IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT CAPE TOWN)

In the matter between:

5255/2006

SA TRUCK BODIES (PTY) LTD **Applicant**

vs

SIVALUTCHMEE MOODLIAR N.O. **1st Respondent**

STEPHEN MALCOLM GORE N.O. **2nd Respondent**

QUINTIN SIMON JOSEPH N.O. **3rd Respondent**
(In their capacities as duly appointed liquidators of
Yuba Trucking (Africa) (Pty) Ltd in liquidation)

JUDGMENT: 11 FEBRUARY 2010

FREUND AJ:

This is an application in terms of Section 13 of the Companies Act 61/1973 ("the Act") and in terms of Rule 47 of the Uniform Rules for security for the applicant's legal costs in the pending action between the parties under case number 5255/2006. The pending action is an action brought by the respondents in their capacities as liquidators of Yuba Trucking (Africa) Pty Ltd ("Yuba"). The pending action is a claim in reconvention, a claim in convention having been brought by the applicant but subsequently withdrawn .

Section 13 of the Act provides as follows;

> ***"Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it being wound up, the liquidator thereof, will be unable to pay the costs of the defendant***

> ***or the respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given."***

In **MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd** 2007(6) SA 620 (SCA) at para [7], Brand JA (with whom the other members of the Supreme Court of Appeal concurred) said as follows in respect of Section 13 of the Act:

> "The section plainly requires a two-stage enquiry. At the initial stage, the question is whether the applicant for security had established, by credible testimony, that the body corporate, if unsuccessful, will not be able to pay the applicant's costs in the main proceedings. If the applicant fails to meet this threshold requirement, that is the end of the matter. The application is bound to be refused. If, on the other hand, the Court is satisfied that such reason to believe exists, it must, at the second stage, decide, in the exercise of the discretion conferred on it by the section, whether or not to compel security (see eg – **Vumba Intertrade CC v Geometric Intertrade** CC 2001(2) SA 1068 (W) in para [8])."

The present application was brought on the ground that, as a result of the liquidation of Yuba, the applicant has reason to believe that the respondents (in their capacities as Yuba's liquidators) will not be able to pay the applicant's costs should the respondents be unsuccessful in their counterclaim. The respondents admit that they are not in a position to pay the applicant's costs, should their claim not succeed. It follows that the applicant has met the threshold requirement and that the remaining question to be decided is

whether, in the exercise of its discretion, the Court should grant an order compelling security.

Granting an order for security for costs, where a respondent is in financial difficulty, may have the result that, where the party concerned cannot find security for costs it will not be able to pursue its action. This may affect that party's right of access to court, as protected by section 34 of the Constitution. In **Giddey NO v J C Barnard and Partners** 2007(5) SA 525 (CC) at para [30] O'Regan J (with whom the other members of the Constitutional Court concurred) held as follows:

> **"In my view there can be no doubt that in exercising its discretion in terms of s 13, a court must bear in mind the provisions of s 34 and weigh them in the light of other factors laid before it. The balancing exercise proposed by the Supreme Court of Appeal in *Sheptone & Wylie's* case (adopted from the English case *Keary Developments Ltd v Tarmac Construction Ltd and Another)* acknowledges this (albeit without express reference to the Constitution). On one side of the scale must be weighed the potential injustice to the plaintiff or applicant if is prevented from pursuing a legitimate claim. This incorporates a recognition of the importance of the right of access to courts. On the other side of the scale must be placed the potential injustice to the defendant if it succeeds in its defence but cannot recover its costs. Relevant considerations in performing this balancing exercise will include the likelihood that the effect of an order to furnish security will be to terminate the plaintiff's action; the attempts the plaintiff has made to find financial assistance from its shareholders or creditors; the question whether it is the**

conduct of the defendant that has caused the financial difficulties of the plaintiff; as well as the nature of the plaintiff's action"

In **Shepstone and Wylie v Geyser NO 1998 (3) SA 1036 at 1045** Hefer JA (with whom the other members of the Supreme Court of Appeal agreed) held as follows:

> **"Because a court should not fetter its own discretion in any manner and particularly not adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security (*cf Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)1997 (4) SA 908 (W) at 919 G-H; Wallace NO v Rooibos Tea Control Board 1989 (1) SA 137 (C) at 144B-D). I prefer the approach in Keary Development Ltd v Tarmac Construction Ltd and another [1995] 3 All ER 534 (CA) at 540 a-b where Peter Gibson LJ said:***
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> > **"The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim."**

I turn therefore to weigh the potential injustice to the applicant if it succeeds in its defence but cannot recover its costs, against the potential injustice to the respondents if security for costs should be ordered.

