REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION)

REPORTABLE

CASE No: 12478/08

In the matter between:

ELMARIE MARÉ **(previously Olivier, born Fourie)**	**Plaintiff / Respondent**
and	
PLETTENBERG BAY / BITOU MUNICIPALITY	**First Defendant / Applicant**
M K LELUMA	**Second Defendant / Applicant**
C L MVIMBI	**Third Defendant / Applicant**
L LUITERS	**Fourth Defendant / Applicant**
N M SISHUBA	**Fifth Defendant / Applicant**
T M NQOLO	**Sixth Defendant / Applicant**
E V M WILDEMAN	**Seventh Defendant / Applicant**

JUDGMENT DELIVERED : 29 OCTOBER 2008

On behalf of Plaintiff / Respondent	***:***	***Attorney J Wagener***
Attorney(s)	***:***	***Johan Wagener Inc***
On behalf of Defendants / Applicants	***:***	***Adv A de Vos SC et Adv P van der Berg***
Attorney(s)	***:***	***Groenewald Lubbe Inc***

Heard on : 2008: 18 September

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MOOSA, J:

Introduction

[1]This is an application, in terms of Rule 47 (1) of the Uniform Rules of Court, for an order that plaintiff be directed to furnish security for costs of the defendants in the amount and in the form to be determined by the Registrar of the Court. The grounds, upon which the application is brought, are two-fold: firstly, that plaintiff is impecunious and would not be able to pay defendants' costs should a costs order be made against her and secondly, that plaintiff's claim against the defendants is frivolous in that her

claim for sexual harassment has become prescribed and her claim for unfair dismissal has been settled.

[2]The plaintiff opposed the application. She took a point *in limine* that first defendant had no *locus standi* in that it was not properly authorised to defend the action or to bring this application. She also opposed the application on the merits. Plaintiff instituted action against the defendants, jointly and severally, the one paying the other to be absolved, for damages in the sum of R32 465 033.97 arising allegedly from sexual harassment and sexual assault and unfair dismissal. The particulars of claim do not lend themselves to clarity and precision and are somewhat obfuscated. Third to seventh defendants are cited in their personal capacity and they are also held legally responsible for the alleged sexual conduct of second defendant.

Point *in limine*

[3]Plaintiff challenged the authority of Deon Daantjie Lot ("Lot") to bring this application on behalf of the first defendant. In her opposing affidavit, she states that the attorneys for first defendant were requested to furnish her attorneys with a Municipal Council's resolution authorising Groenewald Lubbe Inc to defend the action, but they have failed to do so. Lot, in his founding affidavit, states that he is the acting Municipal Manager and duly authorised to bring this application on behalf of first defendant. In his replying affidavit he annexes letters from the Municipal Manager confirming that Groenewald Lubbe Inc has been instructed on behalf of defendants to defend the action instituted by plaintiff against them and to bring this application. In a supporting affidavit, third defendant states that by virtue of Municipal Council's resolution dated 11 September 2003 (the first resolution), he was empowered to instruct Groenewald Lubbe Inc to defend the action on behalf of first defendant and to launch the application for security

for costs. He also authorised the acting Municipal Manager to depose to any affidavit to give effect to such instructions.

The Resolution

[4]The relevant resolution reads as follows:

> *"That all powers, functions and duties, other than those mentioned in (2) above, in all legislation accrued effectively to the Municipal Council of Plettenberg Bay (Bitou) Local Municipality, in terms of the applicable legislation, be delegated in terms of Section 59 of the Local Government: Municipal Systems Act, 2000, as amended (the Act), to the Executive Mayor, subject to (4) below."*

Those powers reserved in terms of clause 2 do not include powers to litigate on behalf of the Municipality. In terms of clause 4, the Executive Mayor is authorised to sub-delegate those powers vested in him, other than those that have been specifically reserved in terms of such clause. Such reservation does not include the power to litigate. The resolution contains a proviso, in terms of clause 5, that the Executive Mayor shall inform the Municipal Council in due course of any sub-delegation.

[5]The plaintiff, in a further affidavit dated 16 September 2008, in reply to third defendant's affidavit dated 15 September 2008, states that the powers vested in the Executive Mayor, in terms of the first resolution, were re-affirmed in terms of a resolution dated 9 March 2006 (the second resolution). It contained a proviso to the effect that the Municipal Manager submits a comprehensive report to the next ordinary meeting of the Municipal Council regarding relevant delegations. Plaintiff conceded in her affidavit that by implication the right to institute and defend legal proceedings is vested in the office of the Executive Mayor. She submitted that the Executive Mayor

had failed to submit a report to the Municipal Council of the sub-delegation in terms of the original resolution and the Municipal Manager had failed to submit a report to the *"next ordinary meeting of the Municipal Council regarding relevant delegations"*.

