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

Case No.: 4530/15

In the matter between:

BLASTRITE (PTY) LTD Applicant

And

GENPACO LTD Respondent

In *re* the arbitration proceedings before Adv. D.R. Mitchell SC between:

GENPACO LTD Claimant

And

BLASTRITE (PTY) LTD Respondent

JUDGMENT: 1 JUNE 2015

Schippers J:

[1] This is an application in terms of s 21(1) of the Arbitration Act 42 of 1965 for an order directing the respondent to put up security for costs in the sum of R250 000.00 in arbitration proceedings. The respondent is the claimant in those proceedings against the applicant, pending before the arbitrator, Mr DR Mitchell SC.

[2] The basic facts are uncontroversial. The applicant is a company with its registered office and main place of business in South Africa. It produces and sells abrasives used as blasting grit to clean metal surfaces on ships, tanks and offshore rigs. The respondent is a company incorporated under the company laws of, and with its registered office in, Nigeria. It carries on business in Nigeria as an importer and supplier of abrasives. It owns no immovable property in South Africa. The respondent is thus a *peregrinus* of the Republic and this court.

[3] The arbitration has its origin in an urgent application which the respondent instituted in this court on 10 February 2010. In that application the respondent sought an interdict against the applicant to prevent it from selling or distributing abrasives to any company trading in Nigeria, on the basis that the applicant had appointed the respondent as its sole distributor in Nigeria under a distribution agreement entered into between the parties in 2002. On 11 February 2010 this court issued a rule *nisi* operating as an interim interdict, in terms of which the applicant was interdicted from selling or distributing any of its abrasives to any company in Nigeria, directly or through any third party other than the respondent ("the interdict").

[4] On 20 January 2011 the respondent's attorneys provided the applicant's attorneys with a deed of security in the sum of R120 000.00 for the applicant's

costs in the urgent application, after the Registrar of this court determined that the respondent was liable to furnish security.

[5] On 1 March 2011 the parties reached an interim agreement which was made an order of court. In terms of that agreement they referred the dispute to an expert for decision, as contemplated in clause 19 of the distribution agreement. It was also agreed that the interdict would continue to operate pending the final determination of the proceedings before the expert. The matter was referred to Mr Mitchell and pleadings were subsequently exchanged.

[6] By letter dated 25 March 2014, the respondent requested the applicant to agree that the proceedings pending before Mr Mitchell in terms of clause 19 of the distribution agreement are in substance arbitration proceedings under the Arbitration Act. On 30 May 2014 the parties formally recorded that the proceedings are arbitration proceedings governed by the provisions of the Arbitration Act.

[7] On 2 December 2014 the applicant's attorney wrote to the respondent's attorney indicating that the applicant intended to seek a determination in respect of security for costs from the arbitrator. The respondent's attorney replied on 8 January 2015 stating that the respondent is under no obligation to provide further security for the applicant's costs.

[8] On 26 February 2015 the parties agreed on the dates for the hearing of the arbitration: 6-10 July 2015. The applicant brought this application for security on 13 March 2015.

[9] The respondent opposes the application on two main grounds. The first is that the applicant has not made out a case for the exercise of the court's

discretion to order security, and equity and fairness dictate that the application should be refused. The second is that the common law practice in terms of which a *peregrinus* may be called upon to give security for costs, is unconstitutional because it violates the right to equality before the law enshrined in s 9(1) of the Constitution, and amounts to unfair discrimination.

[10] In deciding whether a party should furnish security, a court has a judicial discretion, having regard to the particular circumstances of the case and considerations of fairness and equity to both the *incola* and the *peregrinus*.[1] The court should not adopt a predisposition in favour of or against granting security, and must carry out a balancing exercise: it must weigh the injustice to the respondent if prevented from pursuing a proper claim by an order for security, against the injustice to the applicant if no security is ordered.[2]

[11] In this case the consideration that the respondent may be prevented from pursuing its claim does not arise. The answering affidavit states that if so ordered, the respondent will provide security in the amount of R250 000.00 as claimed. There is no complaint that the amount of security is unreasonable. Furthermore, it appears that the respondent is able to furnish security from its own resources.

