IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 10885/2020

In the matter between:

TCI INVESTMENTS PROPRIETARY LIMITED Applicant/Defendant

and

BRAVOSPAN 192 CC Respondent/Plaintiff

Date of hearing: 30 August 2021

Date of judgment: 13 September 2021

JUDGMENT

SAVAGE J:

Introduction

[1] The applicant, TCI Investments Proprietary Limited ("TCI") is the defendant in an action instituted against it under the above case number by the plaintiff, Bravospan 192 CC ("Bravospan"). In this application TCI seeks that Bravospan be directed to furnish security for costs in respect of the action instituted.

[2] The circumstances relevant to the matter are that TCI leased commercial premises to Bravospan in Cape Town. Bravospan fell into arrears in the payment of rental and ultimately cancelled the lease agreement entered into with TCI. Bravospan thereafter instituted an action against TCI claiming that during or about August 2016, prior to the conclusion of the lease agreement, Mr Mark Hibbert representing TCI made a fraudulent representation to Bravospan, represented by Mr Guy van der Post, that no negotiations were underway at that time between TCI and any potential developer of the urban property which was the subject of the lease agreement.

[3] Bravospan pleaded in its action that:

3.1 this representation was false in that TCI was engaged in negotiations with the developer FWJK regarding the development of the premises;

3.2 TCI and Mr Hibbert knew that the fraudulent representation was false and that it was intended to induce Bravospan into concluding the lease agreement;

3.3 the fraudulent representation induced Bravospan to conclude the lease agreement on 10 August 2015;

3.4 the lease agreement was lawfully cancelled by Bravospan as a result of TCI's fraudulent misrepresentation which rendered the lease agreement void ab initio entitling Bravospan to restitution, compensation for improvements and damages;

3.5 no obligation to pay rental arose by virtue of the lawful cancellation of the lease agreement;

3.6 Bravospan suffered damages in the amount of R 6 629 817,00, being the net loss suffered by it.

3.7 TCI, notwithstanding demand, has failed and/or refused to pay the amounts claimed.

[4] TCI has defended the action on the basis that Bravospan was in arrears, failed to pay in terms of the lease, “cannibalised” the deposit and had made payment arrangements to remedy the situation. It denies the fraudulent misrepresentation alleged and in its counterclaim seeks payment *inter alia* of arrear rental owed to it and reinstatement of the security deposit.

[5] In opposing the current application that it be directed to furnish security for costs, Bravospan produced a range of documents, including its 2021 annual financial statements. From these it is apparent that its loan liabilities and accounts payable amount to over R7 million with assets of R1.23 million. Income in the 2021 financial year is shown in the amount of R852 181.

Submissions

[6] It was submitted for TCI that from Bravospan’s 2021 annual financial statements it is apparent that the close corporation is in a position of vast factual insolvency, with its liabilities exceeding its assets by R5.77 million. Even if its full net profit were to be used to pay off debt it was submitted that this would take more than eight years. Furthermore, Bravospan has no real assets and no obligation to continue earning income. Although it has concluded recent commercial agreements, the agreement entered into with the Beachwood Country Club was one concluded between Mr Van der Post and Stardance Entertainment CC, or a close corporation to be nominated and replaced by him, with no nomination provided. As a consequence, Bravospan does not gain any rights under such agreement. Although the subordination of loans advanced to Bravospan was tendered in the argument of this application for the first time, the fact that most of its liabilities consist of personal loans suggests that Bravospan and its members may make decisions which suit their personal situations, with it submitted that paying TCI’s costs is likely to be at the bottom of such priorities. As to the prospects in the main action, it is contended that TCI’s likelihood of success outweighs that of Bravospan when regard is had to the facts. Since a severe risk of loss exists there is reason to believe that a costs order in TCI’s favour may not be satisfied.

[7] In opposing the application it was argued for Bravospan that it had not been established that there is reason to believe that Bravospan will be unable to

pay TCI's costs if unsuccessful in the action and that an order of security should not be permitted to stifle litigation when past financial difficulties faced by Bravospan arose due to fraudulent misrepresentation which is the subject of the action. Any present factual insolvency is not decisive of an inability to pay costs given TCI's conduct and when such factual insolvency exists only if the damages claimed in the main action are left out of the account. Bravospan is clearly commercial solvent given recent commercial agreements entered into, including a further five-year contract with the Kloof Country Club, and the financial documentation produced discloses that it has made a net profit of R1 151 196,00 between August and December 2020 and R953 222,22 from March 2021 to June 2021. Its business prospects are evidently positive and there is no reason to believe that it will be unable to pay any costs order in future when neither Mr Van der Post nor his father, who have advanced loans to the corporation, intends abandoning Bravospan.