Plaintiff's Submission

[6]Mr **Wagener**, on behalf of plaintiff argued that because of such failure, the power entrusted to third defendant to litigate on behalf of first defendant and the authority to sub-delegate such power, has lapsed. In the circumstances it was contended that Groenewald Lubbe Inc was appointed by someone without any delegated authority to defend the action on behalf of first defendant as both third defendant and the Municipal Manager were out of the country. The application for security for costs was likewise flawed. It was submitted further that the appearance to defend, as well as this application, is accordingly null and void. I do not agree.

The Evaluation

[7]The duty on the part of the Executive Mayor to report back to the Municipal Manager on the sub-delegations in terms of the first resolution has been superceded by the second resolution. In terms of the second resolution the duty to report back on all delegations to the next ordinary meeting of the Municipal Council, fell on the Municipal Manager. The fact that the Municipal Manager has not reported back to the Municipal Council does not automatically extinguish the delegated authority vested in the office of the Executive Mayor. For such delegated authority to be terminated, there must be a formal withdrawal of such delegated authority by the Municipal Council. This is expressly provided for in Section 5(1)(c) of the Act. There is no evidence that such delegated authority entrusted to third defendant was formally withdrawn by the Municipal Council.

[8]The further argument that the exercise of the delegated power by third defendant was conditional upon the Municipal Manager reporting back to the Municipal Council is without merit. There is nothing in the first or second resolution which expressly or by implication manifests such intention and neither are the terms of such resolutions capable of such interpretation. The further argument that Groenewald Lubbe Inc was appointed by Lot who did not have authority to make such an appointment, is also misplaced. It was always first and third defendants' case that third defendant instructed the attorneys and Lot was only instructed to depose to an affidavit on behalf of first defendant as he was privy to certain information which formed the basis of this application. (**Mzundizi Municipality v Natal Joint Municipal Pension/Provident Fund and Others** 2007(1) SA 142 (N) at 147G-I; **Nelson Mandela Metropolitan Municipality v Greyvenouw CC** 2004 (2) SA 81 paras 47 – 51.)

[9]The facts in **Great Kei Municipality v Danmisi Properties CC** [2004] 4 All SA 298 (E) at 299, which was referred to by Mr **Wagener** in support of his claim that the instructions to Groenewald Lubbe Inc to defend the action was flawed, are distinguishable from the facts in this matter. In the case of the **Great Kei Municipality**, the acting Municipal Manager brought an urgent application for rescission of judgment in the interest of the Municipality in the absence of the Mayor and the Municipal Manager who were overseas. He had no authority to act on behalf of the Municipality. In the present case, third defendant who had the necessary authority, although he was overseas at the time, instructed the attorneys personally to defend the action on behalf of the Municipality. Such instructions were therefore not flawed as in the case of the **Great Kei Municipalty.**

The finding

[10]I am satisfied that the resolutions in question empowered third defendant to institute and defend proceedings on behalf of the Municipality of Plettenberg Bay (Bitou) and to sub-delegate such powers. Such powers were not conditional upon him or the Municipal Manager reporting back on the delegations. At all material times, third defendant had the necessary authority to instruct Groenewald Lubbe Inc to defend the action and to bring this application. I conclude, therefore, that the first defendant had *locus standi* to defend the action and to bring the present application. The point *in limine* by plaintiff is accordingly without merit and is rejected.

The Merit

[11]I now turn to deal with the merits of the application which is brought under Rule 47(1). The rule reads as follows:

> *"(1) A party entitled and desiring to demand security for costs from another shall, as soon as is practicable after the commencement of the proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded."*

In terms of such notice, defendants demanded security for costs in the amount of R300 000.00 on the grounds that plaintiff is impecunious and the action is frivolous. I will examine each of the two grounds.