The trial in respect of the counter claim will probably be lengthy. The respondents estimate that it will last for four weeks and the applicant estimates that it might take up to six weeks to be finalised. The applicant alleges that it will have to consult with various expert witnesses in preparation for the trial and that their continuous attendance at the trial will be necessary.

In its founding affidavit the applicant alleges that the costs already incurred by it (inclusive of counsels' fees, attorneys' fees and expert fees) already amount to R 1 822 137,94. The applicant alleges that the cost of counsel, attorneys and experts still to be incurred will probably exceed R1 110 000.00. That is undoubtedly a substantial sum and, as referred to above, it is common cause that if the applicant successfully resists the respondents' action those costs will be irrecoverable. The applicant contends that it would not be just and equitable for it to be exposed to a liability to recover its costs in the event that it succeeds in defending the action. In my view there is considerable merit in that contention.

The applicant also contends that the respondents have not been forthcoming regarding how they have funded the litigation to date and what steps, if any, they have taken to endeavor to raise the funds which would be required should the respondents be ordered to furnish security. The respondents have indeed been unforthcoming in respect of these issues and in my view that is regrettable and weighs in the balance against them. In the answering affidavit on behalf of the respondents filed by their attorney, the unmotivated assertion is made that, should the respondents be ordered to furnish security for the

applicant's costs, "this will effectively bring an end to the litigation". Why that should be so, is not explained at all. I take note, however, of the point made by Mr Dickerson, for the respondents, that that was said in response to an application by the applicant for security in the amount of around R 2 500 000.00. As will appear below, the applicant has since altered its stance.

In **Kini Bay Village Association v Nelson Mandela Metropolitan Municipality and Others** 2009(2) SA 166 (SCA) at 172 the Court commented adversely on the failure of the plaintiff in that case to offer an explanation as to the source of the funds for its litigation. It then continued as follows:

> **"Another factor which a court will take into account in its balancing exercise is the plaintiff's attempt to find financial assistance from its shareholders and creditors or other affiliates, backers or interested persons. This must be so considering that they are the ultimate beneficiaries of a successful action. Making this point in *MTN Service Provider*, Brand JA said:**
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> > **"One of the very mischiefs s 13 is intended to curb, is that those who stand to benefit from successful litigation by a plaintiff company will be prepared to finance the company's own litigation, but will shield behind its corporate identity when it is ordered to pay the successful defendant's costs. A plaintiff company that seeks to rely on the probability that a security order will exclude it from the Court, must therefore adduce evidence that it will be unable to furnish security; not only from its own resources, but also from outside sources such as shareholders or creditors."**

> **Needless to say in the circumstances of this case, in the absence of any evidence relating to the appellant's source of funds and whether it solicited its members' financial assistance or made any other attempts to raise funds to continue the litigation, the appellant dismally failed to establish that a security order will halt its case. Its reticence, which is clearly deliberate, inexorably leads to an inference that its wealthy members who authorized it to conduct the litigation in the first place, impecunious as it was, are using it merely as a front and are shielding behind an empty shell simply to avoid liability for costs."**

As referred to above, in the present matter, the respondents have not put up any evidence which could satisfy the court that they had done everything that they could (or indeed anything at all) to raise funds to secure the costs initially sought by the applicant. As I have already said, this weighs in the balance against the respondents.

It is convenient at this stage to record that the applicant did not persist in seeking the relief initially sought in the Notice of Motion. The applicant ultimately pressed for an order directing the respondents to furnish security in the form and amount to be determined by the registrar in respect only of the applicant's costs of defending the respondents claim in reconvention after the date of the Court's order. In its founding affidavit those costs are estimated at a little over R1 100 000.00. The respondents contend that that sum is in itself "grossly inflated". Whether that is correct, is, in my view, a matter for the registrar to determine.

It is, as Mr Dickerson acknowledged in argument, simply not clear whether the respondents might be able to raise such security as registrar might determine. It is possible that they might be able to furnish such security. I am not prepared simply to assume that they will not be able to do so. To the extent that I am in doubt on this question this is, in my view, attributable to the respondents, who failed altogether to place before me any relevant information in this regard. I have not overlooked the fact that the security initially sought is substantially more that that ultimately pressed for. In my view that does not excuse the respondents' complete failure to traverse what attempts, if any, were made to seek funds for security of the applicant's costs and what sum, if any would be affordable.