Evaluation

[8] The ordinary common-law rule is that a plaintiff who resides in South Africa may institute actions in our courts without furnishing security for costs. Despite this, section 8 of the Close Corporations Act 69 of 1984 provides:

> 'When a corporation in any legal proceedings is a plaintiff…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…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 the security is given.'

[9] This provision mirrors section 13 of the Companies Act 61 of 1973 which was repealed with the repeal of the 1973 Act. No provision similar to section 13 was included in the 2008 Companies Act. In spite of this, the jurisprudence which has been developed around the interpretation and application of s 13 continues to provide useful guidance to courts in relation to section 8.

[10] The purpose of security for costs was recognised by the Constitutional Court in *Giddey NO v J C Barnard and Others ('Giddey'),*[1] to protect "*persons against liability for costs in regard to any action instituted by bankrupt*

[1] [2006] ZACC 13; 2007 (5) SA 525 (CC).

companies"[2] and "*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 their opponents unnecessary and irrecoverable legal expenses*".[3]

[11] The court holds a discretion to order that security for costs be furnished "*if there is a reason to believe that the company will be unable to pay the costs of its opponen*t".[4] In *Shepstone & Wylie and Others v Geyser NO*,[5] it was noted that in exercising its discretion, the court "*must decide each case upon a consideration of all relevant features, without adopting a predisposition either in favour of or against granting security*".[6] In *Giddey* it was said that this required that courts -

> '…need to balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against the potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its own costs in the litigation.[7] To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An applicant for security will therefore need to show that there is a probability that the plaintiff company will be unable to pay costs. The respondent company, on the other hand, must establish that the order for costs might well result in its being unable to pursue the litigation[8]and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospects of success. Equipped with this information, a court will need to balance the interests of the plaintiff in pursuing the litigation against the risks to the defendant of an unrealisable costs order.'[9]

[12] In addition:

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[2] At para 8 quoting *Hudson and Son v London Trading Co Ltd* 1930 WLD 288 at 291 (Greenberg J); and *Shepstone and Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045 – 1046.
[3] Id note 1 at para 7.
[4] Id note 1 at para 6.
[5] 1998 (3) SA 1036 (SCA).
[6] At 1045G-J. See too in this regard: *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) 620 (SCA) para 16.
[7] See *Shepstone and Wylie and Others v Geyser NO* cited above n 5 at 1046B, citing with approval the English case *Keary Developments v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 (CA) at 540a – b; Fusion
[8] See *Shepstone and Wylie and Others v Geyser NO* cited above n 5 at 1046G – I.
[9] Id note 1 at para 8.

> '…in exercising its discretion in terms of section 13, a court must bear in mind the provisions of section 34 and weigh them in the light of other factors laid before it. The balancing exercise proposed by the Supreme Court of Appeal in *Shepstone & Wylie*'s case (adopted from the English case *Keary Developments Ltd v Tarmac Construction Ltd and Another*[10]) 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 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.'[11]

[13] In *Fusion Properties 233 CC v Stellenbosch Municipality*[12] the position was summarised on the basis that:

> ' [24] Accordingly, there are at least three principles to be derived from the excerpts from *Giddey* and *Shepstone & Wylie* ... First, a court seized with an application to compel a plaintiff or applicant to furnish security for costs retains an unfettered discretion. Second, the court needs to 'balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against the potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its costs in the litigation'.[13] Third, the salutary purpose of s 13 is 'to deter would-be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects are poor'.[14]

[14] In balancing the potential injustice to each party were an order to be made one way or the other, relevant considerations include the likelihood that Bravospan will be able to pay TCI's costs if unsuccessful in the action; the likelihood that the effect of an order to furnish security will be to terminate Bravospan's action; the attempts Bravospan has made to find financial assistance from its shareholders or creditors; whether it is the conduct of TCI

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[10] *Keary Developments v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 (CA) at 540a – b.
[11] Id note 1 at para 30.
[12] [2021] ZASCA 10 at para 21.
[13] Id note 1 at para 8.
[14] Id note 1 at para 7.

that has caused the financial difficulties of Bravospan; a consideration of the nature of Bravospan's action and TCI's defence to such action to allow a fair sense of the strength and weakness of their respective cases.

