

SOUTH AFRICA / JUDGMENT

Brits and Another v Mahon and Others (4764/2009) [2009] ZAWCHC 150 (21 September 2009) [2009] ZAWCHC 150

COURT

Western Cape High Court, Cape Town

BEFORE

K J Moloi

CASE / FILE NUMBER

4764/2009

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO.: 4764/2009

In the matter between

WALTER ELLIOT BRITS First Applicant

WALTON REAL ESTATE LIMITED Second Applicant

and

IOLA MAHON First Respondent

SHERIFF OF THE HIGH COURT OF

CAPE TOWN Second Respondent

BRIAN ROBERT MAHON Third Respondent

JUDGMENT

DELIVERED ON 21 SEPTEMBER 2009 K J MOLOI, AJ

1. The Applicants, incolae of South Africa, brought an application requiring the First Respondent, a peregrinus of South Africa, to furnish security for costs of the interpleader proceedings they instituted through the Sheriff in terms of Rule 58 of the Uniform Rules of Court.

2. The First and Third Respondents were divorced in the United Kingdom. The court in the United Kingdom ordered the Third Respondent to pay specified sums of money to the First Respondent as maintenance for herself and their two children. The Third Respondent failed to comply with that order. Based on the judgment of the United Kingdom the First Respondent instituted provisional sentence proceedings in the Western Cape High Court where the Third Respondent was domiciled at the time. The action was opposed by the Third Respondent. Judgment was, however, granted in favour of the First Respondent. The Third Respondent sought leave to appeal the judgment and same was refused by this court and also by the Supreme Court of Appeals. The Third Respondent subsequently challenged the lawfulness and the constitutionality of the judgment and the same was dismissed by this court. At this point in time there is no appeal or review of the judgment pending.
3. Pursuant to the judgment of this court relating to provisional sentence the First Respondent caused a Writ to be issued for the attachment of certain property belonging to the Third Respondent or indicated as such. After the attachment by the sheriff the two Applicants made adverse claims to the attached property on the basis that, in respect of the First Applicant, the attached property was pledged to him as security for a debt and in respect of the Second Applicant, the attached property belonged to it and not to the Third Respondent. The First Respondent did not admit those claims and consequently the Sheriff initiated the interpleader proceedings. The court referred the interpleader proceedings to trial and correctly directed that the Applicants be the plaintiffs and the First Respondent be the defendant at the hearing. The hearing is pending.
4. At this juncture the Applicants brought this application requiring an order that the First Respondent furnish security for costs of the pending interpleader hearing on the ground the First Respondent is a peregrinus of the court and her action against the Third Respondent (i.e. the execution) led them to initiate the interpleader proceedings they would otherwise not have done.
5. Rule 47(1) of the Uniform Rules regulates the procedure relating to the interpleader proceedings, but the basis upon which security for costs may be sought and be ordered is a matter regulated by the application of common law. The sub-rule provides as follows: "A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed and the amount demanded." According to the common law an incola defendant/respondent is entitled to seek security for costs where a peregrinus plaintiff/applicant instituted proceedings in our courts and have no or insufficient property in the country to secure the costs order that may be made: *Saker & Co Ltd v Granger* 1937 AD 223 at 227; *Rosenblum v Marcus* 1884 NLR 82; and *Thomson Watson & Co v Poverty Bay Farmers Meat Supply Co* 1924 CPD 93 at 95. In *Thomson Watson & Co*, supra at p.95 Gardiner JP held "... it is clear that a peregrinus who comes into our jurisdiction as a plaintiff is bound to furnish security. He chooses to avail himself of our courts and before

granting him our aid, we see that our incolae are protected".

6. Only the peregrinus who is plaintiff or applicant either in convention or reconvention may be ordered to furnish security: *Witham v Venables* (1828) 1 Menz 291; *Schunke v Taylor and Symonds* (1891) 8 SC 103; *Saker & Co Ltd v Grainger*, supra at 227; and *B & W Industrial Technology (Pty) Ltd v Baroutsos* [2005] ZAGPHC 93; 2006
- (5) SA 135 (SCA) at 143 G-H. In *Alexander v Jokl & Others* 1948
- (3) SA 269 (W) at 273 it was held "In the first place it now seems clear that it is only when a peregrinus himself initiates proceedings not only when he is the plaintiff or claimant, but also when he makes a claim in reconvention in proceedings originally instituted against him". Appeals and review proceedings will have a similar effect.
7. In view of the conclusion I cannot avoid in this matter I do not propose to go into the determination of the constitutional validity of this blanket protection of the incolae according to the common law viewed from the point of the Constitution of the Republic of South Africa Act No 108 of 1996. Whether this protection of the incolae will pass the muster of the constitutional imperatives as contained in section 8 (guaranteeing everyone equality before the law and equal protection and benefit of the law) and section 34 (guaranteeing everyone access to the courts for resolution of disputes) remains to be decided.
8. The question to be decided in this matter is whether the First Respondent initiated the proceedings in respect of which the

