
SOUTH AFRICA / JUDGMENT

Dix v Calzanetto Sociedad Limitada (15353/2017) [2017] ZAGPJHC 303 (19 October 2017) [2017] ZAGPJHC 303

COURT

South Gauteng High Court, Johannesburg

BEFORE

Van der Linde

CASE / FILE NUMBER

15353/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 15353/2017

Not reportable

Not of interest to other judges

Revised.

18-10-2017

In the matter between:

Dix, Peter Grant Applicant

and

Calzanetto Sociedad Limitada Respondent

Judgment

Van der Linde, J:

Introduction

and background

- [1] This is an application by an incola natural person against a peregrine company to provide security for the costs of the litigation

that the latter had initiated against the former. I will refer to the parties as in the main application. The applicant's cause of action against the respondent arises out of the following circumstances.

- [2] It is a company registered in Spain, but it operates in all the major markets of the world. It is the registered proprietor of the trade mark "Calzanetto". It launched an application on 5 May 2017 against the respondent in this court interdicting him from infringing its trade mark, and directing him to remove and erase the offending infringement.
- [3] Its case is that before its recent winding-up on 16 November 2015, a local company Calzanetto SA (Pty) Ltd "acted"[1] as the applicant's local distributor. The applicant held 60% of the shares in that company, and the respondent, together with a Mr Moroldo, held the remaining 40%. The respondent was also a director of that company.
- [4] Subsequently, at an undisclosed date and place, Asprey Holdings (Pty) Ltd was appointed as sole distributor of the applicant. It is not stated whether this appointment was oral or in writing, and other than saying that it was a "sole" distributorship, no corroborating evidence is put up.
- [5] The case then goes on to assert that the respondent unlawfully sells and distributes goods bearing the trade mark, name and get-up of the applicant. The applicant relies for this assertion on having observed such goods at two former customers of the local company, The Ghetto in Boksburg and Shoe Care in Sandton City, and on the contents of conversations that the applicant's deponent had with these two. These statements are not supported by confirmatory affidavits of these two persons, and the founding affidavit does not make out a case for the admission of this inadmissible hearsay evidence.
- [6] Two further observations are necessary before concluding on the applicant's case. The first is that it is nowhere said who the owner is of the goods that the respondent is distributing; presumably then they actually belong to the respondent. And the second is that the applicant has not made clear what its case against the respondent is. It refers in general terms to an infringement of the Trade Marks Act 194 of 1993 and to an infringement of its "rights". But the procedural law is clear, that if a party relies on a statute, the section must be identified; and if the case is passing off, the elements of that delict must be set out.
- [7] The respondent's notice of opposition to the main application was dated 15 June 2017 and served on 20 June. On the same respective dates, the respondent dated and filed a notice demanding security for costs.[2] This was resisted, and it led to the present application. In the meantime he was required to file his answering affidavit, which he did. The replying affidavit was filed on 14 September 2017, and the pleadings in the main application have thus closed.

The relevant legal principles

- [8] In applications such as these, a court has what has been called a discretion in the strict sense.[3] That means that it considers all the circumstances that pertain to the issue, and balancing them all, comes to conclusion that will be upset on appeal only if it was arrived at by the application of wrong principle, bias or caprice.
- [9] The fundamental approach to applications such as these is that a litigant should not be pursued by bankrupt companies, because the litigant will not be able to recover its costs, if successful. There is no predisposition one way or the other, and the fact that the initiating litigant is a peregrinus, is just one of the factors that will be taken into account.[4]

[10] In *Shepstone & Wylie* the Supreme Court of Appeal put it thus:[5]

"In my judgment, this is not how an application for security should be approached. Because a Court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security. (Compare Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1) 1997

- (4) SA 908 (W) at A 919G--H; *Wallace NO v Rooibos Tea Control Board* 1989 (1) SA 137 (C) at 144B--D.) I prefer the approach in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 (CA) at 540a --b where Peter Gibson LJ said:

'The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.'

These are probably the 'considerations of equity and fairness' mentioned in *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14D--F in regard to the consideration of an application for security for costs against a peregrinus, and which should, in my judgment, also prevail in an application under s 13."

- [11] The approach was recently articulated as follows in this division:[6]

"[5] An incola defendant does not, however, have a prima facie right to be furnished with security for costs by a peregrine plaintiff. Whether or not the latter should furnish an incola with security for its costs lies within the discretion of the court. In exercising its discretion, the court must have regard to the particular circumstances of the case as well as considerations of equity and fairness to both the incola and the peregrine. Factors that our courts have taken into account when deciding whether or not to order a peregrine to provide security are his impecuniosity and whether an order compelling him to furnish security would deprive him of the right to litigate against an incola; whether he is economically active within the jurisdiction of the court; and whether execution of the court's judgment is possible in the jurisdiction in which he resides. None of these factors are, however, decisive."

