

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

CASE NO: AC38/2006

DATE: 15 MAY 2008

5 In the matter between:

DEVEREUX MARINE CC Applicant

and

CLASSIC SAILING ADVENTURES Respondent
(PTY) LTD

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J U D G M E N T

CLEAVER, J:

15 [1] On the eve of the trial, that is the day before the trial
commenced, the applicant filed an application for the
respondent to provide security for the applicant's costs in
the trial in an amount of R350 000. The figure of R350
000 stems from an offer which had been made on behalf
20 of the respondent, in December of last year, to provide
security in that amount.

[2] The application was opposed by the respondent,
basically on two grounds; the lateness of the application
25 and the lack of compliance with Rule 6 of the Rules of

Court and secondly, the agreement upon which the applicant relied in its founding affidavit that the respondent would provide security in the sum of R350 000 was disputed.

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[3] The application has its genesis in the filing of a notice in terms of Rule 47(3) by the applicant on 4 December last. That notice was brought in terms of Rule 47 and/or section 13 of the Companies Act and/or section 5(2)(b) of the Admiralty Jurisdiction Regulation Act, the trial being heard by me.

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[4] The application is not a model of clarity. Its main thrust is the alleged agreement which existed for the respondent to provide security in the sum of R350 000 but the deponent to the founding affidavit does refer to the notice in terms of Rule 47 and does refer to correspondence in which the applicant's attorney alleges that the respondent is a company without any assets. The notice in terms of Rule 47 contains the following averments:

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1. That the respondent is a private limited company.
2. Is believed to have been a one ship-owning company whose one ship has sunk.

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3. Has no known assets.
4. Appears not to be trading.
5. As such does not appear to be earning any income.
6. By the time litigation in this matter is resolved may well have ceased to exist or be wound up and/or
7. There is reason to believe, considering the aforesaid circumstances, to be unable to pay the costs of the applicant in the event of the applicant (third defendant in the trial) being successful in its defence.

[5] It seems to me that, as was submitted by counsel for the applicant, that I must weigh up the lateness of the application and its formal defects on the one side, and the prejudice which the applicant may suffer if the application is not granted, on the other.

[6] In my view, there are three important aspects which must also be taken into account. Firstly, the fact that security has been put up by the respondent for the costs of the two other defendants in the action. Secondly, that in December of last year the respondent offered to provide security in the sum of R350 000. Thirdly, the respondent

has not dealt with any of the averments set forth in the Rule 47 notice.

5 [7] I have come to the conclusion that this is a case where I should exercise my discretion in favour of the applicant. But for the lateness of the application and in the absence of the respondent dealing with the averments in the notice and in the correspondence, the applicant would have succeeded.

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[8] As far as the costs are concerned, my view is that even though the respondent has not been successful in resisting the application, the lateness of the application is of such an order that the respondent should not have to bear the applicant's costs. It was suggested by 15 counsel for the applicant that I should refer the matter to the Taxing Master for a determination of the amount of security. I do not consider that that would be appropriate. The applicant itself sought an order for security in the sum of R350 000 and as at the time of the 20 filing of the application that was the figure which the applicant wanted.

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[9] In the circumstances I grant the following order:

1. The respondent, Classic Sailing Adventures (Pty) Ltd, is directed to furnish the applicant, Devereux Marine CC, with security for the applicant's costs in the action in an amount of R350 000 in a form acceptable to the applicant.
2. This security is to be provided by 23 May 2008.
3. Each party is to pay its own costs.



CLEAVER, J