IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 7180/08

DATE: 31 MAY 2010

In the matter between:

EXPLOITATIE - EN BELEGGINGSMAATSCHAPPIJ - ARGONAUTEN II B V First Applicant

ELISABETH CORNELIA MARIA HONIG Second Applicant

and

GEORGE NICOLAAS HONIG First Respondent

MERCIA MARLENE HONIG Second Respondent

JUDGMENT

(Application for Leave to Appeal)

DAVIS, J

This is an application for leave to appeal against the judgment of this Court of 16 March 2010, in which the Court ordered the applicants to furnish security for costs in terms of Rule 47. The applicants now seek to have this matter heard by a higher court in order for the order to be set aside.

The first issue which needs to be canvassed in a matter such as the present dispute is the nature of the power which is

exercised by a Court pursuant to Rule 47. That issue has been canvassed by the Constitutional Court in Giddey N.O. v J C Barnard and Partners 2007(5) SA 525 (CC). At para 19 of her judgment O'Regan, J said the following:

> "The ordinary rule is that the approach of an Appellate Court to an appeal against the exercise of a discretion by another Court will depend upon the nature of the discretion concerned. Where the discretion contemplates that the Court may choose from a range of options it is a discretion in the strict sense. The ordinary approach of appeal to the exercise discretion in the strict sense is that the Appellate Court will not consider whether the decision reached by the Court at first instance was correct, but will only interfere in limited circumstances; for example if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law, even where the discretion is not a discretion in the strict sense there may still be considerations which would result in the Appellate Court only

interfering in the exercise of such a discretion in the limited circumstances mentioned above."

This particular approach was amplified by Brand, JA in MTN Service Provider (Pty) Ltd v Afrocor (Pty) Ltd 2007(6) SA 620 (SCA), particularly at para 11 et seq in which the learned judge of appeal emphasised the limited scope for interference of an appellate court when confronted with a discretion exercised by a Court in the circumstances contemplated in Rule 47.

The principal judgment in this case, unfortunately, does not set out the facts as clearly as I would have wished, partly because of the way in which the matter was argued previously and the manner in which the issues were then raised, particularly by applicant.

In order to examine whether another Court, on these facts, would interfere with the discretion to grant security it might be helpful to briefly set out the critical factual matrix: An application for sequestration was launched at the end of April 2008. It appears that this is not the only application or action which have been brought by applicants against first respondent and associated legal entities. According to the papers, it

appears that a final set of papers in the main application was filed during July 2009 and the main application was set down for hearing on 2 November 2009.

Mr Engela, who appeared on behalf of the applicants, submitted that it was only four days before the hearing of the main application, that is on 29 October 2009, that an application for security for costs in terms of Rule 47 was served on the applicants. Pursuant to this date, Mr Engela pressed the point that, although delay in bringing an application under Rule 47 was not necessarily fatal, the manner in which this application had been brought was such that another Court may well exercise its discretion differently to that of this Court. In his view, no explanation was proffered for the delay, the failure to do so was deliberate, and another Court may come to the view that it was a tactical ploy in order for the main application to be further postponed and, further, that there was no *bona fide* need for security to be obtained.

This argument however omits another significant fact, which Mr Duminy, who appeared on behalf of the respondents, raised. On 23 September 2009 respondents' attorney caused a letter to be written to the applicants' attorney, concerning two respective notices which had been issued by respondents requesting security for costs. In this letter, respondents

attorney notes that security was furnished during the early stages of sequestration proceedings in the amount of R154 000. The reply by applicant's attorney was that some security was furnished but "our client is of the opinion that your client is not entitled at this late stage of the proceedings to demand security for costs". In other words, it appears that provision was made for security for costs in the amount of R154 000, further security for costs was then demanded, and, at this stage, opposition to an application was raised by the applicants. This took place at a very late stage in the proceedings, not too far removed from the date on which the main application was to be heard.