[12] The respondent however contends that security for costs should not be ordered because the applicant has approached the court was unclean hands; has delayed unreasonably; has not shown that the respondent is unable to pay costs or that it would encounter difficulty in executing a costs award; and security is inconsistent with the parties' intention.

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1 *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14 D-E.
2 *Shepstone & Wylie and Others v Geyser* NO 1998 (3) SA 1036 (SCA) at 1045I-1046 B.

[13] These contentions are unsound. Regarding the unclean hands point, the respondent says that the applicant directly and indirectly sold abrasives to customers in Nigeria in breach of the interdict. The applicant declined to deal with these allegations in the replying affidavit because they are the subject of the arbitration. The applicant terminated the distribution agreement between the parties with effect from 1 June 2010, as it was entitled to do. In its statement of claim in the arbitration, the respondent expressly accepted the termination of the agreement. There was thus no longer any need for interdictory relief after 1 June 2010. Aside from this, the respondent was not prejudiced. Its claims in the arbitration proceedings all relate to alleged prior instances of breach of the distribution agreement. Moreover, the claims relating to the breach of the agreement and court orders subsequently obtained, fall squarely within the ambit of the arbitrator's jurisdiction. It would be inappropriate for this court to pronounce upon those claims in an application for security for costs. The submission that the applicant's simultaneous violations of the interdict are merely ancillary to the merits of those claims, is thus incorrect.

[14] As to delay, the general rule is that a party is expected to apply expeditiously for security but may seek additional security at any stage, although an unreasonable delay in doing so may be decisive in the exercise of the court's discretion.[3] The respondent submits that the applicant has given no explanation for its failure to apply for security for costs when it knew in May 2014 already that the matter was to proceed to arbitration.

[15] The respondent however ignores the facts. The matter had been dormant for many months through no fault of the applicant's and it was unnecessary to seek security for costs in those circumstances, particularly when the applicant

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[3] *Exploitatie-en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig* 2012 (1) SA 247 (SCA) at 253A-B.

did not know whether or not costs would be incurred in preparation for trial. The applicant unsuccessfully tried to come to an agreement with the respondent regarding security for costs after May 2014. The dates for the hearing of arbitration were agreed only on 26th of February 2015 and this application was launched on 13 March 2015. But more fundamentally, the respondent has not suffered any prejudice as a result of any alleged delay on the part of the applicant - it is able to furnish the security sought.

[16] The fact that a litigant may have to proceed abroad if it obtains a costs order in its favour, with the associated uncertainty, inconvenience and additional expense which that entails, is one of the fundamental reasons why a *peregrinus* should provide security.[4] The reasons for this approach are not far to seek. The successful party would have to work across thousands of kilometres, instruct lawyers in a country it did not choose and with no connection to the original suit; and it may happen that the expense of recovering its costs may exceed the judgment debt or party-and-party costs. The respondent's contention that the applicant has not shown that it would be difficult to execute a costs award in Nigeria, particularly because both South Africa and Nigeria are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), is therefore misplaced.

[17] In sum, the case comes down to this. The respondent, a *peregrinus*, has instituted proceedings in this country against the applicant, a company registered in South Africa. For that reason it furnished security for costs in the sum of R120 000.00. The applicant now asks for that security to be increased by an additional R250 000.00 as the case is proceeding to trial. The respondent

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4 *Exploitatie* n 3 para 19.

is able to furnish the additional security and will thus not be prevented from pursuing its claim by an order for security. As against all of this, the applicant, if it obtains a costs order in its favour, would have to proceed against the respondent in Nigeria and incur the uncertainty, inconvenience and additional expense associated with the enforcement of that order.

[18] In these circumstances, I conclude that it would be unjust to absolve the respondent from furnishing security.

[19] What remains is the constitutional issue. The respondent contends that the current common law practice in terms of which a *peregrinus* may be ordered to furnish security for costs, is inconsistent with the spirit, purport and object of the Bill of Rights; that it violates the right to equality before the law and equal protection of the law contained in s 9(1) of the Constitution in a manner that is irrational; and that it amounts to unfair discrimination.

[20] Although it is not strictly necessary to determine the constitutional issue,[5] I have nonetheless decided to do so because it can be disposed of briefly, and it is likely to arise again. In the latter event this judgment may provide some guidance.

