

SOUTH AFRICA / JUDGMENT

Good Hope Plasterers CC t/a Good Hope Construction v Aecom SA (Pty) Ltd (15454/2016) [2018] ZAWCHC 164 (6 December 2018)

[2018] ZAWCHC 164

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

15454/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 15454/2016

In

the matter between:

GOOD
HOPE PLASTERERS CC t/a
GOOD
HOPE
CONSTRUCTION Plaintiff/Applicant
and
AECOM
SA (PTY) LTD
Defendant/Respondent

Coram:

Justice J Cloete

Heard:

15 November 2018

Delivered:

6 December 2018

JUDGMENT

CLOETE J:

Introduction

[1] This is an application by the plaintiff in the main action (“Good Hope”) for an order declaring that the defendant (“Aecom”) is not entitled to approach the registrar to increase what Aecom regards as security for costs of R25 000 in terms of an order granted by agreement on 13 January 2017 (“the order”).

[2] The order reads as follows:

‘By agreement between the parties, it is ordered that –

1. Plaintiff’s attorneys of record will make payment to Defendant’s attorneys of record in an amount not exceeding R25,000.00 (Twenty-Five Thousand Rand), in the event of a costs order being made against the Plaintiff in favour of the Defendant, or upon agreement between the parties in writing of the amount due to Defendant in respect of any such cost order.
2. Payment shall be made within 3 (three) days of the Taxing Master’s allocatur or the date of the agreement.
3. The application for security for costs is withdrawn, costs to be costs in the cause.’

[3] It is Good Hope’s case that the order, properly interpreted, does not amount to one granted under uniform rule 47(3) which

provides that:

‘(3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar’s decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.’

[4] On the other hand it is Aecom’s case that the terms of the order fall squarely within the provisions of the subrule and that its approach to the registrar on 14 November 2017 for further security for costs of R211 039 (alternatively in such amount as is determined by the registrar) is competent.

Background

[5] Good Hope is a building contractor. Aecom provides professional engineering, consulting and project management services for

infrastructure projects. The City of Cape Town concluded an agreement with Aecom appointing it as implementing agent for certain projects involving the upgrading of rental stock units. Good Hope successfully tendered for the works for the Man A project for a contract price of R59.6 million and was subsequently appointed to also complete the works for the Man C project for a contract price of R39.4 million (after the successful tender applicant, CF Projects (Pty) Ltd trading as Filcon Projects, was placed in liquidation).

[6] A dispute arose between the parties and on 26 August 2016 Good Hope instituted the main action against Aecom for payment of various amounts allegedly owed under certain payment certificates totalling R3.9 million together with an order directing Aecom to take certain steps including the furnishing of a final payment certificate as well as payment in terms thereof. According to Good Hope, the ultimate total amount due would be in excess of R8 million.

[7] Aecom entered appearance to defend and on 22 September 2016 delivered a request for security for costs in terms of uniform rule 47 in the amount of R100 000 (alternatively as determined by the registrar). The notice reflects that the request for security was based on the following grounds, namely that: (a) the action instituted by Good Hope is vexatious, reckless and 'obviously unsustainable'; (b) there was a pending liquidation application between the parties in the North Gauteng High Court; and/or (c) Aecom had reason to believe that Good Hope would be unable to pay its costs should it succeed in its defence.

[8] On 12 October 2016 Good Hope's attorney responded that:

'1. We confirm our client's instruction as follows:

1.1 Our client disputes that Aecom is entitled to security for costs;

1.2 In the event that same is necessary, our client further disputes that an amount of R100 000.00 in respect of such security is reasonable and appropriate under the circumstances;

2. Be that as it may, and in order to avoid any unnecessary litigation, our client will be prepared to furnish an amount of R25 000.00

as security in a form determined by the Registrar of the Court.

3. Should your client disagree to this amount of security, we have instruction to refer the matter to the Registrar of the Court for determination in terms of Rule 47(2).'

