IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

Case no: 2680/2005

In the matter between:

MAIGRET (PTY) LTD (in liquidation)	Plaintiff
and	
COMMAND HOLDINGS LIMITED	First Defendant
COMMAND PROTECTION SERVICES GAUTENG (PTY) LTD	Second Defendant
and	
DANIEL JOHANNES HUGO DE VILLIERS	Third Party

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JUDGE	:	P.A.L. GAMBLE
FOR PLAINTIFF	:	Adv. Lukas van Tonder
INSTRUCTED BY	:	C. De Villiers Attorney
FOR 1st and 2nd DEFENDANTS	:	Adv. Ashley Kantor
INSTRUCTED BY	:	T. Erasmus
FOR THIRD PARTY	:	Adv. Lukas van Tonder
INSTRUCTED BY	:	C. De Villiers Attorney
DATES OF HEARINGS	:	31 October 2012
DATE OF JUDGMENT	:	26 November 2012

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

REPORTABLE
CASE NO: 2680/2005

In the matter between:

MAIGRET (PTY) LTD (IN LIQUIDATION)	Plaintiff
and	
COMMAND HOLDINGS LIMITED	First Defendant
COMMAND PROTECTION SERVICES GAUTENG (PTY) LTD	Second Defendant
and	
DANIEL JOHANNES HUGO DE VILLIERS	Third Party

JUDGMENT : 26 NOVEMBER 2012

GAMBLE, J:

[1] The parties to these proceedings are involved in litigation relating to the provision of security services to the South African Post Office to whom the Plaintiff allegedly rendered services which the Second Defendant had undertaken to provide. The Plaintiff issued summons against the Defendants for payment in respect of these services in an amount of R3 034 541,50 on 18 March 2005.

[2] In its plea the Second Defendant denied any agreement with the Plaintiff and filed a counter claim for R968 000,00 which it said had been misappropriated by the erstwhile managing director of the Second Defendant (and who was then joined as the Third Party herein), and paid into the Plaintiff's bank account.

[3] Subsequent to the issue of summons Maigret (Pty) Ltd was finally wound up and on 20 March 2012 the liquidators of the insolvent company gave notice of their substitution as the Plaintiffs in this matter in terms of Rule 15(3).

[4] On 14 June 2012 the First and Second Defendants gave notice to the liquidators in terms of Rule 47(3) demanding the provision of security for costs in the amount of R350 000,00. In a supporting affidavit their group legal adviser gave some background detail setting out the relevant circumstances which gave rise to the company's collapse. It was pointed out that the matter has a long history including an appeal in the related matter between the Second Defendant and the post office, which is still pending before the Supreme Court of Appeal. This Court's attention was also drawn to the fact that the company was placed under provisional winding-up in January 2011 by means of a special resolution.

[5] Despite a fair amount of background detail in that affidavit, not much is said about the reason for seeking security, other than that the company was in liquidation having previously experienced severe financial distress. It is said too, that no concurrent award was expected from the company's creditors.

[6] When the Defendants' heads of argument were filed it became clear

why the affidavit in support of the demand for security was so thin: the Defendants legal team had incorrectly assumed that Section 13 of the 1973 Companies Act ("the old Companies Act") were still applicable, notwithstanding the coming into operation of the 2008 Companies Act ("the new Act") on 1 May 2011.

[7] When the Plaintiff's counsel pointed out in his heads of argument that the approach contended for by the Defendants was fundamentally flawed, they retraced their steps and, no doubt slightly red-faced, filed a supplementary note in which argument was then advanced based on the common law principles underpinning Rule 47.

[8] Under the old Companies Act an applicant for security for costs had a fairly low hurdle to cross to persuade a court to grant security. Such party had only to adduce credible testimony that there was reason to believe that the company resisting the furnishing of security would be unable to pay the costs of the opposing party in the event that the latter was unsuccessful, and security would ordinarily then be granted, subject to the exercise of the Court's general discretion. [1]

[9] The commonly accepted practice in such cases was for the company to produce its latest financial statements to enable its opponent and the Court to assess the extent of its financial commitments, its asset base and its trading position, if any.[2]

[10] No doubt mindful of the provisions of Section 34 of the Constitution,

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[1] Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd 1990 (4) SA 196 (C); Henry v RE Designs CC 1998 (2) SA 502 (C); Shepstone and Wylie and Others v Geyser NO 1998 (3) SA 1036 (SCA)

[2] Petz Products case *supra* at 206E-G

1996, in which access to the courts is protected, the drafters of the new Act expressly omitted a corresponding provision to Section 13 in the 2008 Companies Act. [3] The result is now that corporate plaintiffs are to be treated in the same way as all others in relation to applications for security, and that the common law test is to apply to companies as well.