furnishing of the security for costs is sought. It was submitted on behalf of the Applicants that the initiation of the proceedings by the First Respondent commenced when provisional sentence judgment was sought and obtained. It was further contended that had it not been for that, the Applicants would not be before the court on interpleader. Emphasis was placed on the need that the courts must protect and safeguard the interests of the incolae when brought before our courts by the peregrini and that the Applicants were brought before the court at the instance of the First Respondent. I do not agree. The provisional sentence proceedings was a matter between the First Respondent and the Third Respondent. That matter has run its course up to the final judgment. No appeal is pending against the judgment on provisional sentence. The judgment is thus final. The execution by way of a Writ and the attachment made pursuant thereto are not proceedings as contemplated in Section 47(1) of the Rules. In *H R Holfeld (Africa) Ltd v Karl Walter & Co Gmbh and Another* (2) 1987 (4) SA 861 (W) at p.867-8 the following was stated: "Security, in my view, may only be sought and granted, while a lis is pending or after judgment while an appeal is pending, in the sense propounded in *Saker & Co Ltd's* case supra, but not after final judgment". Furthermore, an appeal against the judgment on the strength of which execution was levied can only be at the instance of the Third Respondent the Applicants having not been party thereto. The Third Respondent had exhausted the appeal processes as stated above. See also *Janover v Registrar of Deeds* 1946 TPD 35 at 38 where Naser J stated that "The use of the word 'proceedings' in that sub-section indicates quite clearly that 'proceedings' whatever they may mean do not include

writs of execution or sales in execution because if proceedings are concluded when judgment is given, matters which follow thereafter

are clearly not proceedings ..."

9. Moreover, the granting of an order to furnish security in interpleader proceedings is not a matter of course, but is subject to the court's judicious exercise of discretion: *Magida v Minister of Police* 1987
- (1) SA 1 (A) at p.12 and considerations of fairness and equity to both the incola and a peregrinus as well as all the circumstances of the case. In the circumstances of the case and considerations of fairness and equity, the court would get to the same conclusion despite the exposition of the common law as stated above. The court may not, at this stage, give consideration to the merits of the interpleader proceedings much as they were dealt with extensively in the papers filed of record. I have refrained the best I could to let them influence my conclusion.
10. Taking all the above factors into account the following order is made: (a)The application is dismissed. (b)Applicants are ordered to pay the costs jointly and severally, the one paying the other to be absolved. (c)The costs in (b) above must include the costs of two counsel. K J MOLOI, J

BRIAN ROBERT MAHON Third Respondent

JUDGMENT

DELIVERED ON 21 SEPTEMBER 2009

K J MOLOI, AJ

1. The Applicants, incolae of South Africa, brought an application requiring the First Respondent, a peregrinus of South Africa, to furnish security for costs of the interpleader proceedings they instituted through the Sheriff in terms of Rule 58 of the Uniform Rules of Court.
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"A party entitled and desiring to demand security for costs from

another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed and the amount demanded."

According to the common law an incola defendant/respondent is entitled to seek security for costs where a peregrinus plaintiff/applicant instituted proceedings in our courts and have no or insufficient property in the country to secure the costs order that may be made: *Saker & Co Ltd v Granger* 1937 AD 223 at 227; *Rosenblum v Marcus* 1884 NLR 82; and *Thomson Watson & Co v Poverty Bay Farmers Meat Supply Co* 1924 CPD 93 at 95.

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7. In view of the conclusion I cannot avoid in this matter I do not propose to go into the determination of the constitutional validity of this blanket protection of the incolae according to the common law viewed from the point of the Constitution of the Republic of South Africa Act No 108 of 1996. Whether this protection of the incolae will pass the muster of the constitutional imperatives as contained in section 8 (guaranteeing everyone equality before the law and equal protection and benefit of the law) and section 34 (guaranteeing everyone access to the courts for resolution of disputes) remains to be decided.
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- (c) The costs in (b) above must include the costs of two counsel.

K J MOLOI, J

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