**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case Number: 14184/10**

In the matter between:

| | |
|---|---|
| **Talmera Trading CC** | **Applicant** |
| and | |
| **Glen Ira Aquadro N.O.** | **First Respondent** |
| **Catherine Elaine Aquadro N.O.** | **Second Respondent** |
| **Glen Ira Aquadro** | **Third Respondent** |
| **ABSA Bank Limited N.O.** | **Fourth Respondent** |

---

**JUDGMENT DELIVERED ON 22 OCTOBER 2010**

---

**Baartman J**

[1] This is an application for security for costs by the first, second and fourth respondents in this matter. The proceedings against the third respondent had earlier been withdrawn. I deal with that withdrawal below.

[2] On 22 June 2010, Desai J granted an order brought *ex parte* by the ABSA Bank N.O. as sole trustee of the Fountainhead Property Trust Scheme (**the fourth respondent**) for the eviction of the first and second respondents, in their capacity as trustees of the G & E Trust (**the Trust**), and those holding under them from Shop 71 at Kenilworth Centre (**the premises**). The

applicant was the sub-tenant of the Trust. The applicant instituted proceedings for the rescission of that judgment and further ancillary relief.

[3] The first and second respondents in the rescission application are the trustees of the Trust in their nominative capacities. The third respondent was Glen Aquadro in his personal capacity; he is also the first respondent in his capacity as trustee of the Trust. ABSA Bank N.O. is the fourth respondent.

[4] The fourth respondent took the eviction order with the consent of the Trust. The eviction order provided as follows:

*"It is hereby ordered that --*

1. *Compliance with the forms and service provided for in the uniform rules be dispensed with and that the matter be heard as one of urgency in terms of Uniform Rule 6(12)(A);*

2. *The cancellation of the written agreement of lease concluded between the Fountain Head Property Trust (formerly Allan Gray Property Trust) and the G&E Trust (TMP 2178) on 1 December 2004 (as amended by the written addendum concluded between those parties on or about May 2009) in respect of the premises: Shop No. 71, an outside seating area and store room to, Kenilworth Centre ("the Premises"), is hereby confirmed;*

3. *The G&E Trust (and all persons occupying under it) is ejected from the premises with effect from the date of this order;*

4. *Failing the vacation of the G&E Trust (or any persons occupying under it) from the premises by close of business by 22 June 2010, the Sheriff of this Honourable Court (or any deputy) is hereby authorised and directed forthwith to take all steps as may be necessary to eject any and all those persons in occupation of the premises;*

5. *The costs of this application shall be borne by the respondents jointly and severally as a scale between attorney and own client."*

[5] Terence Pollock (**Pollock**) attested to the founding affidavit in the eviction application and said that:

(a) The Allan Gray Property Trust let and the G & E Trust hired the premises in terms of a lease that commenced on the 1 July 2004 and terminated on 30 June 2009.

(b) In terms of the lease, the G&E Trust enjoyed an option to renew the lease for a further period of 5 years on the same terms and conditions as applicable to the initial period of the lease.

(c) In due course, the Fountain Head Property Trust Scheme succeeded the Allan Gray Property Trust as successor in title. In these proceedings, the applicant, that is ABSA Bank Limited, acted in its capacity as sole trustee of the Fountain Head Property Trust scheme. It follows that the applicant had replaced Allan Gray as the lessee in respect of the lease with the G&E Trust. The first and second respondents were cited in these proceedings, referring to the eviction proceedings, in their capacities as trustees of the G&E Trust.

(d) In May 2009, the parties concluded an agreement in terms whereof the G&E Trust exercised its option to renew the lease for a further period of 5 years. The new lease period commenced on 1 July 2009 and was to terminate on 30 June 2014.

(e) Pollock further indicated that since the execution of the extension to the new lease, the fourth respondent:

*"...has procured the development of plans to effect substantial alterations and renovations to the Kenilworth Centre, and in an effort to improve the conditions and appearance of the shopping centre facility in general, to modernise and uplift the facility and to improve access to and thoroughfare in and around the centre."*

(f) Pollock indicated that the proposed renovations would alter the floor plan of existing shops. He said that part of the premises let to the Trust would be used as a thoroughfare. In order to accommodate the proposed renovations, the parties had cancelled the old lease and entered into a new one.

