

SOUTH AFRICA / JUDGMENT

Matthews N.O and Others v Thyne N.O and Others (20714/17) [2018] ZAGPPHC 30 (16 February 2018)

[2018] ZAGPPHC 30

COURT

North Gauteng High Court, Pretoria

BEFORE

N.M MAVUNDLA

CASE / FILE NUMBER

20714/17

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC
OF SOUTH AFRICA]

CASE

NUMBER:20714/17

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

DATE:16

FEBRUARY 2018

In

the matter between:

ROWAN
WAUCHOPE MATTHEWS N.O.
1ST PLAINTIFF

MATTHEWS:

ROWAN WAUCHOPE
2ND PLAINTIFF

MATTHEWS:

LYNN DELENE KILGOUR
3RD PLAINTIFF
MATTHEWS
: MARK ROWAN
4TH PLAINTIFF

MATTHEWS: BIANCA ROSE
5TH PLAINTIFF

MATTHEWS: ELIZABETH TALLULAH
6TH PLAINTIFF
And
WILLIAM
HERBERT HUNTER THYNE N.O.
1St DEFENDANT
PSG
WEALTH FINANCIAL PLANNING (PTY) LTD
2ND DEFENDANT
RONALD
NORMAN KING N.O.
3RD DEFENDANT
MICHAEL
BRIAN MATTHEW N. O.
4TH DEFENDANT

KING: RONALD NORMAN
5TH DEFENDANT

MATTHEW: MICHAEL BRIAN
6TH DEFENDANT

WARD: HELEN.
7TH DEFENDANT
THE
MASTER OF THE HIGH COURT: PRETORIA.
8TH DEFENDANT

JUDGMENT

MAVUNDLA, J.

- [1] The sixth defendant, as the applicant brought an application for security for costs against the first, third, fourth, fifth and sixth plaintiffs, as the respondents, in terms of Rule 47(3), and claiming that pending the filing of such security for costs the main action of the plaintiffs' be stayed. Needless to state that, he also seeks a costs order against the aforesaid plaintiffs. For ease of reference the parties are referred to as cited in the main claim.
- [2] The sixth defendant, as applicant, claims the amount of R500 000. 00 (five hundred thousand rand) in respect of security for costs, which amount he believes to be reasonable for the following reasons:

2.1 the nature and complexity of the main action involves several legal disputes and will necessitate protracted litigation; and

2.2 the quantum of the main action, being R1, 886, 779. 62 (One Million, Eight Hundred and Eighty Six Thousand, Seven Hundred and Seventy Nine Rand and Sixty Two cents) justifies the legal expenses.

- [3] This application for security for costs, is in my view a "breeder twis", it reveals the strained relations between two brothers, namely the second plaintiff and the sixth defendant, over a golden- nest their late father left them, in the form of a family trust known as Brian Mathews Trust. Both the second plaintiff and the sixth defendant are trustees and beneficiaries of the aforesaid trust. The sixth defendant, has directed his anger not only towards his brother, but also the latter's wife (third plaintiff), their son (fourth plaintiff) their two daughters (fifth and sixth plaintiffs). What raised the sixth defendant's ire, is their temerity to accuse him of having dipped his hand in the golden-nest and removed one of the golden-eggs in the amount of approximately R2 million and demanding that he returns it to the nest (unauthorised disposition of the trust's assets).
- [4] The sixth respondent, embarrassed on being discovered, he denied the accusations, with tongue in cheek tendered to return to the nest an amount of R40 000. 00 (paragraph 30.2 of his plea). Still fuming, he unleashed in terms of rule 47(3) this application for security for costs contending that the third, fourth, fifth and sixth respondents are peregrines of Australia, as such they must deposit an amount of R500 000. 00 before they proceed further with the action. In the event of their action being unsuccessful, he would not have to follow them off-shore, to unknown territory to recover his costs. In this demand for security for costs, the sixth defendant has difficulty in making the same demand against the second plaintiff, for the reason which will follow, but still insisting that the first plaintiff should also pay security.
- [5] Section 34 of the Bill of Rights of the Constitution of the Republic of South Africa, Act 108 of 1996, guarantees everyone the right to access the courts to have their disputes adjudicated by the courts, inter a/ia. Section 9(1) of the Constitution provides that: "Everyone is equal before the law and has the right to equal protection and benefit of the law." In the matter of *Tshwane City v Link Africa*[1] the Constitutional Court held that: "The objects of the Bill of Rights are to be found in the rights guaranteed by it and the values underlying those rights. This means, in the process of interpreting s22 of the Act, we must pay regard to rights in the Bill of Rights "which may be affected by the meaning assigned to the section and settle for a construction that advances those rights."
- [6] The general rule, with regard to security for costs, in terms of common law is that an incola plaintiff cannot furnish security before he can litigate, vide *Alexander v Joki and Others* 1948 SA 269 at 272-273. The right to access to court is not absolute. It can be limited or tempered with if it is just and reasonable and equitable. Indeed section 36 of the Constitution provides for limitation of rights enshrined in the Bill of Rights.

