings in the action be automatically stayed;

(b) the attachment orders granted shall *ipso facto* lapse;

(c) the defendant may further apply on the same papers, supplemented if necessary, for:-

(i) the dismissal of the two actions with costs;

(ii) judgment on the second defendant's claim in reconvention.

24. The defendants finally seek an order that the first and second plaintiffs pay the costs of the applications jointly and severally.

25. In the premises two issues arise for consideration. The first is whether and to what extent security should be ordered in respect of the claims in reconvention made by Zonnekus. The second is whether security should be ordered in respect of the contempt proceedings.

26. It is trite law that the courts have a discretion to grant or refuse an application for security and in coming to a decision will consider the relevant facts of each case. Hardship to the *peregrinus* and financial ability to provide security are taken into account but are not necessarily decisive. The Court should have due regard to the particular circumstances of the case and consideration of equity and fairness to both the *incola* and the non-domiciled foreigner.

See Herbstein & Van Winsen The Civil Practise of the Supreme Court of South Africa (4th ed) at pp 321-322 and the authorities cited therein.

27. It was also not in dispute that security for costs must be given even though the suit of the *peregrinus* is likely to be successful.

See Freer v Oesterman (1908) 18 CTR 662.

28. The practice is clearly established that the Court will not in applications for security enquire into the merits of the dispute or the *bona fide* of the parties.

See Arkell & Douglas v Berold 1922 CPD 198
Estate Fawcus v Wood 1934 CPD 234 at 249

29. Williamson AJ held in Alexander v Jokl and Others 1948 (3) 269 (W) at 281:

> "*The bona fides or the soundness of the claim of the peregrinus is at no time a factor which influences the discretion to be exercised in deciding whether or not an incola should be protected against possible loss in regard to the costs of defending the claim brought against him. The Court in ordering security for such a purpose does not in any way anticipate the eventual decision on the claim by investigating and weighing up at that stage the possibilities of success or the bona fides of the claim…* "

30. The first dispute arises from Saker & Co Ltd v Grainger 1937 AD 223, where the Appellate Division held at 227 that "*it is also well-established practice that such a plaintiff can further be called upon to give reasonable security for a claim in reconvention by the resident defendant*" (referring to Schunke v Taylor (1891) 8 SC 104 and Van Leeuwen Roman Dutch Law 5.17.9). De Wet JA emphasized that the

ordering of security was not a rule of substantive law but one of practice in which the court has a discretion. The principle underlying this practice was that in proceedings initiated by a *peregrinus*, the court is entitled to protect an *incola* to the fullest extent.

31. Mr Fitzgerald, who together with Mr Elliott, appeared for the defendants, submitted that I was bound by the decision and that it confirmed as a well-established practice that a *peregrine* plaintiff can be called upon to give reasonable security for a claim in reconvention by the resident defendant.

32. Mr Myburgh, who assisted by Ms Badenhorst appeared for the defendants contended that in that case, the only question in issue was whether or not the respondent, a *peregrinus*, should be ordered to furnish security for the unsatisfied costs of the applicant, an *incola*, in the appeal which the latter has noted. The remark by the Court to the effect that a *peregrinus* plaintiff can be called upon to give reasonable security for a claim in reconvention by the *incola* defendant (at 226), was therefore *obiter*.

33. Mr Myburgh made a compelling argument as to why this well-known, and if I understood correctly, oft quoted statement, was *obiter.* Joubert JA in Magida v Minister of Police 1987 1 SA 1 (A), however, expressly refers to it as a *dictum* (at 14F-G).

34. Southwood AJ, pointed out in MV Gladiator Samsun Corporation t/a Samsun Line Corporation v Silver Cape Shipping Co Malta 2007(2) 410 (D) that whereas in Saker's case only the question of security for costs on appeal had to be considered, the cases of Schunke v Taylor and Symonds *supra*; Taylor v Merrington (1885) 2 SAR 30; Prentice & Mackie v Bell's Assignee 1906 TH 29 and Africair (Rhodesia) Ltd v Interocean Airways 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"* (at 409C).

35. It seems to me that in the case of a practice it is a matter of procedural rather than substantive law. The distinction between procedural and substantive law was drawn by Corbett J (as he then was) in Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A) at 753H – 754 with reference to Salmond Jurisprudence 11th ed at 504 who states that

> *'Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained.'*
>
> *It is difficult to compose a closer definition of the distinction than this*."