[15] From its financial statements it is apparent that Bravospan's current liabilities exceed its assets. Its damages claim against TCI remains undetermined and does not alter this position. Similarly, while new business ventures have been embarked upon, with evidence of regular income, this has not fundamentally altered Bravospan's financial situation when regard it had to the extent of its liabilities. The facts show that at the current level of income derived from such new business operations it would take many years for Bravospan to extinguish its current liabilities.

[16] Turning to an assessment of the strengths and weaknesses of the parties' respective cases in the action, it is so, as was the case in *Gibbey*, that the allegation of fraud raised could be found to constitute a powerful factor gainsaying the grant of security. But simply because such an allegation is raised, does not bar the court from exercising its discretion to order that security should be furnished. The relative strength or weakness of the parties' respective cases is a relevant factor to be considered and weighed in the balance with all others. In *Zietsman v Electronic Media Network Ltd and Others*[15] it was made clear that the extent to which it is practicable for a court to make an assessment of each party's prospects of success depends on the nature of the dispute in each case, with it not expected of the court in an application for security attempt to resolve the dispute between the parties. Neither party is however entitled, for purposes of an application such as this, to assume that it will succeed in the action.

[17] From the material placed before this Court it is possible to arrive at a fair sense of the strength and weakness of the parties' respective cases. From this the facts do not point to the action against TCI having been instituted vexatiously, nor do they show Bravospan's prospects necessarily to be poor. At its core the fraud alleged is a factual dispute that patently requires determination by a trial court. The allegation of fraud alone is not however a

[15] [2008] ZASCA 4; 2008 (4) SA 1 (SCA) at para 21.

sufficient basis on which to refuse the current application when on the material before this court, the prospects of succeeding in the main action appear to be equally weighted. The prospect of success in the action is, on the facts before this court, no more than a neutral factor which in itself does not weigh heavily in favour or against the grant of security. That the action has been shown not to be vexatious and to have equally balanced prospects of success is not however a factor which on its own invites the exercise by this Court of its discretion in favour of Bravospan.

[18] Bravospan has not suggested that an order to furnish security might well result in its being unable to pursue the litigation. Its recent income stream from new commercial ventures and the expressed assurance that the corporation can rely on the continued support of Mr Van der Post and his father into the future, suggests that it will not. In addition, it is a relevant consideration that there has been no indication made of any attempts by Bravospan to obtain financial assistance, including from its members or creditors, in order to place it in a position to tender security if it is unable to provide such security itself.

[19] In *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty)* Ltd[16]it was stressed that the court vested with a discretion in terms of s 13 performs a balancing act, weighing the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security, as against the injustice to the defendant if no security is ordered and the plaintiff's claim fails and the former finds itself unable to recover costs.[17] I am not satisfied that it has been shown that a requirement that Bravospan furnish security will amount to an injustice to it or that it will necessarily prevent it from pursuing its action. It clearly has found the resources to enable it to pursue the action to date and to oppose the current application in circumstances in which the corporation is factually insolvent. Although it was contended that it retains the support of its creditors, it is a relevant consideration that it creditors have not advanced security to date and were only prepared in argument for the first time to subordinate their loans to the corporation despite their professed support for it.

[16] [2015] ZASCA 93; 2015 (5) SA 38 (SCA).
[17] At para 13.

[20] I am satisfied for these reasons that TCI has established that, if successful in the action, there exists a probability that Bravospan will be unable to pay an order of costs made against it and that TCI may therefore be faced with an unrealisable order of costs. The application must therefore succeed. There is no reason why costs should not follow the result.

Order

[21] In the result the following order is made:

1. The plaintiff, Bravospan CC, is ordered to furnish security for the costs of suit of the defendant, TCI Investments (Pty) Ltd, in the action under the above case number in the form, amount and manner to be determined and directed by the Registrar of this Court.
2. Should the plaintiff not comply with paragraph 1 above within two (2) months of the Registrar making her determination, the defendant is granted leave to approach this Court, on the same papers, duly amplified, if necessary, for appropriate relief, including to seek an order that the plaintiff's claim be dismissed with costs and the granting of judgment in respect of the defendant's counter claim, or such other order that the Court may deem fit.
3. The plaintiff is to pay the costs of the application for security for costs.

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SAVAGE J

Appearances:

Applicant/Defendant:	A Kantor SC
	Instructed by H T de Villiers Attorneys
Respondent/Plaintiff:	G D Harpur SC
	Instructed by De Villiers, Evans & Petit Attorneys