[9] On 14 October 2016 Aecom's attorney replied in relevant part as follows:

'With reference to your correspondence of 12 October 2016, we confirm that our client accepts the plaintiff's offer to furnish security in the amount of R25 000.00. We are happy to accept an undertaking, or any other such acceptable form of security (such as a bank guarantee), from your firm to pay in the event of a costs order being made in favour of the defendant. Please advise of the form such undertaking to pay will take...'

[10] On 30 November 2016 Good Hope's attorney confirmed that:

'...our client paid R25 000.00 into our Trust account as security for costs in this matter and that the aforesaid amount will be held on trust until the finalisation of the above matter...'

[11] On 1 December 2016 Aecom's attorney advised that this undertaking was unacceptable and that:

'We require a formal undertaking to pay to [Aecom's attorneys] the amount held as security for costs in respect of a costs order being made against your client. Such payment is to be made, say, within 3 days of the Taxing Master's allocatur in favour of our client or upon agreement in writing by your client of the amount due to our client in respect of any such costs order.'

Kindly be advised that we are now constrained to place you on terms to provide proper security as you previously tendered to do by 9 December 2016 failing which we will recommend to our client to approach the High Court for relief.'

[12] On 13 December 2016 Aecom launched an application in terms of uniform rule 47(3) for inter alia an order directing Good Hope to put up security for costs in the amount of R25 000 by way of an irrevocable and unconditional guarantee issued by a first class South African commercial bank. In the founding affidavit Aecom's attorney explained that the purpose of the application was for an order directing Good Hope 'to put up proper security in the amount of R25 000 as agreed between the parties'. She also asserted that an order was required because Good Hope 'has not put up the security agreed in a form acceptable' to Aecom. The application was set down for hearing in motion court on 10 January 2017. Good Hope filed a notice of intention to oppose on 5 January 2017 but did not deliver an answering affidavit because the parties then agreed to the terms of the order.

[13] Good Hope contends that its attorneys were ordered to make payment to Aecom's attorneys of an amount not exceeding R25 000 in the event of a costs order being made against it in favour of Aecom. Security for costs, by way of an irrevocable undertaking, guarantee or otherwise, was therefore never furnished by Good Hope to Aecom; nor was there ever any order, as envisaged by uniform rule 47(3), to the effect that Good Hope was obliged to furnish security to Aecom.

[14] Emphasis was also placed on that portion of the order recording that Aecom's application for security for costs was withdrawn. Good Hope argues that this is not a case where, at any stage of the proceedings, security has been provided by it to Aecom and/or where it did not at all relevant times contest its liability to furnish such security.

[15] On 14 August 2017 Aecom issued a final payment certificate reflecting an amount due to Good Hope of R1 466 760.61. On 14 November 2017 Aecom served a further request for security for costs (the subject matter of this application) in the amount of R211 039 (alternatively as determined by the registrar). The notice reads in relevant part as follows:

‘TAKE FURTHER NOTICE THAT the original amount furnished as security for costs is no longer sufficient and accordingly defendant’s

request for security is based on the balance of the amount due in respect of the draft Bill of Costs attached hereto less R25 000.00

previously received from the plaintiff.

TAKE FURTHER NOTICE that if plaintiff contests the amount of security required, it may approach the Registrar to determine the amount to be given and his decision shall be final...’

[16] On 16 November 2017 Good Hope’s attorney responded that:

‘As you are aware, our client has always been of the opinion that it is not liable to furnish security for costs in this matter.

This remains our client’s attitude.

Your request for security is therefore declined.’

[17] On 18 January 2018 Aecom delivered its plea and counterclaim. For present purposes it is only necessary to quote certain paragraphs

thereof. In its plea Aecom alleged that:

‘24.19 The plaintiff’s claim against the defendant in respect of the amounts reflected in IPCs 12, 13, 15 and 16 and final payment certificate number 38, plus interest on such amounts, is for the aggregate amount of R5,762,980.80 including VAT.