(g) Pollock described the relevant terms of the new lease as follows:

*"24.1 The lease premises comprised: shop 71 and 71A, their extended spill out area in front of shop 71A, storeroom 1 and storeroom 2 (collectively "the second premises");*

*24.2 The second lease commences on 10 June 2010 and terminates on 30 June 2014;*

*24.3 In terms of annexure "G" to the second lease, the trust will provide the lessee with a relocation allowance of R300 000.00 including VAT, or the actual costs of relocation incurred by the lessee."*

(h) Pollock further indicated that:

*"...as far as I am aware there is an occupant in the first premises. However, as far as I am aware there is a dispute between the G&E Trust and that occupant in as much as the occupant does not have the consent or permission of the G&E Trust to be in the premises.*

*For what it is worth, I say that the trust has no dealings with the occupant and has not given the said occupant permission to remain in the premises. Moreover, I am advised and verily believe that there is in any event no relationship in law between the trust and any occupant of the premises other than its own lessee, the G&E Trust."*

[6] In these proceedings, it was common cause that the applicant was the occupant to which Pollock referred. Pursuant to the eviction order, the applicant was evicted from the premises.

[7] In these proceedings the applicant sought the following relief: ( I quote from the Notice of Motion)

*"2. That a Rule Nisi do issue calling upon respondents, and all interested parties, to show cause, if any, on a date to be determined by the Honourable Court why the following orders should not be made final:*

*2.1 Setting aside the Court order of His Lordship Mr Justice Desai of 22 June 2010 under case number 13466/2010;*

*2.2 Declaring that the sublease between applicant and first and second respondents on behalf of the G&E Trust of 9/6/07 providing inter alia*

*for the parties thereto showing "the utmost good faith to each other in deciding when to renew the existing lease" (annexure "**ST4**" hereto) constitutes a binding sublease agreement between applicant and the G&E Trust;*

2.3 *Irrespective of whether "ST4" or "ST5" constitutes the sublease between the parties, declaring that the rights, benefits and obligations negotiated by the F&R Trust with fourth respondent in terms of the renewed main lease between them ("**ST2** read with "**ST10**") and which resulted in annexure "**ST26**" being concluded, all apply mutatis mutandis to applicant;*

2.4 *An order that first and second respondents comply with those provisions of annexure "**ST26**" which apply to applicant by inter alia:*

2.4.1 *permitting applicant to occupy the premises at shop 71, shop 71S, the spill out area in from of shop 71S and storerooms 1 and 2 situate in the Kenilworth Centre against payment by applicant of the rental provided for therein;*

2.4.2 *granting applicant occupation and undisturbed possession of the aforesaid premises on the terms set out therein;*

2.4.3 *paying the relocation allowance the G&R Trust received in terms thereof from fourth respondent to applicant.*

3. *That, pending the return day of the Rule Nisi, the orders in subparagraphs 2.1 and 2.4 above shall operate as an interim interdict;*

4. *That, in the event of there being a dispute of fact incapable of being resolved on the papers, interim relief in the aforegoing terms, which is to similarly operate with immediate effect, be granted pending the final determination of any such dispute by way of oral evidence;*

5. *Costs of the application against the respondents jointly and severally the one paying the others to be absolved.*

6. *Further and/or alternative relief."*

## APPLICANT'S GROUNDS FOR RESCISSION

[8] In the rescission application, the applicant alleged that the fourth respondent had failed to disclose that the applicant had entered into a sub-lease agreement with the Trust. The applicant alleged that the Trust colluded with the fourth respondent to evict the applicant so that the Trust could take over the business that the applicant had conducted from the premises.

[9] The applicant alleged that it had a legal interest in the proceedings and that it should have been joined as a party in the eviction application.

[10] It was common cause in these proceedings that the fourth respondent had consented to the sublease. Counsel for the fourth respondent, Mr Dickerson, in argument informed the court that in terms of the lease between the fourth respondent and the Trust, the fourth respondent had to authorise or agree to the sub-lease of the premises. The applicant sought to use the fourth respondent's consent to the sub-lease to advance the argument that it was a necessary party to the eviction application.

[11] The applicant further alleged that the fourth respondent's failure to have given it notice of the eviction application was in violation of its rights in terms of section 34 of the Constitution. It therefore argued that to the extent that the common law did not require a sub/lessee of the premises to receive notice of the application, the common law stood to be developed in light of the constitutional imperative.

