 REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 14918/2008

DATE: 21 NOVEMBER 2008

In the matter between:

IOLA MAHON Applicant

And

BRIAN ROBERT MAHON Respondent

J U D G M E N T

DAVIS, J:

[1] This is an application to compel respondents to furnish security for costs. The case has a somewhat unfortunate history. Briefly stated, on 19 March 2008 the Family Division of the High Court of Justice in England granted certain ancillary relief orders in favour of applicant in divorce proceedings. The orders were supplemented and made final by the Court on 23 April 2008. Respondent sought to appeal the judgment and this application for leave to appeal was refused by the Court of Appeal on 24 June 2008.

[2] Respondent has made no payments to applicant in terms of this judgment, whether in respect of capital, maintenance for the parties and minor children or costs. As a result and without dealing with all the details of the case, the applicant instituted provisional sentence proceedings in the court. The defence raised by the respondent to the proceedings was a lack of jurisdiction. At the date of service of the provisional summons, he contended that he was a *peregrinus*, having left the jurisdiction of South Africa in early 2007. He further stated that he owned no assets in South Africa and does not carry on business in the country. Respondent unsuccessfully sought a postponement of proceedings for provisional sentence. Provisional sentence was finally granted by Erasmus, J on 19 August 2008.

[3] Two further pieces of litigation have flown therefrom: firstly an application for leave to appeal which is pending and secondly an application in which respondent argues that the provisional sentence summons is inconsistent with provisions of the Republic of South Africa Constitution Act, 108 of 1996.

[4] As a result of the constitutional challenge, the applicant has come to this Court for an order for security of costs.

As Mr Katz, who appears together with Ms Thaysen on behalf of respondents submitted, correctly, that the *onus* is on the applicant to prove that she is entitled to a claim for security of costs. Furthermore, it is fairly trite law that the process involves two separate stages, (1) an allegation to be proved by the applicant that the respondent is a *peregrinus*; (2) if that is proved, then the Court will need to be persuaded to exercise a discretion as to whether to grant the order so sought. See MTN Service Provider (Pty) Ltd v Afrocore (Pty) Ltd 2007(6) SA 620 (SCA) at paras 6-7.

[5] The issue with regard to the question of whether the respondent is a *peregrinus* constituted the first point of Mr Katz's attack on the order so sought. In his submission, the applicant was obliged not only to allege but to show some factual basis that the respondent is a *peregrinus*. In his view, the applicants failed to prove, let alone allege, that the respondent was a *peregrinus*. Indeed, he noted that applicant had refused to accept or admit that the respondent is a *peregrinus*.

[6] In Protea Assurance Company Ltd v Januszkiewicz 1989(4) SA 292 (W) Goldstone, J (as he then was) analysed the particular question as to what is required in

his judgment, he cited Herbstein and Van Winsen with approval:

> "[T]he proper conclusion be to drawn from the authorities is that either domicile or residence is sufficient to constitute a person an *incola* insofar as the question of being bound to furnish security for costs is concerned. The proper approach is therefore that domicile or residence of some permanent or settled nature is sufficient to constitute a person an *incola* for the purpose of being obliged to furnish security for costs" (at 294F)

[7] In the present case, the applicant relies, *inter alia*, on a confirmatory affidavit deposed to by the respondent in the constitutional application to which I have made reference, in which he states baldly:

> "I state that from early July 2008 and at all times since then I have been permanently resident and domiciled in Mauritius".

Mr Katz responds to this argument in two ways. Firstly he suggests that this averment is not enough, that somehow further proof is required to show that the respondent is neither resident nor domiciled in South Africa. Secondly he submits that, in the judgment for

provisional sentence, Erasmus, J, at the very least by implication, must have been taken to have rejected the notion that respondent was a *peregrinus* in order to grant provisional sentence.

[8] Both of these particular arguments can be disposed of in the same fashion. There is an affidavit by the respondent in which he asserts that he is permanently resident and domiciled in Mauritius. Whatever the applicant may have said in the provisional sentence proceedings, the respondent deposes to an affidavit to the fact that he is permanently resident and domiciled in Mauritius. What further proof is required? Is this Court to find against the applicant and in favour of respondent by effectively saying the respondent has lied on oath? I do not think that a Court should countenance this kind of defence and I am not prepared to so do.