36. In the premises I will approach the question as one of a matter of practice, in which the Court has a discretion as to whether or not it should order security for the full amount of the claim. This would accord with what De Wet JA held in Saker & Co Ltd v Grainger,

supra, which I find is binding on me. The question then is how that discretion is to be exercised.

37. In Magida v Minister of Police 1987 (1) SA 1 (A) at 14E-G Joubert JA held that a Court had a discretion to absolve a *peregrinus* from being ordered to pay security before it applied the principle "*that in proceeding initiated by a peregrinus, the court is entitled to protect an incola to the fullest extent."*

38. As was, however, also pointed out by Joubert JA in Magida, *supra*, at 14E, the court still has to exercise a judicial discretion

> "*by having due regard to the particular circumstances of the case as well as the consideration of equality and fairness to both the incola and the peregrinus to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs, Nor is there any justification for requiring the Court to exercise its discretion in favour of a peregrinus only sparingly.*"

39. In this regard, no one should be compelled to furnish security beyond his means and a *peregrinus* should not on account of his impecuniosity be deprived from prosecuting his action against an *incola* (see Magida at 15E).

40. At the same time, however, the Court will see that justice is not denied by unreasonable obstacles being placed in the way of persons seeking redress.

See Herbstein & Van Winsen *supra* at p322

Schunke v Taylor & Symonds 1891 (8) SC 103 at 107

41. As Wunsch J observed in D-Jay Corporation CC v Investor Management Services 1996 CLR 854 (W) at 861

> *"They (the rules for the furnishing of security for costs) are, in any event, a matter of practice of the courts and not substantive law (see Africair (Rhodesia) Ltd v Interocean Airways SA 1964 (3) SA 114 (SR) at 116 G and cases there cited). Against the general rule referred to in Van Zyl v Euodia Trust (Edms) Bpk, supra[1] that an incola should have unrestricted access to the courts should be weighed the principle, which applies in South Africa as much as in England, 'that the system of justice which prevails in this country is founded on the premise that the interest of justice are ordinary best served if successful litigants recoup the costs of their litigation, or the bulk of those costs, and unsuccessful litigants pay them' (Keary Developments Ltd v Tarmac Construction Ltd (1995) 3 All ER 534 (CA) at 536c), which is the approach on which section 13[2] is based."*

42. In South African Iron & Steel Corporation Ltd v Abdulnabi 1989 (2) SA 224 (T) Hartzenberg J held

> "*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*" (at 232H-233B)

43. The soundness of that judgment was questioned by a full bench in the WLD in B & W Industrial Technology (Pty) Ltd & Others v Baroutsos 2006 (5) SA 135 (W) in which Marais J, speaking for the court, stated at para [41] that

[1] 1983 (3) SA 394 (T)
[2] of the Companies Act, Act 61 of 1973

> "*It is somewhat difficult to understand how Hartzenberg J in the SA Iron and Steel Corporation case at 233C understood (the case of Schunke v Taylor and Symonds (1891) 8 SC 103 to be authority for the proposition that a peregrinus plaintiff can be ordered to give security for a claim in reconvention."*

44. In B & W Industrial Technology (Pty) Ltd and Others v Baroutsos, *supra*, Marais J came to the conclusion that, insofar as a practice existed to permit a court to order security for the amount of the claim where an *incola* counterclaims against a *peregrinus* plaintiff, it, in present day circumstances, should not be followed, save perhaps in the most exceptional of circumstances. The Court concluded that it was not in accordance with modern commercial needs nor was it just or equitable to impose such a burden on *peregrinus* plaintiff who chose to sue their alleged debtors in South African courts (at para [42]).

45. The Court held that at para [37] the equity and fairness of directing security for costs where in *incola* defendant is sued by a *peregrinus* plaintiff, is far more readily apparent than what is the case where an *incola* defendant demands security from the *peregrinus* plaintiff to the judgment likely to be obtained against him. In the case of the former, the claim is brought by the *peregrinus;* in the case of the latter, the claim is brought by the *incola* who chooses to sue the *peregrinus* plaintiff in a domestic court in the same action, instead of instituting a separate action in the latter's own country were he/she resides or is domiciled.

