

SOUTH AFRICA / JUDGMENT

Dinos and Another v Agro V.I.M SA and Another (08284/14) [2015] ZAGPJHC 72 (29 January 2015)

[2015] ZAGPJHC 72

COURT

South Gauteng High Court, Johannesburg

BEFORE

Windell

CASE / FILE NUMBER

08284/14

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NUMBER: 08284/14

DATE: 29 JANUARY 2015

In the matter between:

PANAGIOTOS

DINOS.....FIRST

APPLICANT

LAMBROS

DINOS.....SECOND

APPLICANT

And

AGRO V.I.M

SA.....FIRST

RESPONDENT

MATOU FRANCE VIOHAR

S.A.....SECOND

RESPONDENT

JUDGMENT

WINDELL J:

- [1] The applicants seek an order directing the first respondent (a perigrinus) to provide security for costs which it may incur in the event that they successfully defend the action instituted against them. The first respondent opposes the application and submits that the applicants failed to make out a proper case entitling them to the order.
- [2] The first respondent is a Greek company that exports various agricultural products to different countries including South Africa. It is a well-established and affluent entity with an annual turnover of €32 000 000 per year. It does not own any immovable property or any other assets in South Africa. The first respondent contends that it will be able to settle any cost order that may be granted against it, and that there is therefore no need to give any security for costs.
- [3] As a rule of practice, the merits of the litigation are not considered at this stage of proceedings except in cases where it is alleged that the defence is vexatious. There is no allegation or indication that the defence is vexatious. I therefore do not intend to consider the merits or the alleged lack of bona fides on the applicants' part.
- [4] The general rule of practice is that a peregrinus should provide security for an incola's costs. See *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig* 2012 (1) SA 247 (SCA). This does not mean that an incola has a right which entitles him as a matter of course to the furnishing of security for his costs by a perigrinus. The court has a discretion in deciding whether or not to direct that security be furnished.
- [5] In the exercise of the court's discretion all the relevant factors have to be weighed, having regard to the particular circumstances of the case as well as to considerations of equity and fairness to both the incola and the peregrinus. Hardship to the perigrinus and financial ability to provide security are taken into account, but are not necessarily decisive. See *Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd, and Two Other Cases* 2009 (5) SA 602 (C) para [26] at 607.
- [5] It is common cause that the applicants will not be able to recover a costs order in South Africa and they would have to proceed against the first respondent in Greece.

In *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig* supra, the court held that the associated uncertainty and inconvenience that this would entail is one of the fundamental reasons why a peregrinus should provide security.

- [6] If the peregrinus is impecunious and alleges that he is not able to furnish security due to his own impecuniosity, it will be a material consideration in the exercise of the court's discretion in deciding whether to absolve a perigrinus from furnishing security for costs. In *Magida v Minister of Police* 1987(1) SA 1 (A) an impecunious perigrinus was excused from

providing security. The court held that no one should be compelled to furnish security beyond its means and a perigrinus should not, on account of his impecuniosity, be deprived of prosecuting his action against an incola.

- [7] The facts of this matter can clearly be distinguished from the facts in *Magida supra*. The first respondent in *casu* does not allege that it would not be able to pursue its action against the applicants or that it will be affected in any way if it is ordered to put up security for costs. On the contrary, it contends that it is well able to give security, but contests that it is liable to do so.
- [8] I am satisfied that there are no facts present that justify deviating from the general rule that a peregrinus should provide security for an incola's costs. I was not persuaded to exercise my discretion in favour of the first respondent and to absolve it from furnishing security for costs.
- [9] In the result the following order is made:
1. The first respondent is ordered to provide security for the costs of the applicants in an amount to be determined by the Registrar.
 2. The first respondent is ordered to pay the cost of this application.
 3. Draft order marked "X" made an order of court.

L.WINDELL

Judge of the South Gauteng High Court

Counsel for applicant : Adv. L. Hollander

Counsel for respondent : Adv. S Mc Turk

Date of hearing : 27 January 2015

Date of judgment : 29 January 2015

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Prepared on 13 October 2026 · Esheria