24.20 The defendant’s claim against the plaintiff in respect of the amounts reflected in IPC 17, IPC 30 to IPC 37, and final payment certificate number 38, is for the aggregate amount of R14,802,635.33 including VAT.

24.21 In the circumstances, the plaintiff’s claim against the defendant is extinguished by set-off.’

[18] In the alternative, Aecom pleaded that Good Hope repudiated an executory contract and cannot claim payment in terms of the interim payment certificates (IPCs). In its counterclaim, Aecom pleaded:

‘3. In the premises, the plaintiff is liable to the defendant in the sum of R9,039,654.53 including VAT (R14,802,635.33 including VAT as pleaded in paragraph 24.20 of the defendant’s plea, less R5,762,980.80 including VAT as pleaded in paragraph 24.19 of the defendant’s plea).’

[19] Good Hope thereafter delivered both a replication and plea to the counterclaim. Good Hope interprets Aecom’s plea and

counterclaim to mean that the only issue remaining in respect of its claim is whether Aecom owes it an amount in excess of R8 million or R1 466 760.61 or, put differently, whether at worst for Good Hope, Aecom is indebted to it in the latter amount. This, Good Hope contends, is a change in circumstances which supports the conclusion that its claim against Aecom can never be

regarded as vexatious. As far as Aecom's counterclaim is concerned, Good Hope submits that it is absurd that it should put up security for what is essentially a claim that Aecom wishes to pursue against it. This would defeat the object of security and enable unscrupulous

defendants to contrive to counterclaim large sums from a plaintiff and claim security on the strength thereof.

Discussion

[20] Good Hope's interpretation of Aecom's defence and counterclaim is misconceived. Its proceeds from the premise that,

taking the counterclaim into account, Aecom admits being nonetheless indebted to it in at least the sum of R1.4 million. But this is not Aecom's case. Its pleadings reflect that Good Hope's claim is completely extinguished by set-off and that after set-off has been applied, Good Hope is nonetheless indebted to it in the amount of R9 million including VAT. Moreover Aecom's

defence of set-off arises from the factual matrix relied upon by Good Hope and to this extent the two are inextricably linked.

[21] Contrary to what Good Hope now contends, it is clear from its attorney's letter of 12 October 2016 that, although Good Hope disputed Aecom's entitlement to security, it nonetheless offered such security 'in order to avoid any unnecessary litigation' in the amount of R25 000 'in a form determined by the Registrar'. If it was not consenting to security at all, it is difficult to conceive why its attorney pertinently went on to write that 'should your client disagree to this amount of security we have instructions to refer the matter to the Registrar of the Court for determination in terms of rule 47(2)'.

[22] Uniform rule 47(2) provides in no uncertain terms that:

'(2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.'

[23] It is clear from the correspondence that followed that Aecom accepted the amount of R25 000 tendered as security and that the only remaining dispute was the form that the security should take. Uniform rule 47(5) stipulates that:

'(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.'

[24] It is also clear from Aecom's application, which culminated in the order, that Aecom approached the court not only to order that security be furnished (in the agreed sum of R25 000) but also to determine the form and manner of such security.

[25] To my mind, Good Hope's assertion that the order imposed liability for security on its attorneys, and not itself, is

contrived. There can be no dispute that by that stage Good Hope's attorney had confirmed (on 30 November 2016) that Good Hope had paid 'R25 000 into our trust account as security for costs in this matter' and that it would be held in trust pending finalisation of the main action. There is also no suggestion by Good Hope's attorney that his firm at any stage undertook to furnish security for Good Hope's costs independently of its client, and it would indeed have been quite extraordinary for it to have done so in the knowledge of the potential risk to which it was exposing itself.