46. The court held (at para [40] and [42]) that it is neither in accordance with modern commercial needs, nor just and equitable to impose the burden of having to give security for the amount of an *incola* defendant's counterclaim, on a *peregrinus* plaintiff – particularly in circumstances where the *peregrinus* plaintiff resides in a civilised country with a civilised legal system and where there is nothing preventing the *incola* defendant, given the present ease of travel and communication, from suing the *peregrinus* plaintiff is his/her own country.

47. The court accordingly refused to make an order, directing the *peregrinus* plaintiff to give security for the potential value of an *incola* defendant's claim in reconvention.

48. While the court conceded that the remedy might, in principle, be available, it stated that a court should be slow to conclude that considerations of fairness and equity favour the granting of such security, and should do so only in the most exceptional of circumstances (if at all) (at para [38] and para [42]). It is not clear from the judgment that "*the most exceptional circumstances*" might entail.

49. I fully agree with what was said by Marais J.

50. In an informative article by Christian Schultze "Should a Peregrine Plaintiff Furnish Security for Costs for the Counterclaim of an Incola

Defendant? which appeared in (2007) 19 SA Merc LJ 393 – 399 the author wrote as follows

> *"Another question was whether an order for security for the claim, or only for costs, was to be made when an action (either in convention or in reconvention) is brought by an incola against a peregrinus.*
> *In Banks v Henshaw 1962 (3) SA 464 (D & C), Milne J had held (at 465E and 466E):*
>
> > *"In general, a peregrinus will not be ordered to furnish security where he is the defendant but only where he claims against an incola, whether as plaintiff or as claimant in reconvention, in which case he may be ordered to provide security to cover the costs of the incola… When, however, the applicant filed a counterclaim against the respondent, he laid himself open to a claim for security, but only for the costs of the action and no more".*
>
> *This was confirmed in Sandrock Austral Ltd v Exploitation Industrialle et Commerciale 'Bretic 1974 (2) SA 280 (D & C) at 285H-286E. Subsequently, in Elscint (Pty) Ltd & Another v Mobile Medical Scanners (Pty) Ltd 1986 (4) SA 552 (W), Goldstone J held (at 557H) that*
>
> > *"[c]onsideration of fairness and justice and the reality of modern international commerce and efficient means of travel and communication militate against treating foreign defendants who have submitted to the jurisdiction more harshly than incola defendants".*
>
> *Referring to these decisions, Marais J could (at 16) find "no compelling reason to distinguish between the appropriate approach when the claim is made by an incola plaintiff in convention and the present situation where the claim is made by the incola defendant in reconvention".*
>
> *Marais J's argument is supported by the finding in Schunke v Taylor Symonds (supra at 110-1). In that case, the Court held that 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 plaintiff, who follows his debtor to such debtor's domicile, and sues him in his own forum, to furnish 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.*

In summarizing the above, it is important to differentiate between two aspects.

First, it is an established practice and not part of the substantive law (as was confirmed in Saker & Co Ltd v Grainger supra at 227) that a court may order security for the judgment on the counterclaim of the resident defendant against the foreign plaintiff.

Secondly, by applying this practice, the court has discretion and has to consider all the circumstances of the case, including general considerations of equity and fairness to both parties (see Magida v Minister of Police supra at 14).

In exercising the discretion, the court has to take into consideration the changes of practice which had occurred as a result of the evolution of modern technology. It goes without saying that, as a general rule, a foreign plaintiff can, in the discretion of the court, be compelled to give security for costs… The underlying principle is to protect the incola to the fullest. However, the quest to protect a defendant who is domiciled within the area of the jurisdiction of the court sufficiently against unfounded claims by a foreign plaintiff would be overstretched if the court were to make an order compelling such plaintiff to provide security for any amount of money which the defendant alleges he intends to claim by way of reconvention. The court must consider all the circumstances connected with the claim and determine the nature and extent of security which should be given, so as to protect the claimant, on the hand, and to see that justice is not denied, on the other hand. To order a peregrine plaintiff to furnish security in respect of a claim by an incola in reconvention could, if made a general rule, result in a denial of justice."