[12] But there is undoubtedly a practice that when all things are equally balanced, orders to furnish security for costs are made against peregrine plaintiffs/applicants. This was recently referred to by the Supreme Court of Appeal in *Exploitatie- en Beleggingsmaatschappij*

Argonauten BV and Another v Honig [7] in these terms: “ ... the general rule of practice that a peregrinus should provide security for an incola’s costs ...”.[8]

[13] This approach was restated in *Futura Footwear Ltd v Salomon S.A.S*[9] where Pillemer, AJ said:

“[5] It is a general rule of practice that a peregrinus should provide security for an incola’s costs. (Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig 2012

(1) SA 247 (SCA) at para 18). The court exercises a discretion in deciding whether or not to direct that security be furnished. It involves the weighing of the relevant factors. As was explained in the *Honig* case the fact that a defendant will have to proceed against the peregrine plaintiff abroad if he obtains a costs order in his favour, with the associated uncertainty and inconvenience that would this would entail is one of the fundamental reasons why a peregrinus should provide security.”

The principles applied

[14] In the application for security for costs, the respondent expressly challenged the issue whether the applicant had any assets in South Africa. He said that he had been involved with the applicant in this country through the liquidated company, and that as far as he knew, the applicant had no assets in South Africa. He expressed the fear that he was accordingly at risk for irrecoverable costs should he be successful in pursuing his defence of the main application.

[15] The applicant responded by saying that in fact it did have assets in this country, being a proven concurrent claim against the insolvent company on shareholder’s loan account in the amount of R9 968 392. No value is placed on the claim. Counsel for the applicant submitted that the claim must have some value, and given that the respondent was involved in the affairs of the local company, he ought to know whether there are assets in the liquidated company.

[16] The correct approach to the case of a peregrine applicant/plaintiff of whom security for costs is demanded, but who is unable to point to unencumbered immovable property in the country, is discussed by Moosa, J in *Majunga Food Processes SARL v South African Dried Fruit Co-operative Ltd*. [10] There His Lordship held:

“[5] In a claim for security, a peregrinus plaintiff can effectively avoid giving such security if he/she has immovable property of sufficient equity in this country. The question as to whether he/she could avoid giving such security if he/she has movable property in this country is an open one. (See Burton v Villieria Diamond Syndicate Ltd 1905 TS 85 at 87; Cohn v Weston Email Industrie Handels AG of Vienna 1926 WLD 20 and Saker & Co Ltd v Grainger 1937 AD 223 at 227.)

- [6] The principle underlying the practice of security is to protect the incola defendant against a peregrinus plaintiff who has no immovable property with the necessary equity in this country. It should, however, not be used as a means to disempower a peregrinus from enforcing his rights in this country. (See *Saker & Co Ltd v Grainger* (supra at 227) and *Magida v Minister of Police* 1987 (1) SA 1 (A) at 10.)
- [7] In the case of *Magida v Minister of Police* (supra at 10A - J) the Court, after analysing the Roman-Dutch authorities, concluded that various forms of security have been recognised. They were suretyship (*fideiussor*), pledge (*actio pignoratitia*) and security on oath (*actio iuratoria*). The latter was resorted to when a peregrinus was unable to furnish suretyship or pledge. In that case he or she gave an undertaking on oath that he/she could not furnish security but that he/she would prosecute the case to its end. The security on oath (*actio iuratoria*) as a form of security has become obsolete because of disuse.
- [8] Security for costs is part of the practice and not part of the substantive law. (*Saker & Co Ltd v Grainger* (supra at 226
- 7).) The normal practice, in terms of our common law, is that security takes the form of a suitable bank, institutional or personal guarantee, or other acceptable guarantee. To comply with the objective of giving security, in my view, it ought to be tangible and durable. It ought to possess value and be negotiable. These attributes are not necessarily exhaustive. There can be no reason to exclude movable property as a form of security provided it complies with the criteria mentioned above. In the Roman-Dutch tradition the practice was for a pledge (*actio pignoratitia*) to be a form of security. Rule 47(5) does not impose any limitation on the form of security the Registrar or the Court can direct to be given.”
- [17] In that case the peregrinus applicant actually suggested that the value of the consignment of mangoes it had tendered putting up as security was in the region of R120 000 and R160 000. The court was however not prepared to accept that valuation, and as will have been noted, insisted that something durable be put up.
- [18] In the present matter the respondent asks for an order that the peregrinus applicant puts up R100 000 as security for costs. The applicant seeks to meet that case by saying that it in fact has assets, that these consist not of unencumbered immovable property but of movable property, that the movable property is comprised of the claim against the insolvent company, and that the amount – not value - of this claim is close to R10m.
- [19] In exercising my discretion I must take all factors into account. This includes that response of the applicant. It includes too the merits of the case in the main application, particularly here where the affidavits have all been exchanged and thus not only the pleadings but also the protagonists’ cases have closed.[11]