On the other hand, it is necessary to take into account various considerations which the respondents submit point against the ordering of any security at this stage.

In my view, the strongest consideration against ordering security at this stage is the late stage at which security has been applied for. Rule 47(1) provides that a party entitled and desiring to demand security for costs from another, "shall, as soon as practicable after the commencement of proceedings" deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded. In this case, a Notice in terms of Rule 47(1) was only delivered on 14 September 2009. The respondents counterclaim had been delivered on 8 September 2006. Yuba had been placed in provisional liquidation on 15 November 2007 and a final order of liquidation had been

granted on 11 December 2007. The respondents pointed out that the applicant had continued litigating after Yuba's liquidation at full stretch, as a result of which the respondents had incurred substantial legal costs. They pointed out that, after an earlier postponement, the counterclaim had been set down for trial from 22 February 2010 and that the application for security was brought a mere three months before the postponed hearing date. They contended that the delay in bringing the application for security is both unfair and oppressive to them. They pointed that in **Wallace NO v Rooibos Tea Control Board** 1989 (1) SA 137 (C) this Court held that an application for security of costs should be brought promptly, citing the following dictum from the Australian case of **Buckley v Bennell Design & Constructions (Pty) Ltd** 1975 Supreme Court of NSW Company Law Reports 301 with approval:

> ***'The very nature of an order for security is that it may result in the company being prevented from litigating its claim. The right to seek security for costs and to stay proceedings, with the possible result that a claim for damages is frustrated, is a powerful weapon. Therefore, the litigant who seeks to use it against his opponent is at risk of not having it available, unless the application is made and persevered with in circumstances involving the least oppression of his opponent. The primary reason why the application should be brought promptly and pressed to determination promptly, is that the company, which by assumption has financial problems,*** **is entitled to know its position in relation to security at the outset, and before it embarks to any real extent on its litigation, and certainly before it is allowed to commit substantial sums of money toward litigating its claim.'**

The respondents pointed out that in **ICC Car Importers (Pty) Ltd v A Hartrodt SA (Pty) Ltd** 2004 (4) SA 607 (W) the court held that a delay is an important and often decisive factor in the exercise of the Court's discretion in an application for security.

Although there is some merit in the respondents' complaint of delay, in my view, the complaint is not as compelling as it appears at first sight. I referred above to the fact that the applicant instituted an action against Yuba which was later withdrawn. It was withdrawn on 18 August 2009, leave having been granted to the applicant to do so by this Court on 21 May 2009. The Rule 47(1) Notice was subsequently delivered on 14 September 2009 and the present application was brought on 12 November 2009. It is common cause that the issues in the withdrawn conventional action substantially overlapped with the issues in the still remaining reconventional action. For so long as the conventional action continued to be pursued, an order that the respondents give security for costs of their reconventional action would in effect be an order to give security for the costs of defending the conventional action. In **Compare SA (Pty) Ltd v Global Chemical Co (Pty) Ltd** 1985 (1) 532 (C) this Court (per Aaron AJ) held that such an order would be inappropriate and dismissed an application for security. It is accordingly my view that an application by the Applicant for security before it withdrew its claim in convention would in all probably have been doomed to failure.

As referred to above the applicant was granted leave to withdraw its claim in convention on 21 May 2009 and formally did so on 18 August 2009. On 14

September 2009 it delivered a Rule 47(1) Notice demanding security for its costs and on 12 November 2009 it brought the present application for security for costs. Even if one assumes that the applicant acted reasonably in only seeking leave to withdraw its action in or about May 2009, it could still have brought its application for security for costs earlier than it did. It could have withdrawn its claim in convention on or shortly after 21 May 2009 and therefore could have delivered its Rule 47(1) Notice shortly thereafter. I am, however, not persuaded that the delay in applying for security between May and November 2009 caused any material prejudice the respondents.

The respondents argued, however, that the applicant could and should have withdrawn its action against them long before May 2009 and contended that its failure to do so, taken together with certain other considerations, demonstrated the ***mala fides*** on its part. I am not persuaded by the argument of ***mala fides***. As the respondents themselves have pointed out, various issues (to be referred to briefly below) had been held over for determination at the trial and I can understand the applicant's reluctance, and consequent delay, in accepting the commercial reality that Yuba's liquidation meant there is no point in continuing to pursue its various claims against it.