51. I am in agreement with this lucid analysis and adopt it.

52. In view of the foregoing, I am of the view that there is indeed a practice operating in this Division that would permit the Court to grant an order, directing the plaintiffs to give security for the potential value, and costs, of the second defendant's claim in reconvention, but that all the circumstances should be considered before a plaintiff is compelled to provide security in full for a claim in reconvention.

53. Mr Myburgh submitted that a consideration which weighs against the defendant is that the Sholto-Douglas AJ has already refused the defendants' request that security be furnished in support of the undertaking given in respect of the defendants' alleged damages – which damages from the basis of their claim in reconvention.

54. Sholto-Douglas AJ was informed by Mr Myburgh, who also appeared before him on behalf of the defendants, that Silvercraft undertook to pay such damages as Zonnekus may establish that it suffered as a result of the attachment of the helicopters. This undertaking was considered by Sholto-Douglas AJ as a factor in considering the issue of balance of convenience. Sholto-Douglas AJ considered whether, in addition to the undertaking, and by virtue of the fact that the applicants were *peregrine,* security should be ordered. He found that he was unable to determine if, or to what extent, Zonnekus will suffer damages if an interim interdict is granted and the action is ultimately dismissed. He held that net effect was that issue of an undertaking and the furnishing of security was neutral. Sholto-Douglas AJ remarked that Zonnekus was not entitled to an order for security in support of the undertaking. Mr Myburgh did not contend that a binding finding was made, he contended that it was a factor to be taken into account.

55. Mr Fitzgerald submitted that an undertaking to pay damages can never be a substitute for the actual payment of the value of the claim as security. I agree.

56. The plaintiffs also state that they have been compelled to institute proceedings against the defendants for the return of helicopters which Zonnekus allegedly acquired with full knowledge of the plaintiffs' claim in respect of those helicopters and the plaintiffs' intention to institute proceedings for the recovery thereof from Zonnekus. The plaintiffs contend that this was done in an attempt to thwart their attempts to recover the helicopters from Zonnekus.

57. Accordingly, the plaintiffs submitted that it would not be just and equitable to compel the plaintiffs to provide security for the costs of the action in circumstances where the defendants were aware of the dispute and the claim in respect of the helicopters by the plaintiff.

58. More particularly, so it was submitted, the defendants took possession of the helicopters in the face of a dispute and, having taken that risk, should face the costs and risks of the attendant litigation resulting therefrom.

59. Mr Fitzgerald submitted that the plaintiffs' attempt to introduce the merits of the action into the question of security should not be countenanced in the light of the authorities referred to in paragraphs 29 and 0 above. In any event, the circumstances upon which the second defendant took possession of the helicopters were unilaterally disclosed by it in the answering affidavit filed of record during July 2007.

60. No doubt these disputed allegations of impropriety and lack of *bona fides* will be traversed at the trial. I, mindful of the above authorities, refrain from entertaining the argument advanced on behalf of the plaintiffs.

61. Mr Myburgh submitted that there was nothing exceptional about the present application that would justify the granting of an order for the full amount of the claims in reconvention. The first and second plaintiffs are resident or domiciled in civilised countries with civilised legal systems and there is nothing preventing the defendants from suing them in Switzerland and Great Britain respectively. I tend to agree. I am of the view that to order security for the full value of the defendants' counterclaims would amount to a denial of justice. Mr Fitzgerald, at the outset of his argument also made it clear that he was not pursuing such a claim. He submitted that a lesser amount, left in my discretion, should be ordered. He pointed out that that would accord with what was held in Saker's case and Schunke v Taylor Symonds, *supra.* He pointed out that to merely order security for the cost of the claim in reconvention may be meaningless, after all, one would often not be able to distinguish between the costs of the claim and the claim in reconvention. In this regard what comes to mind in the context of considering whether a defendant should be ordered to furnish security in respect of its claim in reconvention, is what Aaron AJ said in Compair SA (Pty) Ltd v Global Chemical Co (Pty) Ltd 1985 (1) SA 532 (C) at 532-533A

> *"A counterclaim is technically separate and distinct from the claim in convention, and it is probably competent to order, in a proper case, that a defendant give security for the costs of the counterclaim. Nevertheless the issues in the conventional action and the reconventional action may be so closely related that, if the Court orders a plaintiff in reconvention to give security for costs, it may in effect be ordering it to give security for the costs brought about by its defence of the action in convention. Accordingly, although it may be competent for a Court to order security to be given by a plaintiff in reconvention, the Court may in the exercise of its discretion decline to do so in such cases."*