### Reasons for withdrawing against third respondent

[12] The only relief sought against third respondent was a costs order. However, the applicant withdrew the application against him. The reasons for the withdrawal appear from the record to be the following:

(a) On 7 July 2010, the first, second and third respondents, in terms of Rule 47(1) and (3), gave notice to the applicant that they required it to put up R200 000 as security for their costs.

(b) The applicant's attorney in correspondence to the first, second and third respondents disputed the applicant's liability to put up security.

(c) On 12 July 2010, the third respondent proceeded with his application for security and indicated that he would accept R80 000 as security. As indicated above, the only relief sought against the third respondent in his personal capacity was a costs order.

(d) In correspondence dated 9 July, the applicant's attorney confirmed the withdrawal of the matter against the third respondent as follows:

*"We refer to the third respondent's application for security for cost in terms of Uniform Rule 47 in the above matter.*

*We note therein that your client (third respondent) states that our client (applicant) will be entitled to continue with the actual or effective relief it seeks against the remaining respondents, even if it is unable to provide your client (third respondent) with security for its cost and is obliged to discontinue its application against it.*

*Our client's instructions are that it is unable to provide third respondent with security for his cost.*

*In the light of that which has been stated by your client in his affidavit (referred to above) and in order to avoid an interlocutory application, which will only delay the substantive relief our client seeks, it is prepared to amend its notice of motion by substituting all references to the respondent "in prayers 2 and 5 thereof with reference to first, second and fourth respondents."*

*As a result our client will not be seeking the cost of its application nor any other relief currently contained in the notice of motion from your client (third respondent). It will be proceeding with such relief against the remaining respondents.*

*Our instructions are furthermore to tender your client's (third respondent's) wasted costs occasioned by this amendment, which would include the abortive cost of the application for security by third respondent, on the scale as between party and party, as tax or agreed.*

*We look forward to receiving your client's confirmation that its application for security is to be withdrawn on the above basis."*

[13] Subsequent to the withdrawal against the third respondent, the first and second respondents pursued their application. They indicated that they did not continue with their applications earlier because they required financial information in respect of the applicant. The fourth respondent later also applied for security for its costs.

## The applicable legal principles

[14] I deal below with the applicable legal principles.

[15] The first applicable legislation to this matter is Section 8 of the Close Corporations Act 69 of 1984 (**the Act**) which provides as follows:

*"When a corporation in any legal proceedings is a plaintiff or applicant … the court concerned may at any time during the proceedings if it appears that there is reason to believe that the corporation … will be unable to pay the costs of the defendant or respondent … if he or she is successful in his or her defence, require security to be given for those costs, and may stay all proceedings till security is given."*

[16] It is so that the provisions of section 8 are almost identical to that of section 13 of the Companies Act 61 of 1973 (**the Companies Act**) and accordingly the principles applicable to Section 13 apply *mutatis mutandi* to the provisions of section 8 of the Act.

[17] The Constitutional Court had in the matter of **Henry v RE Designs CC** 1998(2) SA 502(C) at 507 F–G said the following:

*"To ensure that companies, who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing the opponents unnecessary and irrecoverable legal expenditure."*

[18] It is so that the court seized with an application for security for costs engages in a two-stage process. At the first stage, the court is required to enquire whether there is reason to believe that the applicant or the plaintiff as the case may be, will be unable to satisfy an adverse costs order made against it. In that enquiry, the party seeking security for costs bears the

*onus* and if it fails to discharge that *onus,* that is the end of the enquiry (see **MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd** 2007(6) SA 620 (SCA) at 622h and **Ferreira v Arlinders Ltd** 1964(1) SA 630(O).)

[19] If the applicant for security succeeds in discharging that *onus*, the court enters the second stage of the enquiry, which involves a balancing of factors and the exercise of a judicial discretion.

[20] In the matter of **Giddey N.O. v J C Barnard & Partners** 2007(5) SA 525(CC), the Constitutional Court described the court's discretion as follows:

> *"There can be no doubt that in exercising its discretion in terms of S13 [and similarly Section 8], a court must bear in mind the provisions of S34 [of the constitution] and weigh them in light of the other factors laid before it. The balancing exercise proposed by the Supreme Court of Appeal in Shepstone & Wylie … acknowledges that, 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 it 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".*

[21] The applicant contended that ordering it to pay security for the cost of the respondents would lead to the termination of the rescission application. That is a factor which I have to consider in the exercise of my discretion.