The respondents argued that the delay in seeking security demonstrated that the present application is not motivated by a ***bona fide*** concern that the applicant will not be able to recover its costs if ultimately successful and is solely motivated by a desire to quash the pending litigation. I do not accept

that argument. It is quite plain that the applicant faces the prospect of a lengthy and expensive High Court action with certain knowledge that if it succeeds and a costs order is made in its favour, that costs order will not be met. I accept that there has been a measure of regrettable delay but I do not accept that this delay manifests a ***mala fides***.

In support of its argument of ***mala fides***, the respondents pointed out, quite correctly, that the pending litigation is not solely concerned with the claim in reconvention. Three different costs issues arising in earlier litigation between the parties have been left over for determination together with determination of the claim in reconvention. There is also an outstanding unresolved issue as to which party is entitled to take possession of certain vehicles currently held by the sheriff. That too is apparently to be determined in the pending litigation. The respondents contend that the applicant anticipates that it will fail at the trial in relation to these issues and that this motivates its attempt to quash the pending litigation. Whilst there may be some merit in the argument that the applicant fears it might fail at the trial in relation to the ancillary issues (a matter in which I am unable to form any clear view), I am not persuaded that this proves the applicant's alleged ***mala fides***. The ancillary issues seem to me to be of considerable smaller import than the claim in reconvention, in which the respondents are claiming payment of substantially more than the sums apparently involved in the ancillary issues. Whatever the merits of the respondents' case in relation to the ancillary issues may be, the fact remains that the primary issue at the trial will be the merits of the claim in reconvention. In my view, the mere fact that the ancillary issues are to be

determined in the same proceedings is not in itself a convincing reason to refuse the application for security for the costs for the claim in reconvention.

Another point initially taken by the respondents was that the applicant in seeking security for the payment of costs in the amount of R 2 500 000,00 was, in effect, attempting to obtain security for costs which it had occurred as the plaintiff in pursuing its (now withdrawn) claim in convention. There was merit in that argument when it was first raised, but it does not apply to the costs yet to be incurred in the trial of the claim in reconvention. In my view, the principle established in the **Compare SA** case can be adequately addressed by ordering security only for costs incurred after the date of the court's order.

That brings me to the next principal ground relied upon by the respondents, namely that Yuba's liquidation was directly caused by the applicant's conduct and that this is a basis upon which security for costs should be refused. There is a fundamental factual dispute as to whether it is true that the applicant's conduct resulted in the financial demise of Yuba. Robert William Ross, a shareholder of Yuba, deposed to a confirmatory affidavit supporting the following allegations in the respondents' principal answering affidavit;

> **"Thirdly the financial embarrassment and ultimate commercial insolvency suffered by Yuba (being the very basis upon which the security application has been brought) was directly caused by the Applicant's conduct in:-**

failing to deliver the trailers it was contractually obliged to deliver timeously (or at all, in respect of the tenth trailer), as a result of which Yuba could not properly perform its contractual obligations in respect of haulage contracts it has secured;

delivering trailers to Yuba which suffered from design and manufacturing defects to the extent that they could not be used for their intended purpose, resulting in substantial losses to Yuba as detailed in its counterclaim, including the loss of a lucrative contract for road construction from Wellington to Hermon;

repossessing four of the trailers in May 2006, as a result of which they were not available to be used by Yuba in the production of income. It was emphasized in the opposing affidavit filed by Yuba in the repossession application that it would suffer severe financial prejudice should four of the trailers be repossessed as it would not be in a position to carry out its contractual obligations. This is precisely what ultimately transpired.

As direct result of the repossession of the four trailers and the defective nature of all the trailers, not only did Yuba incur substantial costs in repairing the trailers, but also lost lucrative contracts already secured and was unable to tender for other haulage and dumping sub-contracts. Yuba was solely reliant on these contracts to generate an income stream. Accordingly, Yuba was unable to generate sufficient income to meet its expenses and liabilities and became commercially insolvent."

These allegations are disputed by the applicant. The applicant alleges that Mr Ross was not party to the original agreement between the applicant and Yuba

the terms of which appear to go to the root of the present dispute between the parties. The applicant points out that it is evident from an answering affidavit in an earlier application, that Yuba was at all relevant times represented by one Richard John Scully. It points out that Scully's version in respect of this issue, which appears to be an important factor, was found by this Court (per as Van Reenen J) in earlier interlocutory litigation to be "highly improbable". It also points out that there is a "huge dispute" regarding ***inter alia*** the question of the payload of the relevant trailers which are the subject matter of the litigation, as well as the question as to when payment was required to have been effected. It points out that, in the application for the liquidation of Yuba, Mr Ross alleged, when explaining the causes of the company's insolvency, that Yuba had no sub-contract work and that its trailers remained idle. He also alleged that Scully appeared to have been "acting in an irrational manner" and had, for no apparent reason, simply repudiated the terms of a contract (at Ogies) which had materially contributed to Yuba's financial predicament.