[11] The common law approach was usefully summarized by Thring J in Ramsamy v Maarman N.O.[4] His Lordship noted that the point of departure was the judgment in Ecker v Dean [5] in which De Wet JA observed that the Court has an inherent jurisdiction to prevent abuse of its process by, for example, ordering the payment of security, but that this was a power which had to be exercised "*sparingly and only in very exceptional cases*".

[12] After considering the judgment of Berman J in Crest Enterprises (Pty) Ltd and Another v Barnett and Schlossberg NNO [6], Thring J went on to circumscribe the approach as follows:

> *"Notwithstanding then what on my findings were very poor prospects of recovering any substantial costs from the Applicants, they could in my discretion be ordered to furnish security for such costs only if I was satisfied that their main application –*
>
> *(a) was vexatious or;*

[3] Ngwenda Gold (Pty) Ltd v Precious Prospect Trading 80 (Pty) Ltd and Another [2011] ZAGPJHC 217 (14 December 2011) at para 12.
[4] 2002 (6) SA 159 (C) at 172-3
[5] 1938 AD 102 at 111
[6] 1986 (4) SA 19 (C)

(b) was reckless or;

(c) amounted to an abuse of the process of this Court."

[13] Because of the flawed approach in the Defendants' founding papers there is not a word suggesting anything vexatious or reckless in the envisaged litigation, nor is there any suggestion that the Plaintiff is abusing the process of the Court. Rather, counsel for the Defendants based his argument on the recent decision in Haitas v Port Wild Props 12 (Pty) Ltd [7] in which the learned Judge was primarily concerned with the interests of justice and the potential for abuse on the part of impecunious plaintiffs who sought to hide behind the veil of corporate identity.

[14] While the sentiments expressed by the learned Judge in the Haitas case make eminent sense to me (for ultimately any decision by a court of law in a constitutional state must serve the interests of justice), I prefer the approach adopted by Thring J which is based on a long line of considered authorities which suggest that the power to order security is to be exercised with caution and that "*something more*" was required to be established by a defendant than just the prospect of the plaintiff not being able to meet an adverse costs order.

[15] In Crest Enterprises [8] Berman J in forthright fashion asserted that "*no hurdle should be permitted to stand in the way of any persons access to a court in seeking relief at its hands*". The learned Judge did temper that approach somewhat by referring to certain well-recognized exceptions to the general rule, such as

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[7] 2011 (5) SA 562 (GSJ)
[8] At p20 B-D

vexatious or reckless litigation.

[16] In the constitutional era access to justice is guaranteed by Section 34 of the Constitution and, as O'Regan J observed in Giddey N.O. v J.C. Barnard and Partners [9] (a matter involving an application for security for costs under Section 13 of the old Companies Act), the Court is required to employ a balancing exercise:

> *"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."*

[17] But in my view those considerations only come into play when the Court is required to exercise its discretion, and that discretion only falls to be exercised when a party has set up facts to bring it within the ambit of the approach suggested by Thring J in Ramsamy's case *supra*.

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[9] 2007 (5) SA 525 (CC) at 538B-E

[18] In the present case the Defendant has failed to make any such allegations and has relied exclusively on the Plaintiff's "*woeful insolvency*" as the basis for its relief. In the circumstances I am not satisfied that it has made out a proper case for the relief sought.

[19] I would, however, add the following two points. It may be found at trial that one of the factors which contributed to the insolvency of the company was the very conduct on the part of the Defendant on which the Plantiff relies for its cause of action. In such circumstances it would be unfair to insist on security [10].

[20] Further, the Plaintiff referred the Court to an undertaking which had been made by a third party, Maxi Phumelala Security (Pty) Ltd, to indemnify the Plaintiff for any adverse costs order granted against it. On the face of it this indemnity appeared to come from a company of substance: its management accounts for the year ended 29 February 2012, which were placed before the Court, suggest that it has an annual turnover of R39m. In such circumstances the Defendants' reluctance to accept the indemnity because of uncertainty regarding the company's financial strength appears to be unfounded.

[21] Finally, the litigation in the main action certainly does not appear to be vexatious or an abuse of process. It commenced in 2005 long before the company was liquidated and, importantly, the Defendants have sufficient interest and confidence in that litigation that they have filed a counter claim amounting to almost R1m. By all accounts the main matter seems to be serious litigation.

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[10] Beaton v SA Mining Suppliers (Pty) Ltd 1957 (2) SA 436 W at 439G; Wallace N.O. v Rooibos Tea Control Board 1989 (1) SA 137 (C) at 142 C

[22] **The following order is therefore made**:

The application is dismissed with costs.

P.A.L. GAMBLE