[21] The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.[6]

[22] When interpreting any legislation, and when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights.[7] Where the common law as it stands deviates from, or is deficient in promoting

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5 *Zantsi v Council of State, Ciskei and Others* 1995 (4) SA 615 (CC) para 3.
6 Section 8(1) of the Constitution.
7 Section 39(2) read with s 173 of the Constitution.

these objectives, the courts are under a general obligation to develop it appropriately.[8]

[23] Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. This means, at the very least, that everybody is entitled to equal treatment by our courts of law; that no one is above or beneath the law; and that all persons are subject to law impartially applied and administered.[9]

[24] A practice that differentiates between categories of people will violate s 9(1) of the Constitution if there is no rational relationship between the differentiation and a legitimate government purpose. The question as to whether there is unfair discrimination under s 9(3) ordinarily would arise only if there is such a rational relationship. In that event the party challenging the constitutionality of the differentiation must establish that the differentiation constitutes unfair discrimination.[10]

[25] The respondent concedes that the common law practice relating to security for costs promotes a legitimate government purpose - to enable an *incola* to recover the costs of successfully defending a claim by a *peregrinus*. But it says that in the modern world of instant global communication, ease of global travel and the fact that many states have developed legal systems like South Africa, it cannot be assumed that in all cases where a *peregrinus* sues, the defendant will always be subject to uncertainty, inconvenience or expense in recovering costs, in the absence of any evidence to that effect. This is

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8 *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC) paras 33, 39 and 54.

9 *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) para 22. Although this case dealt with the interpretation of the right to equality in s 8(1) of the Interim Constitution, the position is no different under the Constitution.

10 *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) para 11.

particularly so, the argument runs, in the case of an international arbitration where the parties are residents of member states of the New York Convention; and therefore the practice regarding security for costs is a violation of the right to equality because the differentiation between an incola plaintiff and a *peregrinus* plaintiff is irrational.

[26] Then the respondent submits that the differentiation upon which the applicant relies in this case - the claimant in the arbitration is a *peregrinus* which owns no immovable property in South Africa and this *per se* renders it liable to furnish security for costs – amounts to unfair discrimination, displays "a xenophobic attitude to the respondent" and the practice directly or indirectly imposes a burden or disadvantage on a *peregrinus*.

[27] The respondent however is mistaken. The practice regarding security for costs has nothing to do with xenophobia - it was laid down as far back as 1828 (*Witham v Venables* 1 Menzies 291) that a non-resident plaintiff who does not own immovable property in this country, can be called upon to give security for the costs of the action.[11]

[28] Furthermore, the alleged differentiation upon which the applicant relies is irrelevant. The question is whether in terms of the practice, security for costs is required purely on the basis that the litigant is a *peregrinus* which owns no immovable property in this country. The answer is, no. The court has a discretion to order security, and must take into account the particular circumstances of the case and considerations of fairness and equity to both parties. Even before the advent of the Constitution, the Appellate Division in

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[11] *Saker & Co Ltd v Grainger* 1937 AD 223 at 226-227.

Magida held that there was no justification for the principle that a court should exercise its discretion in favour of a peregrinus only sparingly.[12]

[29] In my opinion therefore, a proper order in terms of the practice regarding security does not result in irrational differentiation or unfair discrimination. And the cases reveal that the courts have given or withheld security because of the justice of the individual case.[13]

[30] Neither does the practice relating to security impose any burden or disadvantage on a *peregrinus*. This proposition is based on common sense, as is evidenced by the dictum of Cote JA, writing for the Court of Appeal of Alberta in *Crothers*:[14]

> "It is almost impossible for a non-resident to sue without a lawyer. That is because of the practicalities of life, not because of any law or Rules. A lawyer, court reporters, and experts all cost far more than security for costs would, so what is the practical impact of security? Security for costs never exceeds (and may be less than) estimated party-and-party costs, which are rarely more than a fraction of solicitor-and-client costs on one side … So the security, but a drop in the total bucket of litigation expenses, is highly unlikely to be the prohibitive expense."[15]