[9] It may well be that Erasmus, J held that the respondent was an *incola* at the time of the granting of provisional sentence. I do not propose to engage in an analysis of that particular judgment which, in any event, is not before me. What is before me is that, after the provisional sentence judgment was granted, the respondent has stated in papers before the highest court

of the land that he is "permanently resident and domiciled in Mauritius". This is the version of respondent placed before the Court. On these papers, I am entitled to take this version seriously and I do so. Accordingly, in my view, applicant has proved that the respondent is a *peregrinus* for the purposes of this application.

[10] That then raises the second question, namely whether this Court should exercise its discretion in favour of the applicant. If one reads the papers in the way that Mr Katz has urged me to do, that in effect means that there was an insufficient basis laid in the founding affidavit for why this Court should exercise its discretion in favour of the applicant. Mr Mitchell, who appears together with Ms Gordon-Turner on behalf of applicant, submitted that this Court can take a broader view than simply parsing the founding affidavit and look more comprehensively at the approach adopted by the respondent in these proceedings and those related thereto in Vanda v Mbuque 1993(4) SA 93 (T).

[11] Mr Mitchell also referred me to the case of MV "Guzin" 2002(6) SA 127 (DCLD) at 130 in which Hugo, J held:

> "I have no doubt that the Courts do have a discretion to grant an order for security of

> costs whereas here both parties are *peregrini*. Although the rule relating to security for costs may have been instituted in an effort to protect *incola*, there is no reason why it should also not protect *peregrini* such as the applicant who, by force of circumstances, must litigate in these courts".

Significantly, Hugo, J then went on to say, in that case which dealt with a ship:

> "The applicant cannot litigate elsewhere, its security lay in the ship and then latterly in the fund and the only way to effect its security is by litigation in this court. To refuse the applicant the right to claim security can in certain cases lead to great injustices".

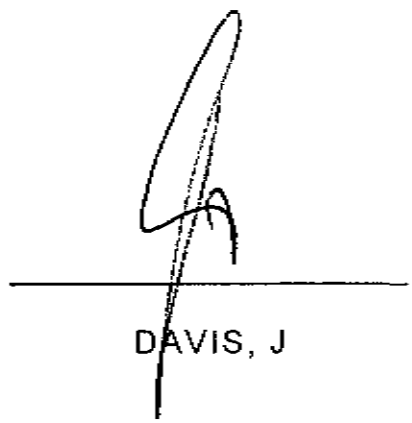
Mr Katz seeks to counter this *dictum* in two ways: (1) Correctly he urges this Court to use its discretion sparingly, as indeed has been set out in the jurisprudence of courts dealing with applications of this kind; (2) he submits, on the strength of Constitutional Court jurisprudence, most recently in Weare & Others v Ndebele N.O. & Others (CCT/08) at para 79, that the Constitutional Court is reluctant to persuade litigants from challenging the constitutionality of a law of the State under which they face statutory penalties and

accordingly this reluctant to grant cost orders in such proceedings.

[12] This case may well be different. In short, I do not know the outcome of the proceedings in the Constitutional Court. It is not for me to so speculate. The possibility of an adverse costs order against one or other of the parties is an option available to the Constitutional Court. Although I am mindful that this Court's discretion must be exercised sparingly and carefully, it appears to me, upon a careful read of the entire narrative which has given rise to this particular application, that the approach adopted by Hugo, J in the MV "Guzin" commends itself. That is, the applicant is forced to litigate in these courts, both in order to enforce a judgment granted in the courts of England and, furthermore, in the context of further litigation now being pursued by the respondent which could subvert any advantage gained through the provisional sentence judgment. The respondent has been on record as stating that he has no assets in South Africa. The question therefore arises as to what other possible way could the applicant have secured its own position than by way of this application.

[13] There is a letter from respondent's attorney in which the question of security of costs was never placed in issue, save for the *quantum* thereof. That in itself must have some significance in the consideration of exercising a discretion which is predicated on grounds of justice and equity.

[14] For all of these reasons, the application is granted and the respondent is directed to furnish security for applicant's costs in this application brought by respondent under case number 14918/2008 by no later than Friday 5 December, 2008. If the security is not granted, then the application brought by the applicant under case number 14918/2008 shall be dismissed with costs, such costs to include the costs of two counsel. The respondent is directed to pay the costs of this application, although I consider one counsel would have been sufficient. I therefore order respondent to pay the costs of one counsel.



DAVIS, J