[26] Not only did the order determine that security be furnished, and its amount, it also determined the form and manner thereof. Nowhere in the order is it recorded that Good Hope disputed its liability to furnish security and was agreeing to the order without conceding that any amount or form of security should be provided, which it could easily have done. Moreover its attorneys were not a party to the application. That the application was withdrawn, with costs to be costs in the cause, is of no significance. Litigants often include a paragraph of this nature when a matter is settled, and it cannot detract from the order itself which exists despite such withdrawal.

[27] I am thus persuaded that Aecom was entitled, pursuant to the order, to approach the registrar to increase the amount of security in terms of rule 47(6) which provides that:

'(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient; and his decision shall be final.'

[28] Good Hope is not left without any remedy. Although the subrule stipulates that the registrar's decision is final, the court nonetheless has jurisdiction to review such decision. In *Trakman NO v Livshitz and Others*[1] it was stated that:

'The gist of the respondents' argument, as I understood it, was this: the review of the Registrar's decision was merely a procedural step in the main proceedings; an order by a Judge to furnish security for costs is not appealable (*Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990

(4) SA 196 (C) at 211G-212E); by parity of reasoning the grant or refusal of the review of the Registrar's decision should also not be appealable.

In my view this argument overlooks the essential nature of review proceedings. The Registrar's decision, being in the nature of an administrative act, was always susceptible of review provided the necessary grounds for review existed (*Pharumela and Others v St John's Apostolic Faith Mission of SA and Another* 1975 (1) SA 311 (T) at 313A). Any application for review would be a substantive one in its own right. The review proceedings were separate and distinct – they were not merely an extension or ancillary part of the main action. The Registrar, an indispensable party in such proceedings, was not a party to the main action. Roux J's order was intended to be definitive of the rights of all the parties to the review application, and to finally dispose of those proceedings in the Court a quo.'

[29] It was on this basis that the Appellate Division held the court a quo's dismissal of the review of the registrar's decision to be appealable. In addition, in *Legal & General Assurance Society Limited v Lieberum NO and Another*[2] it was held that a court may review a decision of the registrar, not only where he has acted mala fide or from improper motives, has not applied his mind to the matter or exercised his discretion at all, but also where it is satisfied that the registrar was clearly wrong in the amount he fixed; although it will interfere on this latter ground only when it is in the same or a better position than the registrar (taxing master) to determine the point in issue.[3]

[30] During argument Mr Engela, who appeared for Good Hope, also submitted that, if the order of 13 January 2017 was found to be one compelling Good Hope to furnish

security, then it was not properly granted, because the presiding Judge was not called upon to exercise his discretion. He relied on *Boost Sports Africa (Pty) Ltd v The South African Breweries (Pty) Ltd*[4] where the Supreme Court of Appeal considered whether, absent a provision similar to the repealed s 13 of the Companies Act 61 of 1973, an incola company can be compelled to furnish security for costs:

'[16] Absent s 13, there can no longer be any legitimate basis for differentiating between an incola company and an incola natural person. And as our superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings, it must follow that the former can at common law be compelled to furnish security for costs. Accordingly, even though there may be poor prospects of recovering costs, a court, in its discretion should only order the furnishing of security for such costs by an incola company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse.'

[31] However in *Department of Transport and Others v Tasima (Pty) Ltd*[5] the Constitutional Court held that under s 165(5) of the Constitution a court order is binding until set aside, irrespective

of whether it was validly granted. Orders wrongly granted are not nullities but exist in fact and may have legal consequences. In the present matter, Good Hope has not sought to impugn the order on this basis, it therefore continues to exist, and this is not an issue which I am required to determine.