The Law

[12]Before dealing with the two grounds, I will briefly set out the law. The court has inherent jurisdiction to order an *incola* plaintiff to give security for costs to defendant where the court is satisfied that the proceedings are vexatious, frivolous, reckless or an abuse of the process of the court. However in **Ecker v Dean** 1938 AD 102 at 111, the court cautioned as follows:

> *"The Court has inherent jurisdiction to prevent abuse of its process by staying proceedings or ordering security in certain circumstances, but as pointed out by* ***Solomon JA*** *in* ***Western Assurance Company v Caldwell's Trustee****1918 AD at 274 this power ought to be sparingly exercised and only in exceptional cases."*

[13]Our courts have repeatedly emphasised that each case for security for costs must be considered on its own facts and on its own merits. There are a number of factors that a court has to consider in order to determine whether security for costs should be provided or not. They are firstly, what are prospects of the litigant satisfying an adverse costs order; secondly, what are the prospects of the litigant succeeding in its case; thirdly, what are the objects of the litigation; fourthly, does it amount to an abuse of the process of the court in that the proceedings are either vexatious, or frivolous, reckless, instituted with an ulterior motive or with collateral and improper purpose and fifthly, whether the litigant is a close corporation, a company, a trust, an insolvent or a peregrinus. (**Ecker v Dean** *(supra)* at 111; **Hudson v Hudson & Another** 1927 AD 259 at 268; **Benash v Wixley** 1997 (3) SA 727 (SCA) at 734F-G; **Brummer v Gorfil Bros Investments (Pty) Ltd en Andere** 1999 (3) SA 389 (SCA) at 414I-J and 416B-F; **Phillips v Botha** 1999 (2) SA 555 (SCA) 565E-F; **Crest Enterprises (Pty) Ltd and Another v Barnett and Schlosberg NNO** 1986 (4) SA 19 (C) at 22A-E; **Henry v R E**

Designs CC 1998 (2) SA 502 (C) and **Ramsamy NO and Others v Maarman NO & Another** 2002 (6) SA 159 at 172D-H.)

[14]The factors mentioned in the preceding paragraph should not be regarded as exhaustive and the individual factors should not be regarded as decisive. In the exercise of the court's discretion, the factors present in a particular case ought to be carefully balanced before concluding whether or not security for costs ought to be given by the litigant. In exercising such discretion the starting point is that the *incola* has a right to enforce his or her claim in accordance with the due process of the law and in such enforcement he has a right to approach a Court of Law. These rights in terms of the common law have been re-inforced by our Constitution in Articles 34 and 38 of the Constitution of the Republic of South Africa, 1996. (See: **Crest Enterprises (Pty) Ltd and Another v Barnett and Schlosberg NNO** *(supra)* at 22A-E and **Ramsamy NO and Others v Maarman NO & Another** *(supra)* at 173A-F.) On the other hand, the court ought to be mindful of the fact that the opposing litigant could be mulcted in costs and have no prospect of recovering such costs from an impecunious plaintiff. It could create prejudice and hardship to such opposing litigant. The court accordingly has to strike a balance between the different considerations and the interests of the litigating parties in determining whether security for costs should or should not be ordered. (**Mears v Pretoria Estate and market Company Ltd** 1907 TS 951 at 956 and **Ecker v Dean** *(supra)* and **Giddey N O v J C Barnard and Partners** 2007 (2) BCLR 125 (CC) at para 8 .)

The Evalution

[15]Within that legal framework, the court is going to examine the grounds upon which the defendants have brought this application. The first ground is the impecunity of plaintiff. It is common cause that plaintiff has no assets and no income. It is also common cause that she is presently unemployed and there are no immediate prospects of her finding any employment. It is therefore unlikely that she would be able to pay the costs of the defendants should an adverse cost order be made against her. This in itself is not sufficient to justify an order that she furnish security for the defendants' costs. Something more is required. Defendants assert that plaintiff's claim is frivolous. I will examine that proposition.

[16]Defendants' proposition that plaintiff's claim is frivolous is based on three grounds. The first is that third, fifth, sixth and seventh defendants have been cited as parties in their personal capacity without there being any factual basis for holding them liable in law. The second is that she has compromised her claim based on unfair dismissal and in any event even if she had a legitimate claim, this court's jurisdiction is ousted in respect of such claim in favour of the Labour Court in terms of Section 10 of the Employment Equity Act, No 55 of 1998, read together with Section 6(3) of the said Act. The third is that any claim she may have had against defendants has become prescribed in terms of the Prescription Act, No 68 of 1969. I will deal with each of these defences in turn.