[20] In embarking on that endeavour, I am sceptical about the applicant's unvalued movable asset in the form of the claim against the insolvent company. There does not appear any explanation why the applicant did not say what the asset position of the insolvent company is. After all, it is the majority shareholder in that company and should know what its assets are. The applicant itself did not purport to suggest any value at all for that concurrent claim.

[21] I am sceptical too about the paucity with which the applicant has sketched the merits of its case in the main application, as I have already alluded to above. I take into account that the respondent is an individual living in South Africa, and against that, that the applicant is an international company which trades in many countries. On the face of it, there is a disparity in nett assets in favour of the applicant.

[22] Finally, although I accept that the respondent might be able to follow the applicant into Spain with a costs judgment of this court, that is often easier said than done.

Conclusion

[23] All in all, in my view fairness between the parties requires that the applicant in the main application, respondent in this interlocutory application, be directed to furnish security for the costs of its application.

[24] The respondent asked for an order that this court fixes the amount of the security as R100 000. The applicant did not take a position, except to say that it left the matter in the court's hands. In my view the Registrar should fix the security; that is the usual order. In this regard rule 47(5) provides as follows:

"(5) Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar."

[25] In the result I make the following order:

- (a) The respondent Calzanetto Sociedad Limitada is directed to furnish security for the costs of the applicant Peter Grant Dix in respect of the main application launched by the said respondent against the said applicant under case number 15353/2017 in this court, in the form, amount and manner directed by the Registrar.
- (b) The respondent Calzanetto Sociedad Limitada is directed to pay the costs of this application for security for costs.

WHG van der Linde

Judge, High Court

Johannesburg

For the applicant: Adv. Kanyangarara

Instructed by: H. Miller, Ackermann & Bronstein

102 William Road

Norwood

Tel: 011 483 2930

Ref: Mr. I Bronstein

For the respondent: Adv. Keeling

Instructed by: Du Toit Sanchez Moodley Inc

Stonemill Office Park

Groundfloor, Kiepersol House No.2

Randburg

Tel: 011 045 6700

Ref: Mr. Sanchez/ CAL1/0004

Date argued: 17 October 2017

Date judgment: 19 October 2017

- [1] This is the word used in the founding affidavit. It is not said that the local company had entered into an agreement with the applicant, nor that the factual distributorship then meant that only the local company was distributing the applicant's products.
- [2] I refer to these dates, because some point was made in argument by the applicant that there was undue delay by the respondent in initiating the process to obtain security for costs. Having regard to these dates, I do not believe that there is anything in that point.
- [3] *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC). At footnote 17, O'Regan J said: "Various terms are used by the courts to define this type of discretion. Sometimes it is referred to as a 'strong' discretion (see, for example, *S v Basson* cited above n16 at para [110]), sometimes as a discretion 'in the narrow sense' (see, for example, *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* [1992] ZASCA 149; 1992 (4) SA 791 (A) at 800G - H and *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) ([1999] 4 All SA 505) at 804I (SA)); sometimes as a 'true' discretion (see, for example, *Media Workers Association*, cited above, at 800D). Throughout this judgment I shall refer to it as a discretion 'in the strict sense' as used in *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996] ZASCA 58; 1996

- [4] SA 348 (A) ([1996] 3 All SA 669) at 361H (SA); and S v Basson cited above n16 at para [111]. It is not that the other terms are incorrect, but for consistency and clarity I prefer to use the one term.” Although this was said in the context of s.13 of the previous Companies Act, 61 of 1973, the same applies to the discretion exercised at common law.
- [4] Magida v Minister of Police 1987 (1) SA 1 (A); Shepstone & Wylie & Others v Geyser NO 1998
- [3] SA 1036 (SCA) at 1045I-1046C.; Browns The Diamond Store CC V Van Zyl (717/2015) [2017] ZAGPJHC 70 (3 February 2017).
- [5] At 1045 in fin, ff.
- [6] Browns The Diamont Store, op cit.
- [7] 2012 (1) SA 247 (SCA)
- [8] At [18].
- [9] (5459/2011) [2012] ZAKZDHC 68 (30 October 2012)
- [10] 2000 (2) SA 94 (C).
- [11] Compare Browns The Diamond Store, op cit, at [24].

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