[31] The fact that the practice regarding security treats a *peregrinus* plaintiff differently from an incola plaintiff is not itself a violation of s 9(1) of the Constitution. As was said in *Prinsloo*, it is impossible to govern a modern country or regulate the affairs of its inhabitants without differentiation and without classifications which treat people differently and which impact on people differently.[16] Contrary to the respondent's assertion that the practice violates the right to equality, it does exactly the opposite – its purpose is to ensure equality between litigants. Where a *peregrinus* does not reside or

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12 *Magida* n 1 above at at 14F.
13 See for example *Magida* n 1and *Exploitatie* n 3 above.
14 *Crothers v Simpson Sears Ltd* 1988 ABCA 155 (CanLII); 51 DLR (4th) 529.
15 *Crothers* n 14 above para 21.
16 *Prinsloo* n 9 above para 24.

conduct business in South Africa and does not own sufficient assets to satisfy a costs order, it is not at risk on an equal footing with the *incola* or resident party. The practice relating to security for costs thus has the effect of restoring a measure of equality between the parties.[17] As was held in *Crothers*:

> "Security for costs is designed to protect a defendant from a plaintiff who wants to gamble and collect if he wins, but not pay if he loses. Indeed, such a plaintiff acts more unfairly than that for by his groundless suit he inflicts serious expenses on the defendant."[18]

[32] For these reasons, I do not think it can be said that the practice relating to security is either irrational or that it amounts to unfair discrimination.

[33] I should also point out that aside from holding that security for costs by non-residents does not violate the right to equality in s 15(1) of the Charter of Rights and Freedoms,[19] the courts in Canada have also held that security for costs does not unfairly hinder access to courts.

[34] Thus in *Crocker-McEwing*,[20] Watson J, after noting that security for costs embodies "a carefully considered policy balance which has withstood Constitutional challenge," said:

> "[33] The fundamental policy balance is between the desire not to unnecessarily or unfairly impede access to the Courts by legitimate and *bona fide* Plaintiffs and the desire to ensure that the administration of justice is not perverted by encouraging risk-free and doubtful litigation claims by Plaintiffs to the harassment of, and to the imposition of practically unrecoverable cost upon, Defendants who are possessed of facially meritorious answers to such claims.
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> [34] Both policy considerations deserve great respect. Access to the Courts is a matter going to the very heart of the viability and credibility of the administration of

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17 *Crothers* n 14 above para 43.

18 *Ibid*.

19 *Crothers* n 14 above; *Isabelle v Campbellton Regional Hospital and Arseneau* (1987) 80 NBR. (2d); *Nissho Corp v Bank of B.C.* (1987) 39 DLR. (4th) 453 (Alta.); Cf *Kask v Shimizu* 1986 CanLII 100 (AB QB).

20 *Crocker-McEwing v Drake* 2001 ABQB 13 (CanLII).

> justice. Limitations on that access should be driven by strong grounds of policy … On the other hand, the uses of recoverable and case-related costs has long been accepted as a means of regularizing the processes of courts and ensuring fairness therein. Moreover, the use of costs is to serve the further aim of discouraging the phenomenon of legal proceedings which become the tool of the recreational litigant or, worse, the litigation terrorist. Judicial notice can, arguably, be taken about the litigation atmosphere of our great southern neighbour. There, costs do not have the same function or characteristics as they do in Canada."

[35] For the above reasons I am of the opinion that the common law practice in terms of which a non-resident plaintiff who does not own immovable property in this country can be called upon to give security for the costs of a lawsuit, is consistent with the Constitution.

[36] I make the following order:

(a) The respondent shall furnish security for the applicant's costs in the sum of R250 000.00, in respect of the arbitration proceedings pending before the arbitrator, Mr DR Mitchell SC.

(b) The respondent shall furnish such security by no later than Friday 12 June 2015, failing which the applicant is granted leave to approach this court on the same papers (supplemented if necessary) for an order dismissing the respondent's claims in the arbitration; alternatively, staying the arbitration proceedings until such time as the respondent furnishes security in the sum of R250 000.00.

(c) The respondent shall pay the costs of this application, including the costs of two counsel.

SCHIPPERS J

Applicant's counsel	:	Advocates B Manca SC and S Van Zyl
Applicant's attorneys	:	Herold Gie Attorneys
Respondent's counsel	:	Advocates A Katz SC and J Engelbrecht
Respondent's attorney	:	Bisset Boehmke McBlain Attorneys