[17]Plaintiff's claim arises from sexual harassment and sexual assault perpetrated allegedly by second defendant as an employee of the first defendant. Her claim is based on the *actio iniuriarum* for which she is claiming damages. Second defendant has denied these allegations. There is no causal link between third to seventh defendants to such harassment and assault. The defendants were either councillors or

employees of first defendant. Third defendant was the Executive Mayor and as such member of the Executive Committee, fourth defendant was the Speaker and a member of the Mayoral Committee, fifth defendant was an ordinary councillor, sixth defendant was an employee of first defendant and seventh defendant was the Deputy Mayor. In her Particulars of Claim she alleges that the collective conduct of the defendants resulted in her losing her work contrary to the recommendation of the Departmental Presiding Officer, Adv Vermaak. The involvement of third to seventh defendants is therefore essentially concentrated on her unfair dismissal claim and not on her sexual harassment and assault claim. They are also not cited in their representative capacity but in their personal capacity. The claim against third to seventh defendants is, in the circumstances, legally flawed.

[18]In addition to such flaw, the second leg of their defence is that the claim for unfair dismissal has been compromised and/or settled between plaintiff and first defendant. The defendants' claim in the papers is that an agreement dated 14 June 2000 was concluded between plaintiff, first and second defendant in terms of which the parties resolved their differences. Plaintiff states that she refused to sign the agreement because it amounted to blackmail. This not borne out by the objective evidence. Lot in his replying affidavit dated 8 September 2008, stated that the agreement was signed by plaintiff and annexed a signed copy of the agreement to such affidavit, from which it appears that the agreement was signed by her. Lot went further to state that first defendant received a letter dated 21 June 2000 from her in terms of which she resiled from the said agreement. In the said letter she specifically refers to the agreement signed by her. She unequivocally admits that she signed the agreement. It appears therefore that her veracity must be called into question.

[19]Lot states further in his affidavit that, in view of the fact that plaintiff reneged on the agreement, first defendant instituted disciplinary proceedings against her. Following a hearing, plaintiff was dismissed. Plaintiff then appealed to the Bargaining Council against the sanction. The parties came to a settlement and in pursuance to such settlement first defendant paid plaintiff an amount of R62 256.00 in full and final settlement of her claim based on unfair dismissal. Plaintiff did not dispute these allegations despite the fact that she filed a further affidavit dated 16 September 2008, that is after the replying affidavit of Lot was served on her attorneys. The only reasonable inference the court can draw is that her claim for unfair dismissal was settled and in terms of such settlement she was paid a sum of money in full and final settlement of her claim. In the circumstances it is not necessary for the court to consider or give a ruling concerning the jurisdiction of this court as opposed to that of the Labour Court or the question of prescription. The court accordingly concludes that her claim for unfair dismissal in respect of all the defendants is frivolous.

[20]I now turn to deal with her claim in respect of the sexual harassment and assault. There is no causal link between third to seventh defendants. Second defendant denies the allegations against him. Defendants have furthermore raised the defence of prescription. Plaintiff alleged that second defendant sexually harassed and assaulted her during February 1999 to March/April 2000. In terms of the provision of Section 11(d) of the Prescription Act, No 68 of 1969, ("the Act") the claim in respect of the sexual harassment and assault became prescribed by the latest on 1 May 2003. Plaintiff issued Summons in this matter on 30 May 2008, that is, more than five years after the claim had become prescribed. Plaintiff's response to such defence was that Magistrate Buhr indicated soon after the case began, that the police should investigate the case and the police docket and the court file had disappeared. Defendants

disputed the disappearance of the police docket or the court file. In any case these do not appear to be grounds for the delay of prescription in terms of Section 13 of the Act. Sections 14 and 15 furthermore provide for the interruption of prescription by express or tacit acknowledgment of liability by the debtor or by means of judicial interruption. It does not appear that plaintiff relies on such interruption.