62. In the instant case, it appears that the claims in reconvention, are not merely defensive proceedings and one does not know how the trial may proceed. The claims in reconvention total some R13,7 million. I don't know what the value of the 6 helicopters is. The defendants have estimated their costs of defending the two actions at R250 000 per action and in respect of the contempt proceedings at R175 000. I can take no view on the quantum that should be ordered in respect of the claims in reconvention. Justice may very well be denied were I to order security for a substantial amount in respect of the claims in reconvention. On the other hand the Zonnekus should be adequately protected were I to order security for its costs in the claims in reconvention. Any other amount, in my view, would be a guess, and accordingly not be an amount awarded in the proper exercise of a discretion.

63. In the premises, I am of the view that Zonnekus is entitled to security for the costs of its claims in reconvention in the two actions.

64. The final issue which requires consideration is whether security for costs should be ordered in respect of contempt of court proceedings.

65. In his answering affidavit on behalf of the plaintiffs Mr Dewald Nel van den Berg, an attorney of this court, submits as follows:

> *"It is respectfully submitted that there is no reason why a party, who has good reason to believe that a criminal offence (namely contempt of court) has been committed and then report same to the court by way of an contempt application, should have to put up security for doing so. If this were to be the case, the interests of justice would be seriously prejudiced as it would discourage parties from bringing such an offence to the attention of the Court."*

66. Mr Myburgh pointed out that as far has he could ascertain there was no reported cases where the High Court has ordered an applicant in contempt proceedings to furnish security.

67. Mr Myburgh submitted that

(a) Such an order is inappropriate in contempt proceedings which, by their nature, are *quasi*-criminal, and they stand on a different footing to ordinary proceedings.

(b) There is no reason why a party, who has good reason to believe that a criminal offence (namely contempt) of court has been committed and who reports same by way of a contempt application, should have to put up security to do so. If this were so, the interests of justice would be seriously prejudiced as it

would discourage parties from bringing such an offence to the attention of the Court.

68. The plaintiffs are correct, in their contention that contempt of court is a criminal offence, but I disagree that the only way of bringing such an offence to the attention of the Court is by way of a contempt application. The plaintiffs could have laid a criminal charge. There is no suggestion that that was done. The contempt application is brought for also for the purpose of enforcing the attachments and not merely to unmask the criminal offence. It is, of course, the right of the plaintiffs to do so.

69. In S v Beyers 1968 (3) SA 70 (A) the then appellate division held that the wilful non compliance with an interdict granted by a civil court constitutes the crime of contempt of court for which the state can prosecute. Steyn CJ referred to Verkoutering v Savage 1918 TPD 62 where the court held that an application for committal is a civil process (at 77H-78A). Steyn CJ held as follows at 80C-G:

> "*Dat daar 'n gevestigde prosedure bestaan waarvolgens 'n gedingvoerder wat 'n bevel teen sy teenparty verkry het, in sy eie belang bestraffing van sy teenparty weens minagting van die Hof kan aanvra om gehoorsaamheid aan die bevel af te dwing, val nie te betwyfel nie. Dit is 'n proses van tweeslagtige aard wat volgens sivielregtelike prosedures afgehandel word (vlg Afrikaanse Pers-Publikasie (Edms) Bpk v Mbeki 1964 (4) SA 618 (A) op bl 626). In navolging van die Engelse reg word die minagting dan beskryf as siviele minagting. Dit is egter ewe duidelik dat hierdie vorm van minagting nie deurgaans 'n strafregtelike inhoud ontsê nie. Dit word telkens beskryf en behandel as 'n misdaad met geen aanduiding dat dit anders as die gemeenregtelike*

minagting van die hof beskou word nie. . . . Die opvatting dat dit inderdaad 'n misdaad is, blyk ten duidelikste uit die feit dat 'n gewone straf opgelê word as die aansoek slaag. Strafoplegging sonder dat 'n misdaad gepleeg is, sou in ons reg iets onbestaanbaar wees. Al is afdwinging van 'n burgerlike verpligting die hoofdoel van die straf, dan word dit nogtans nie opgelê bloot omdat die verpligting nie nagekom is nie, maar uit hoofde van misdadige minagting van die Hof wat daarmee gepaard gegaan het."

