REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 10977/05

In the matter between

CRAIG NEVEN Plaintiff

and

THE UNIVERSITY OF CAPE TOWN Defendant

JUDGMENT delivered this 5th day of June 2008

NDITA, J

INTRODUCTION

[1] This is an application brought by the defendant for the dismissal of the plaintiff's action on the basis that he has failed to provide security for costs as ordered by the Court.

[2] Mr Nevin appeared in person while Mr Howie represented the defendant. At the commencement of the hearing this Court enquired from the plaintiff whether he wished to obtain legal representation and he responded that he did not. He also indicated that he did not wish to file an answering affidavit. The Court explained that this is purely a legal application and suggested that it would be advisable for the plaintiff to obtain legal representation. The plaintiff was none the less adamant that he did not wish to engage services of a legal practitioner.

FACTUAL BACKGROUND

[3] In 1995, the plaintiff was accepted by the defendant as registered a student pursuing the degree of Doctor of Philosophy ("PhD") in the Research Unit for Exercise Science and Sports Medicine. On 8 October 2001 the plaintiff submitted a thesis for examination entitled "*Initiation and Control of Gait from First Principles – a Mathematically Animated Model of the Foot."* The defendant, in terms of its procedures appointed three experts to examine the plaintiff's thesis and make recommendations. The findings of the experts were unfavourable to the plaintiff. An independent assessor appointed by the plaintiff to reconsider the plaintiff's thesis reached the conclusion that "*there were no reasonable prospect that the plaintiff's thesis would be a contribution to science and that it therefore lacked the necessary standard of proficiency for the defendant to confer a PhD upon the plaintiff."*

THE ACTION

[4] After the plaintiff was advised that he had not been awarded a PhD, he instituted action against the defendant claiming various forms of relief (including monetary claims totaling R 19 651 550.00). The action arises directly out of the plaintiff's relationship with the defendant as a student and the fact that he was not awarded a PhD.

THE APPLICATION FOR SECURITY FOR COSTS

[5] The defendant's contention was that in every aspect the plaintiff's claims were unsustainable and his action is therefore vexatious. Accordingly on these grounds the defendant launched an application seeking an order that the plaintiff provide it with security for costs in the amount of R75 000, 00 in respect of the action. The plaintiff opposed the application and at the preliminary hearing of the application in the Third Division of this Court on 3 July 2007 the Court ordered that:

1. the application be postponed to 15 November 2007 for hearing on the semi-urgent roll;

2. the plaintiff file an answering affidavit by 31 August 2007;

3. the defendant file its replying affidavit by 19 October 2007;

4. heads of argument be file; and

5. costs of the application stand over for later determination, save for the fact that the plaintiff was ordered to pay the costs of the hearing on 3 July 2007.

[6] The plaintiff did not file an answering affidavit and the matter was argued before Saldanha AJ on15 November 2007 on only the defendant's papers and what the plaintiff submitted in person from the bar. Subsequent to the full hearing of the application Saldanha

AJ found in favour of the defendant and made the following order, that:

1. *the plaintiff provide the defendant with security for costs in respect of the action in the amount of R75 000,00 by 31 January 2008;*

2. *that the action be stayed until such time that the plaintiff complied with sub-paragraph 1 above; and*

3. *Should the plaintiff fail to comply with sub-paragraph 1 above, then the defendant was given leave to apply to this Court on the same papers amplified as may be necessary for the dismissal of the plaintiff's action.*

THE APPLICATION FOR DISMISSAL OF THE PLAINTIFF'S CLAIM

[7] It is common cause that the plaintiff failed to provide the defendant with the security for costs by 31 January 2008. Accordingly, on 11 February the defendant launched an application for the dismissal of the plaintiff's claim as a result of his failure to provide security for costs as ordered by the Court. The matter was placed on the Third Division roll of this Court for the 14th day of February 2008. The plaintiff appeared in person and stated that he wished to oppose the application. As a result of the plaintiff's opposition and by agreement between the parties an order was granted by Motala J in terms of which:

1. *the application was postponed to 4 June 2008 for hearing on the semi-urgent roll;*

2. *the plaintiff was obliged to file his answering affidavit by no later than 31 March 2008;*

3. *the defendant could file a replying affidavit by no later than 5 May 2008;*

4. *the parties were obliged to file heads of argument in accordance with Court Notice 10 (1) bis; and*

5. *costs stood over for later determination.*

[9] The plaintiff failed to file his answering affidavit by 31 March 2008, and has until the hearing of this matter on 4 June 2008 not filed any answering affidavit. Accordingly, the plaintiff has not advanced any evidence in opposition to the application and the defendant has therefore not filed a replying affidavit. At the hearing of this application the defendant asked for an order that:

1. the plaintiff's claim be dismissed;
2. the costs of the action be paid by the plaintiff; and
3. the costs of the application for dismissal be paid by the plaintiff.