This exchange of correspondence between the attorneys of the parties appears, in my view, to be destructive of the argument concerning delay. Firstly, it was only at a late stage that opposition was raised; secondly, applicants did not seem to have any difficulty – or at least did not resist the furnishing of security in the amount of R154 000 at an early stage of the proceedings; thirdly, as Mr Duminy asked rhetorically, how could it be argued that this was not a *bona fide* application for security of costs, when an initial amount of security had been provided, and what was now being requested was an additional amount of security for costs, when it was clear the costs had escalated.

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This particular point is buttressed by the following: In the affidavit of 29 October 2009, in support of the application for security of costs, Mr Honig, the first respondent, states that he has incurred legal expenses in relation to the three matters which had been brought against him in the amount of "no less than R1 218 687. He then tabulates the amounts which he has paid to various firms of attorneys.

The answer provided by the applicants, in their opposing affidavit, is simply to say: "I have no knowledge of the actual amounts spent by the first respondent in costs but suffice to say that the amounts appear to be exorbitant". That, of course, is an opinion expressed by the second applicant. Given the fact that Courts have to deal with costs on a fairly regular basis, I assume that it is not improper to take account of the exorbitant levels of legal expenses which are all too often generated in contemporary litigation. The amount does not appear to me to be so exorbitant as to be supportative of an argument in favour of an absence of *bona fides*. Respondent goes further. He alleges that both the first and second applicant are peregrines in this Court, which is common cause. He avers that neither the first applicant nor the second applicant are possessed of un-mortgaged immoveable property situated within the area of the jurisdiction

of this Court. To that the response is: 'well it is of course not true that the applicants are not possessed of South African assets. Applicants have claims in the amount approaching the equivalent of R200million'. Of course, this latter amount is of no comfort to the respondent, in the event that the respondents win their case. Thereafter, "it is admitted that the applicants have no other assets in South Africa, other than perhaps my own indirect interest in the Marco Polo Jersey Trust, which in turn is a beneficiary of the Marco Polo S A Trust, which is the subject of a separate dispute". That can hardly be regarded as a confident, or indeed definitive view that the approach to the lack of assets as averred in the founding affidavit is incorrect.

The question therefore arises: on which facts would another Court come to the view that the exercise of the discretion by this Court fell outside the strict confines which will permit an appellate court to come to a view different to that adopted by this Court.

Mr Engela and the Court had a lengthy and interesting debate about the implications of the judgment of Joubert, JA in Magida v Minister of Police 1987(1) SA 1, and in particular the passage at 14, in which, in dealing with the *dictum* in Saker and Co Limited v Grainger 1937 AD 223, which indicated that a

Court should protect an *incola* to the fullest extent in proceedings initiated by a peregrine, Joubert, JA said that this *dictum* should be read:

> "subject to the qualification that it is only applicable after the Court in the exercise of its judicial discretion in accordance with the principles hereinafter stated, had come to the conclusion that the peregrines should not be absolved from furnishing security for costs."

From the facts given by the respondents as set out in this judgment, the question arises as to the basis upon which it can be said this Court exercised an improper discretion in finding in favour of respondent pursuant to Rule 47.

The argument based upon the merits of the case, which I might add appear to be central to the initial submissions made by the applicants, in opposing the application for security, that is that ultimately this was vexatious litigation on the part of the respondents, has now fallen away. Therefore it is necessary for me to traverse only the remaining issues; in a sense applicants' argument has now morphed into an argument that security for costs should not be granted because the Court has not exercised its discretion in the manner which is indicated.

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In summary, respondent put up facts, which are not gainsaid. These are facts, which on the available *jurisprudence*, justifies the exercise of a discretion that the respondent should not be prejudiced. Mr Engela, in an attempt to circumvent this argument, contends that it is possible, on the basis of the papers, that the respondents could seek to recover their costs from assets situated outside South Africa. The whole purpose of this application is to ensure that an *incola* is not inconvenienced by searching for assets in other jurisdictions and then having to go to extraordinary lengths to recover those costs to which he or she is entitled.

On its own, this cannot be an argument to suggest that the discretion of this Court in favour of the respondents was improperly exercised in terms of the approach adopted by the Constitutional Court in Giddey, supra.

For these reasons therefore the APPLICATION TO APPEAL THE ORDER OF SECURITY FOR COSTS IS DISMISSED with costs.

DAVIS, J

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