***The first stage of the enquiry***

[22] I, for the reasons that follow, am of the view that there is reason to believe that the applicant would be unable to satisfy a costs order made against it.

(a) The applicant had operated a franchise from the premises. It has, since the granting of the eviction order, ceased trading and has lost its source of income.

(b) In its opposition to the first and second respondents' application for security for costs, the applicant described its financial situation as "penurious".

(c) The applicant owned no immovable property and its movable assets were subject to an instalment sale agreement with Stannic. R240 000 was owed in terms of the instalment sale agreement.

(d) According to the applicant, Stannic had in September valued the immovable property at R600 000. However, 2 years later, in September 2009, Stannic valued the same assets at R300 000.

(e) The first and second respondents have attached a sworn valuation of the equipment dated 26 June 2010, from which it appears that the movable property was valued at R64 550.

(f) The applicant alleged that there existed a R60 000 surplus in the immoveable property that could be used to settle at least part of a costs order. However, the property is currently in the possession of the Trust who is using it in its business. The applicant and the Trust are in dispute in respect of the property. It is not necessary for purposes of this judgment to deal with the merits of that dispute.

(g) The Trust is unable to fund this litigation. The applicant has two members who also claim to be unable to fund the litigation instead. The members' husbands, to whom the two members are married in community of property, are financing this litigation. The husbands are unwilling to put up the security for the respondents' costs.

(h) The applicant failed, when called upon by the fourth respondent, to furnish the following financials:

*"1. The applicant's tax returns for the years 2009 and 2010;*

*2 The applicant's bank statements from January 2010 until July 2010;*

*3. The applicant's audited financial statements for the years 2009 and 2010."*

(i) The fourth respondent's counsel referred me to the matter of **Petz Products v Commercial Electrical Contractors** 1990(4) SA 196 CPD as authority for the proposition that the applicant's failure to produce the financials justified an inference that the information would have revealed that the applicant would be unable to pay its costs in the rescission application and that the applicant was in dire financial straits from a date predating even the launch of the present application. Rose-Innes J in the Petz matter said the following at 206 F–G on the subject:

*"The normal method to be adopted by a company endeavouring to resist an application for security is to furnish its balance sheet so that the party requiring security and, if need be, the court can see how far the assets of the company exceed its liabilities.* ***Equitable Trust and Insurance Co of SA Ltd v Registrar of Banks*** *1957(1) SA 689(T) at 691. Precisely the same applies to a company resisting a demand for an increase of security. The probable inference to be drawn from respondent's failure to produce its financial records is that, were they revealed, they would afford respondent no answer to the demand for additional security for costs."*

(j) I agree that the Petz matter is authority for that proposition. In my view, in the light of the applicant's financial situation, set out above, its failure to have produced its financial records justifies the inference that the applicant would be unable to satisfy an adverse costs order against it.

(k) In the light of the objective facts set out above, I am of the view that there is reason to believe that the applicant would be unable to satisfy an adverse costs order if such an order was made against it.

***The second stage of the enquiry***

[23] Based on the above, I now enter the second stage of the enquiry; the principles applicable to this stage appear from paragraphs 14–20 above.

[24] I deal below with the factors that I have considered in the exercise of my discretion to ascertain whether the applicant should be directed to put up

security. I have balanced those factors in order to determine what would be equitable and fair to all the parties concerned.

[25] I have taken into consideration the applicant's current inability to finance these proceedings as well as its members' alleged inabilities. The reluctance of the members' husbands to put up security was taken into account.

[26] I have further taken into account the circumstances surrounding applicant's withdrawal of the application against the third respondent. The applicant's counsel conceded that it was not apparent that the third respondent had the authority to bind the fourth respondent, its landlord at the time.

[27] It is likely that the third respondent as trustee had authority to bind the Trust. However, the third respondent has denied that he purported to bind any of the respondents. I do, however, consider that the applicant on the correspondence quoted above clearly acted on that understanding. The applicant's counsel argued that the applicant acted to its detriment on that understanding. He argued that the applicant would not have withdrawn the application against the third respondent had it realised that the other respondents would require the applicant to put up security for their costs.