[21]Mr **Wagener** submitted that it is not proper for the court to determine the issue of prescription at this stage of the proceedings. The proper forum to determine such issue is the trial court after the issue has been properly ventilated in the pleadings. Adv **De Vos** SC with Adv **Van der Berg**, on behalf of the defendants, countered that they did not ask that this court make a ruling that plaintiff's claim has become prescribed but to order that security be furnished on the basis of the approach enunciated by **Innes CJ** in **Mears v Pretoria Estate and Market Co Ltd** *(supra)* at 956:

> *"I do not go into the merits of this case; I look at the general rule. It would be a cruel hardship for men to be harassed by actions which they might succeed in, when they know that by no possibility can their cost be paid by the insolvent and when proceedings are not brought* ***in forma pauperis****. That being so, we should grant the cross-application, and directt Mears to give security for cost".*

[22] On the face of it, it appears that plaintiff's claim in respect of sexual harassment and assault has become prescribed. I agree with Mr **Wagener** that the issue can best be determined in a trial after it has been fully ventilated in the pleadings. Without making a definite finding on the issue of prescription, I will take note of what Adv **De Vos** emphasised, namely, that prescription is a factor that I have to bear in mind, when

balancing all the other relevant factors in the exercise of my discretion whether to order security for costs or not.

[23] In this regard the court *mero motu* raised the case of **Van Zyl v Hoogenhout** 2005 (2) SA 93 in which the question of prescription was raised for a claim of damages arising from sexual assault. The trial court found that the claim had become prescribed three years after plaintiff attained majority and accordingly upheld the special plea of prescription. On appeal to the Supreme Court of Appeal, the court reversed the decision and held at p 107I-108B:

> *"But, in this case, there is evidence that indicates, prima facie, that the plaintiff was not aware until recently that it was not she who was the cause of, or who bore responsibility for what occurred but, rather, that the responsibility was that of the defendant. There was no evidence to controvert it in any substantial way. In my view, the Court should have found that the defendant failed to establish as a matter or probability that prescription commenced to run before 1997."*

Adv **De Vos** submitted that the facts are distinguishable from the facts in this case. I agree. However, that case lays down an important principle, namely, that prescription starts running from the time the victim makes the causal connection between the assault, abuse or injury and the harm or wrong done to her by the perpetrator. Such connection may only be made through therapeutic intervention. In such event the realisation of such connection would then trigger off the cause of action.

[24] In the present case important constitutional issues are at stake. They are the right to dignity (Article 10 of the Constitution), the right to equality and equal protection

and benefit of the law (Article 9 of the Constitution) and access to courts (Article 34 of the Constitution). Because a person is impecunious, such person, in my view, should not be prevented from asserting her important constitutional rights in a court of law. If our courts should succumb thereto, they will become an elitist institution and a conclave and playing field for the few, the rich and the privileged. The majority of our citizens, both black and white, would effectively be excluded from the protection and benefit of the law. Poverty knows no colour. The court is mindful of the fact that should the court order the plaintiff to furnish security for costs to pursue her claim in respect of the sexual harassment and assault, it would put paid to her proceedings against those responsible.

[25] In **Kini Bay Village Assoc v Nelson Mandela Metro** [2008] 4 All SA 50 (SCA) at para 12 **Maya JA** writing for the Court, in connection with the furnishing of security in terms of Section 13 of the Companies Act, No 61 of 1973, read with Uniform Rule 47(3), held:

> *"Whilst the court is enjoined to exercise its discretion with the litigants' constitutional right to access to courts in mind, the mere possibility that an order for security will effectively put an end to the litigation, which seemingly is the intended and inevitable result of Section 13, does not constitute sufficient reason for its refusal – this is but one of the factors (there is no closed list) a court will consider in the exercise, which involves weighing the potential injustice to the plaintiff or applicant if it is prevented from pursuing a legitimate claim, against the potential injustice to the opposing party if it succeeds in its defence but cannot recover its costs."* (references left out)

The Conclusion

[26] In light of all the circumstances, I conclude firstly, that the claim against third to seventh defendants is frivolous and the court will order plaintiff to furnish security, should she wish to pursue her claim against them; secondly, that her claim against first and second defendants in respect of unfair dismissal is frivolous and the court would order her to furnish security in respect of such costs should she wish to pursue such claim against them and thirdly, the court would not bar her from pursuing her claim in respect of the sexual harassment and assault against first and second defendants, should she wish to do so, by ordering her to put up security for costs.

The Order

[27] In the premises the court makes the following order:

(a) That the application of first and second defendants for plaintiff to furnish them with security for costs in respect of her sexual harassment and assault claim, is refused;

(b) that plaintiff is directed to furnish security for costs of third to seventh defendants in an amount and in the form to be determined by the Registrar of the above honourable court;

(c) that plaintiff is directed to furnish security for costs to first and second defendants in respect of plaintiff's claim against them for unfair dismissal in an amount and in the form to be determined by the Registrar of the above honourable court; and

(d) that the costs of this application shall be cost in the cause.

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