[32] Mr Engela also relied on *Cooper v Mutual and Federal Versekeringsmaatskappy Bpk*, a decision of the former Orange Free State Provincial Division.[6] As the judgment itself is in Afrikaans, I will for convenience only quote from the headnote:

'Rule 47(3) is also applicable to applications for increased security in terms of Rule 47(6). One of the reasons is that, although a party may be liable and may admit liability for the initial provision of security, circumstances may change, so that he is no longer so liable, and he or she may deny liability when increased security is requested. Liability for the provision of security is not established once and for all, and does not obtain unassailably in the future, upon the initial

furnishing of security, but must be determined afresh with every application for the provision of security or increased security. This means that where, during an application in terms of Rule 47(6), there is a denial of liability to furnish increased security, the Registrar is not authorised to determine that dispute and to order an increase in security. In such circumstances the party who requires security is obliged to apply to the Court for an order.’

[33] In *Cooper* the court did not however refer to either *Trakman* or *Legal & General* (supra). If it is indeed incumbent upon a litigant, wherever a dispute arises under uniform rule 47(6) to first approach court for an order, then there would seem to be no purpose in the review and subsequent appeal procedures set out in *Trakman*, and neither would there be any purpose in the court of review having the wide powers which it does when considering the registrar’s decision.

[34] I respectfully disagree with what was held in *Cooper* and rather concur with the finding in *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd*, [7] a decision of this division, where it was held that:

‘In my view it is quite clear that the Registrar may in the circumstances set out in Rule 47(6) order an increase in security for costs without a preceding order of Court authorising him to do so... It seem immaterial to the authority of the Registrar to order an increase in the amount of security whether the security provided by a party in terms of Rule of Court 47 was provided on an uncontested basis and by consent of the party in compliance with a notice demanding security under Rule 47, or was provided pursuant to an order of Court compelling the party to furnish security. In both cases liability for security has been established...’[8]

[35] As pointed out by Ms Reynolds who appeared for Aecom, there is also nothing in the order of 13 January 2017 to suggest that the amount of R25 000 is a final one. She also submitted, correctly in my view, that it was open to Good Hope to have applied for rescission of the order which it has not done. Obviously, any such application would have to be determined separately on its merits.

[36] Given that the registrar is obliged to provide notice to interested parties (which it is common cause he did in the present matter) Good Hope is at liberty to make submissions before him for the purpose of enabling him to be satisfied that the amount originally furnished is no longer sufficient or otherwise.

[37] In *Banks v Henshaw*[9] it was held that in determining a fair and reasonable amount of security, a court is entitled and obliged to take into account the nature of the claim and counterclaim and the circumstances in which those claims arise. There is no reason why the registrar should be relieved of the same obligation.

[38] Further, in *Trakman No v Livschitz: In Re Livschitz v Trakman NO*[10] it was stated that:

‘The notional bills are far from skeletons. In any event the reason why the determination of the amount of security is referred to the Registrar is that the personnel in the Taxing Master’s office should have had considerable experience in the taxation of bills of costs and the determination of

the amount of security in terms of Rule 47(2); at any rate, those who would be entrusted with the function of carrying out the Court's direction would have such experience. From this experience they should be able to make a reliable estimate of the costs which will be involved up to the first day of a trial with reference to the issues appearing from the pleadings, the number of counsel which the case seems to warrant and the amount involved. The parties should be able to bring to the Taxing Master's attention any unusual or extraordinary features which would increase or decrease his or her prima facie estimate of the costs. The determination of the amount for which security is to be furnished should, insofar as possible, be entrusted to Taxing Masters who have sufficient previous experience in the quantification of costs.'

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

'The application is dismissed with costs, including any reserved costs orders.'

J I CLOETE

- [1] 1995 (1) SA 282 (AD) at 289E-H.
- [2] 1968 (1) SA 473 (AD) at 478.
- [3] At 478A-H.
- [4] 2015 (5) SA 38 (SCA).
- [5] 2017 (2) SA 622 (CC) at paras [180], [182] and [198].
- [6] 2002 (2) SA 863 (OPA).
- [7] 1990 (4) SA 196 (CPD).
- [8] At 207I-208D.
- [9] 1962 (3) SA 464 (D&CLD) at 467C.
- [10] 1996 (2) SA 384 (WLD) at 389H-390A.

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