[28] I have also considered the relief sought in the eviction application. It is so that the applicant as sub lessee had no *locus standi* to intervene in the proceedings for an order confirming the cancellation of a contract to which it was not a party. (See **United Watch and Diamond Co. v Disa Hotels** 1972(4) SA 409(C) at 417 and **Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape & Others** 2000(4) SA 681).

[29] In the Vandenhende matter, Thring J dealt with an application from a prospective buyer to set aside review proceedings. The proceedings involved the relevant authority's refusal to grant a rezoning application by the owner of the property. On the facts of that matter, the court found that a prospective buyer had no *locus standi* to bring an application for review of that refusal. Thring J accepted that the applicant as prospective purchaser had a commercial or financial interest but found that it was not sufficient to give him *locus standi* in that matter. He referred to among others the matter

of **Henri Viljoen (Pty) Ltd v Awerbuch Brothers** 1953(2) SA 151(O) and quoted the following passage from that judgment with approval.

*"The sub/tenants' right to, and interest in, the continued occupancy of the premises sub/leased is inherently a derivative one depending vitally upon the validity and continued existence of the right of the tenant to such occupancy. The sub/tenant, in effect, hires a defeasible interest. ... He can consequently have no direct legal interest in proceedings in which the tenant's continued right of occupation is in issue, however much the termination of that right may affect him commercially and financially. Consequently, if the proceedings in issue in the present case were for ejectment or relief similar thereto, there can be no question that applicants, as sub/tenants, would be neither necessary parties whose joinder could be demanded nor parties entitled as of right to intervene."*

[30] The applicant's counsel argued that the applicant was not a sub-tenant as that term is commonly understood. Instead he argued that:

*"... the sublease concluded between the applicant, the first and second respondents as well as the sale agreement and franchise agreement concluded between applicant and the third respondent contain tacit, alternatively implied, warranties against eviction from the premises. First and second respondent's participation in the eviction application was in breach of the aforesaid warranty and the order so obtained should therefore be set aside on this ground alone."*

[31] The fourth respondent opposed the application for the rescission of the eviction order but not the ancillary relief sought. The fourth respondent's counsel indicated that the fourth respondent did not object to the applicant entering into a sub-lease with the Trust. However, due to the applicant's financial position, the fourth respondent was not prepared to replace the applicant as lessee of the premises. I have already indicated that the objective facts indicate that the applicant's financial position is precarious and that there is reason to believe that the applicant would not be able to satisfy an adverse costs order if made against it.

[32] It appears that the applicant will have to convince a court that it had *locus standi* in the rescission application. In this judgment, I do not have to

determine the merits of that application but I do take into consideration whether the applicant has made out a *prima facie* case.

[33] The applicant's counsel referred me to the matter of **Waste/Tech (Pty) Ltd v Van Zyl & Glanville NNO** 2000(2) SA 200 SECLD, as authority for the proposition that I should enquire into "the conduct of the party which has reduced the other to penury". Counsel alleged that the applicant was in a sound financial position at the time of its eviction. In support of this allegation, counsel relied on a document annexed to these papers. It appears from the document that the "applicant's business bank accounts were rated as "good for business".

[34] The first and second respondents alleged that between November 2007 and October 2008, the applicant enjoyed a net profit of R795 493, which was apparently extracted from the business by member's drawings. The respondents annexed a management account in support of that allegation and indicated that that report had been prepared by the applicant.

[35] However, in its opposing affidavit, the applicant said the following about the management account:

*"It is denied that the management account shows that the applicant enjoyed a net profit of R795 493.00. The management account was prepared by the applicant's accountant together with Mr Chambers, a business broker of Cape Business Bureau, in order to establish a selling price of the applicant's business. The management account was based on the assumption that the new owner would manage the business itself thereby eliminating two managers salaries of about R15 000.00 each which equates to R390 000.00 per annum. . . . The applicant further denied that its members extracted an amount of R795 493.00 or any other amount from the business by means of members' drawings.*

[36] Although the respondents placed the applicant's financial position in issue, it failed to put up its financial records when called upon by the fourth respondent to do so.

[37] I have also considered that it appeared from the papers that the landlord, being the fourth respondent, had in 2009 decided to renovate the premises.

The renovations would have involved the demolition or part thereof of the premises. The fourth respondent commenced the renovation immediately after the applicant's eviction. The applicant did not dispute these allegations on the papers before me.