70. In Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) Cameron JA held as follows at para [8] and [9]

"[8] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)."

71. There is to my mind, in principle, nothing unjust in requiring security in contempt proceedings. Section 9 of the Criminal Procedure Act, 51 of 1977, provides for security to be furnished by the private prosecutors for the costs of accused in private prosecutions (see for instance Williams and Another v Janse van Rensburg and Others (1) 1989 (4) SA 485 (C)). In my view a factor, in applying the test laid down in Magida's case, would be to enquire whether security should be

ordered in contempt proceedings, rather than to proceed from the premise that, because it is contempt proceedings, it should not be required at all.

72. Accordingly the mere fact of contempt proceedings does not in itself absolve the plaintiffs from furnishing security. And all else being equal it must follow that the plaintiffs are obliged to furnish security in the contempt applications just as they had tendered to do in the two actions.

73. The plaintiffs have placed no evidence before this Court in support of the bald allegation that they have sufficient assets to satisfy any judgment.

74. I am satisfied that the defendants have established a basis upon which the Court should exercise its discretion in favour of the defendants and order the plaintiffs to furnish security for the defendants' costs in the action (as tendered) and for the costs in the claim in reconvention but not for the amount of the second defendant's claim in reconvention. I am also satisfied that the defendants are entitled to security for costs in respect of the contempt application.

75. In the premises I make the following orders.

A. Under case number 11418/2007.

1. The first and second plaintiffs, jointly and severally, are ordered to furnish the defendant with security for its costs of the claim in reconvention in the amount and form to be determined by the Registrar of the Court ("the Registrar").

2. The first and second plaintiffs, jointly and severally, are ordered to furnish the defendant with security for the costs of the defendant's claim in reconvention in this matter in the amount and form to be determined by the Registrar.

3. That in the even of non-compliance with either or both of the prayers 1 and/ or 2 above (or any part thereof):

3.1 the proceedings under the above case number will be automatically stayed;

3.2 the of attachment granted on 2 August 2007 under case number 9657/2007 shall *ipso facto* lapse;

3.3 the defendant may further apply on the same papers, duly supplemented if necessary, for:

3.3.1 the dismissal of the action under case number 11418/2007, with costs;

3.3.2 judgment on its claim in reconvention.

4 The first and second plaintiff, jointly and severally, are ordered to pay the costs of this application, which costs are to include the costs of two counsel.

B. Under case number 16340/2007

1. The first and second plaintiffs, jointly and severally, are ordered to furnish the defendants with security for their costs of the claim in convention in the amount and form to be determined by the Registrar.

2. The first and second plaintiffs, jointly and severally, are ordered to furnish second defendant with security for the costs of second defendant's claim in reconvention in this matter in the amount and form to be determined by the Registrar.

3. That in the event of non-compliance with either or both of the prayers 1 and/ or 2 above (or any part thereof):

3.1 the proceedings under the above case number will be automatically stayed;

3.2 the order of attachment granted on 28 November under case number 14624/2007 shall *ipso facto* lapse;

3.3 the defendants may further apply on the same papers, duly supplemented if necessary, for the dismissal of the action under case number 16340/2007, with costs;

3.4 the second defendant may further apply on the same papers, duly supplemented if necessary, for judgement on its claim in reconvention.

4. The first and second plaintiffs, jointly and severally, are ordered to pay the costs of this application, which costs are to include the costs of two counsel.

C. Under case number 14624/2007.

1. The first and second plaintiffs, jointly and severally, are ordered to furnish the defendants with security for their costs of the contempt of court proceedings in this matter in the amount and form to be determined by the Registrar.

2. That in the event of non-compliance with prayer 1 above:

2.1 that the contempt of court proceedings under the above case number will be automatically stayed;

2.2 the defendants may further apply on the same papers, duly supplemented if necessary, for dismissal of the contempt proceedings, with costs.

3. The first and second plaintiffs, jointly and severally, are ordered to pay the costs of this application, which costs are to include the costs of two counsel.

S Olivier AJ

27 October 2008