[7] Rule 47(3) of the Rules of the High Court afford a litigant the right to approach the Court for an order that security be furnished. The Court has discretion to grant such an order. In the exercise of its discretion the Court must have regard to the circumstances of that particular case, and without pre-judging the relevant main case, determine the nature and extent of the security and the need to protect the applicant and also guard against an injustice committed and ensure that justice is not denied, vide *Africair (Rhodesia) Ltd v InterOcean Airway*[2] where Buchanan J in *Schunke v Taylor & Symans*, 8 SC at 103 is cited. The Court must balance the respective interest of the parties having regard to the consideration of equity and fairness when deciding whether security for costs must be furnished; vide *Klerk NO SA v SA Metal & Machinery Co (Pty) Ltd* .[3]

[8] In the matter of *Siemens Telecommunications v Dataenics* [4] Fabricius J after a thorough research, with respect, on the genesis of 'security for costs' held as follows:

"[5] It is clear that rule 47 does not create any rights for an applicant for security for costs. It is solely and purely procedural in kind. It only provides for the procedure to be adopted if a party is 'entitled' to security for costs. ...

[6]... Under the common law an incola company could not be compelled to give security for costs at all. In *Witham v Vendables* (1828) 1 Menzies 291 the following was said:

'(N)o person, who is either civis municeps or incola of tis colony, can as plaintiff, be compelled to give security for costs, whether he be rich or poor, solvent or insolvent; and on the other hand, that every person, who is neither civis municeps, nee incola, may, as plaintiff be called on to give security for costs, unless he prove that he is possessed of immovable property situated within the colony.'

This dictum clearly indicates that incolae cannot be compelled to give security for costs. A perigrinus could under certain circumstances, however, be so called upon."[5]

[9] In the matter of *Sharenisa and Others v Minister of Safety and Security and Another*[6] Matlapeng AJ held as follows:

"The law is settled that a perigrinus may be called upon to give security for costs. Where there is a dispute regarding a person's status, a two stage approach is taken to resolve it. The first stage is to determine whether a person is a perigrinus or incola. If it is found that such a person is a perigrinus, the next stage is whether the court will exercise the discretion which it has to absolve him or her from the obligation to give security."

[10] In exercising its discretion, the court should be extremely wary in closing the door of the courts to any litigant entitled to approach a particular court; vide *Standard Credit Corporation Ltd v Betser and Others*[7] The court shall have regard to all the circumstances and consideration of equity and fairness to both parties, and decide whether the peregrines should or should not be absolved in furnishing security. Vide *Magida v Minister of Police*[8]

[11] I now consider the respective plaintiffs from whom security for costs is demanded:

8.1 Starting with the second plaintiff: It is common cause that he is resident in Perth, Australia; a 50% shareholder, via his nominee company (Wauchope and Kilgour (Pty) Limited, an entity by the name of MERB {Pt y} Ltd ("MERB") which is a South African registered and located company; He from time to time comes to South Africa;

8.2 MERB in turn is a 100% shareholder of, and in effect a holding company for the shares in, Douglasdale Dairy (Pty) Ltd ("Douglasdale Dairy" situated in Douglasdale, Sandton, South Africa. The second plaintiff is a director of both MERB and

Douglas Dairy, and indirectly a 50% shareholder of these entities.