APPLICABLE LAW AND ANALYSIS

[10] It is trite law that the Court has inherent jurisdiction to dismiss actions where there had been a failure to furnish security which had been ordered by the Court. (See **Wallace NO v Commercial Union CO of SA LTD** 1999 (3) SA 804 (C) paragraph (B – D); **Excelsior Meubels BPK v Trans Unie Ontwinkels** 1957 (1) SA 74) (T). However, this discretion must be exercised judiciously, bearing in mind that courts are open to all, and it is truly in exceptional cases that doors will be closed to anyone who desires to prosecute an action. See **Commercial Union** *supra* at 810 A – B).

[11] In the present case, as I earlier stated in this judgment, the plaintiff was ordered by a Court to furnish security for costs by 31 January 2008, failing which the defendant was given leave to apply to this Court for the dismissal of the plaintiff's action. Mr Howie, for the

defendant argued that on this basis alone, the defendant is entitled to the dismissal of the plaintiff's action. I am not persuaded to dismiss the plaintiff's action on this basis alone. Trollip J, in **S.A Scottish Finance Corporation Ltd v Smit** 1966 (3) SA 634 D – F, remarks that the dismissal of a plaintiff's action has serious consequences – the waste of costs, time and effort already expended on the action, usually the liability to pay the defendant's costs, and having to re-institute the action if the plaintiff wishes to proceed. These consequences have to be borne in mind when a Court exercises its discretion and as such the action should not be dismissed unless

> "*the plaintiff has recklessly disregarded his obligations, or … the case appears to be hopeless, or the Court is convinced that the plaintiff does not seriously intend to proceed."*

These remarks bring me to the second leg of Mr Howie's argument that a dismissal is warranted on the basis that the plaintiff has recklessly disregarded his obligations.

[12] It is not in dispute that up until the hearing of this matter on 4 June 2008, the plaintiff had neither furnished the security for costs nor tendered any explanation. In his submission (from the bar), the plaintiff indicated that he did not wish to file any affidavits. Furthermore, he did not consider the order by Saldanha AJ as applying to him because it referred to "having heard argument from both counsel" whereas he was not legally represented. The puzzling aspect of the plaintiff's submission is that he has not appealed against the judgment. Furthermore, in that judgment, Saldanha AJ, literally implored the plaintiff to consider legal representation in further hearings but he remained adamant that he did not wish to be legally

represented. From the day the judgment was delivered on 14 December 2007 until the matter was heard on 4 June 2008, the plaintiff had more than six months to either furnish security as ordered or put up a proper defence or appeal against the judgment. In my view, he was reckless in not taking any action despite the existence of a court order. This Court is in the dark as to why he failed to comply with an order by Motala J, that he should file his answering affidavit and heads of argument as stipulated. Furthermore, when the application was served on him he presumptuously made use of the opportunity to oppose it. The plaintiff cannot therefore be allowed to keep an action which the court ordered he could only prosecute if he provided security for the plaintiff's costs. The following remarks by Cillie J in **Exelsior Meubels** supra at 77 D – E are appropriate in the circumstances of the present case.

> "*In this case, it must have been the intention of the Court, when the provision of security was ordered, that the respondent was not to proceed with the action unless and until he provided security for the plaintiff's costs. The respondent was given time to find the amount of money, but the security was not provided, it is illogical that the respondent should proceed with his action and inequitable that by disregarding the Court order he should be allowed to alive that action which the Court had ordered he could only prosecute if he provided security for the applicant's costs."*

13] I turn now to consider the plaintiff's submission that dismissing the action is tatamount to a violation of his right to litigate or be heard. It should be noted that right to be heard operates within the context of court procedures. The converse of it is that a litigant is entitled to have closure on litigation and after an inordinate delay he is entitled assume that the losing

party (in this case the plaintiff in the security for costs application) has accepted finality of the order and does not intend to pursue the matter any further. The principle of finality of litigation was applied by the Constitutional Court in **Van Wyk v Unitas Hospital and Another** 2008 (2) SA 472 (CC) at 479 H and 480 A – B. Although it was applied in the context of an application for condonation, Mr Howie has correctly submitted that it is relevant in the instant matter and is set out as follows:

> "*This is an important principle involved here. An inordinate delay induces a reasonable belief that the order has become unassailable. This is a belief that the hospital entertained and it was reasonable for it to do so. It waited for some time before it took steps to recover the costs. A litigant is entitled to have closure in litigation. The principle of finality in litigation is intended to allow parties to get on with their lives. After an inordinate delay a litigant is entitled to assume that the losing party accepted finality of the order and does not pursue the matter any further. To grant condonation after an inordinate delay in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice.*

In applying this principle to the facts of the present matter, I must reiterate that in view of the fact that the plaintiff failed to give a reasonable explanation, the defendant was entitled to assume that the plaintiff had accepted the finality of the order to pay costs.

[13] Finally, Mr Howie submitted that if the Court is not inclined to dismiss the plaintiff's claim, then the defendant would still be satisfied if the court ordered an absolution from the instance. Taking into account the drastic effect of a dismissal of an action, in my view the

appropriate order is that of an absolution from the instance.

CONCLUSION

[14] In view of the above findings, I make the following order:

1. Absolution from the instance is granted in the plaintiff's action against the defendant under case number 10977/05 ("the action")

2. The costs of the action shall be paid by the plaintiff.

3. The costs of the application shall be paid by the plaintiff.

NDITA, J