***Alternative sources of funding***

[38] I next considered whether the applicant was able to obtain funds from its members or other sources in order to put up security. As indicated above, the members' husbands are funding this litigation.

[39] The current members of the applicant are Mrs Faeeza Coovadia (**Coovadia**) and Mrs Salma Tayob (**Tayob**) and they each hold 50% of the membership in the applicant. Mrs Coovadia has been a member of the applicant since November 2007, while Mrs Tayob has been a member since June 2007.

[40] The first and second respondents alleged that the members of the applicant had an interest in a Dodger City Diner outlet at Canal Walk. That diner is trading as Salfay Trading CC (**Salfay**).

[41] They alleged that Mrs Tayob is a 20% member of Salfay and Mrs Coovadia's husband, to whom she is married in community of property, holds 40% of the members' interest in Salfay. The remaining 40% is owned by Mr Yasiem Tayob, Mrs Tayob's brother. The first and second respondents alleged that MrsTayob had been a member of Salfay since May 2007 and Mrs Coovadia's husband had been a member since May 2007.

[42] Mr Tayob owned Erf 108108 situated in Plumstead, which Erf was purchased for R1 080 000 in 2007. Three separate bonds are registered over the property in the amounts of R220 000, R900 000 and R430 000.

[43] According to the first and second respondents, the Coovadia couple owned two properties in Johannesburg.

[44] Mrs Tayob deposed to an affidavit and said that her husband and she each owned an undivided half share in the property. They had an outstanding bond of R1 515 996.07 in respect of their immoveable property. She said

that her husband had at all times relevant paid the full bond instalment and that she had never utilised any of her own income received from the applicant to pay any of the bond instalments due.

[45] Mrs Coodavia also admitted the ownership of the immovable property as set out by the respondents. In addition, she indicated that Mr Coodavia had made the bond payments in respect of the property.

[46] The members of the applicant alleged that they would not be able to obtain approval from any financial institution for the registration of a further bond over any of their properties.

[47] Mrs Tayob remarked as follows:

*"We enjoy average lifestyles which are funded by our spouses / certainly not by the income we received from the applicant's business."*

[48] O'Regan J in the matter of **Giddey N.O. v J C Barnard & Partners** 2007(5) SA at 525 CC said the following at record 577 paragraph 29:

*"Section 13 contemplates that an order for security for costs will be made where a plaintiff or applicant company is in financial difficulties. The sharp commercial reality of such an order is that at times where the plaintiff or applicant cannot find security for costs it will not be able to pursue its action. This seems an inevitable and intended result of S13. In my view this section is not reasonably capable of being read as contended for by the applicant. The applicant did not challenge the constitutionality of the section, and in my view it is not capable of being read, in light of the Constitution or otherwise, to mean that a court has no discretion to order security to be furnished where effect of that order will be to terminate the litigation. The provision states the contrary quite clearly and the applicant's submission in this regard must be rejected."*

[49] I considered the above in the balancing of the factors that I have mentioned and I have also considered the judgment by Chetty J in the Waste Tech matter at page 404 para C in which the court is called upon to "have regard to considerations of equity and fairness to both parties."

[50] I have considered that there might be alternate sources from which the applicant might find funding. I have accepted that the reality of this decision might be that this is the end of the road for the applicant.

[51] In my view, in the circumstances of this matter, it is just and equitable to order the applicant to put up security for the costs of the respondents.

[52] On 7 October 2010, Louw J directed the manner in which security, if ordered in respect of the fourth respondent, should be determined. The relevant portions of that order provided for the following:

*"By agreement between the parties it is ordered that –*
*... 6. Without concession by the applicant that it is obliged to furnish security for cost to any of the respondents ...*

*6.1 the forum and quantum of any security to be furnished shall be determined by the registrar as a matter of urgency (and this may be done prior to the hearing on 14 October 2010), and*

*6.2 in the event that the court determines that the applicant is liable to furnish security for cost*

*... 6.2.3 there shall be an immediate stay of proceedings until security is furnished...".*

## ORDER

[53] I for the reasons stated above make the following order:

(a) The applicant is directed to furnish security for the costs of the first, second and fourth respondent.

(b) The proceedings in the main application are stayed until the applicant furnishes security.

**BAARTMAN, J**