The applicant also referred to a portion of the liquidators' report of 5 May 2008 in which the causes of the failure of the company were described as follows:

> **"The company has a company fleet of twelve trailers. The nature of the business that the company required these trailers be utilized on a continuous basis for the purpose intended, namely the haulage of materials.**

During October 2007, the company found itself in a position where it had no sub-contract work, with the result that the trailers stood idle.

As a result of the above, the company was unable to generate any incoming order to discharge its financial obligations.

The break-down in communication between the shareholders further contributed to the financial predicament of the company."

Nothing was said by the liquidators (i.e. the present respondents) at that stage to suggest that the trailers standing idle was a consequence of defect in the vehicles delivered by the applicant. It may also be noted that not all of Yuba's vehicles emanated from the applicant. The breakdown in communication between the shareholders also appears to have contributed to the failure of Yuba.

On the information presently before the court, it is in my view impossible to say whether or not the applicant's conduct brought about the demise of Yuba. Whilst it is possible that the respondents may be correct in this regard, I think that the information available to the court does not conclusively establish this. In the circumstances it is not a factor which weights heavily with me in the exercise of my discretion, though I do bear in mind that there is a possibility that the respondents may ultimately be held to be correct on this issue.

In my view, the various considerations referred to above are those most directly relevant to the exercise of my discretion. I mean no discourtesy to the

parties or to counsel if I fail to deal explicitly with all the other factors and arguments raised by them.

On a conspectus of all the relevant factors, I have come to the view that it would be appropriate to grant an order requiring the furnishing of security for the costs incurred subsequent to the date of the order by this Court. In the final analysis, although I accept that there is some merit in some of the points advanced by the respondents, particularly that they are to some extent prejudiced by the delay, I am of the view that the injustice to the applicant of refusing an order for security exceeds the potential injustice to the respondents of directing them to furnish security. The fundamental fact is that Yuba is insolvent and the liquidators will admittedly not be in a position to meet the applicant's costs if it should ultimately succeed. Someone is apparently willing to pay the respondents costs but is apparently not willing to pay the applicant's costs if it should ultimately succeed. All things considered, I think it is unjust to expose the applicant to the risk if it succeeds at the trial, it will not be able to recover any costs which may be awarded in its favour.

It is impossible to foresee what the effect will be of an order at this stage directing the respondents to furnish security. As I have referred to above, the trial of the claim in reconvention is due to start shortly. Whether or not that will be possible is not for me to determine. The parties were in agreement, however, that insofar as this would be possible, the security issue should be resolved speedily. It is accordingly my expectation that the applicant will act with due and appropriate expedition in placing before the registrar such

material as he or she may require in order to determine the form and amount of the security to be furnished. I expect the registrar to deal with the security application as soon as may be feasible.

I have come to the view that the respondents should pay the cost of this application. It is correct, as pointed out by Mr Dickerson, that the case as ultimately presented by the applicant was different from the case that the respondents were initially called upon to meet. Nonetheless, the respondents continued to dispute liability to furnish any security at all and I have found against them on that issue. The applicant has therefore been substantially successful.

In the premises I make an order in the following terms:

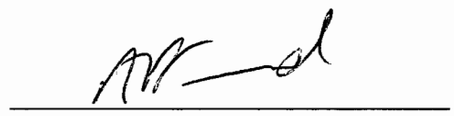
1. **The respondents are ordered to furnish security, in the form and the amount to be determined by the registrar in accordance with Rule 47, in respect of the applicant's costs of defending the respondents' claim in reconvention after the date of this order.**

2. **The registrar is directed to make the aforementioned determination as soon as may be practically feasible.**

3. **In the event of non-compliance by respondents of the order in paragraph 1 above, leave is granted to applicant to apply on the same papers, duly amplified if necessary, for the dismissal of the**

respondents claim in case number 5255/2006, alternatively that the proceedings be stayed until such date as the respondents have furnished the applicant with security as determined by the registrar.

4. **The respondents are to pay the costs of this application.**



A J FREUND
ACTING JUDGE