8.3 It is not disputed that the sixth respondent tried to exit MERB and in turn Douglasdale and valued his 50 % interest in both these two entities to be R65, 000, 000, 00 (sixty-five million rand), and by parity of reasoning so too is the value of the second plaintiff's 50% interest in both the aforesaid entities;

8.4 The second plaintiff also has un-mortgaged immovable property situated at Douglasdale Farm valued at R7.4 million;

8.5 From time to time he comes to South Africa to attend to his business interest;

8.6. He is, suing also as the first plaintiff in his capacity as the trustee of the family trust.

[12] The third plaintiff and adult female, is married to the second plaintiff and resides in Australia. The fourth plaintiff, an adult male, fifth and sixth plaintiffs, both adult females are receptively the son and daughters of the second and third plaintiffs. It is common cause that all the aforesaid plaintiffs reside in Australia and are therefore peregrines.

[13] All the plaintiffs have sued Jointly and severally. This means that in the event any adverse costs order is made against them, they shall be jointly and severally liable for such costs order. The sixth respondent contended nonetheless, that the question of the locus standi of the third to sixth plaintiffs is still an issue; were it to be found that they do not have any locus stand/ then they shall be held liable, not jointly and severally but in their individually capacity and therefore they must be ordered to pay security for costs. Without prejudging the issue of locus standi of the other plaintiffs, suffice to point out, it is trite, that trustees are duty bound to protect the interest of the family trust

which can only speak through its trustees and take action against a delinquent trustee, such as the sixth defendant in casu, to demand restoration of the trust's assets; vide Bafokeng Tribe v Impala Platinum Ltd and Others;[9]Graham v Park Mews Body Corpo rate.[10]

[14] The onus of persuading the court that security should be provided, rest with the applicant. It is not necessary that a detailed investigation of the merits of the main action should be undertaken, but the court nonetheless should have regard to the essential and salient averments therein; vide Zietsman v Electronic Media Network Ltd and Others. [11]

[15] In the matter of Northbank Diamonds Ltd v FTK Holland BV and Others[12] it was held that where one or more of applicants are able to pay order of costs made jointly and severally, any possible prejudice to respondent of not being compensated for its costs is removed. The Court is entitled to consider the overall financial position of the applicants and their pulled resources of all the applicants.

[16] The second plaintiff although he is a perigrinus, is undoubtedly possessed of substantially means and interests which are situated in this country. The other plaintiffs are his wife and children also perigrines of Australia. The second plaintiff from time to time comes to South Africa to attend to his business interest. The sixth defendant is very much aware of the means and interests of the second plaintiff in this country, and can easily lay his hands through the hands of the law, upon such interest. It is unlikely that such interest can be spirited out of this country by the second plaintiff without the sixth defendant not becoming aware thereof. Besides, some of the other plaintiffs are beneficiaries in the family trust. In the event of the costs having to be paid, not jointly and severally by those beneficiaries to the trust, their respective

beneficiary Interest can be attached. But the second respondent says whatever costs awarded against the other plaintiffs can be retrieved from him, although he has not offered to stand security in that regard.

[17] There is a serious allegation levelled against the sixth defendant by the plaintiffs, namely that he has dipped his hands in the family trust. In this regard I only need to bear in mind the fact that the sixth defendant has offered to pay R40, 000. 00 (forty thousand rand to the family trust, although he denied the rest of the accusations as contained in main application. This olive branch he waived is enough to persuade me that the action brought by the plaintiffs cannot be said to have been vexatious or reckless and amounts to abuse of the court process. On the contrary, in my view, the action was not vexatious but bona fide brought to retrieve what is believed to have been syphoned out of the family trust by the sixth defendant; vide Ramsay NO and Others v Maarman NO and Another[13]. To demand of the plaintiffs to deposit security for costs, in the light of serious allegations of pilfering by the sixth defendant,

would do injustice to the family trust, which, its interest as trustees and beneficiaries, they are duty bound to strive to protect;

vide Harris v Rees[14] These factors outweigh the interest of the sixth defendant, who, if a costs order is awarded in his favour, can still attach such interest of the second plaintiff to be found in the country; vide Shepstone & Wylie v Geyser N.O[15]

[18] In the premises, in the exercise of my discretion, I come to the conclusion that the plaintiffs should be absolved from paying any security for costs and that the sixth defendant's application should be dismissed with costs.

[19] I do not agree with the submission made on behalf of the sixth defendant, which went against his own motivation for the security for costs, (vide para [2] supra) that the matter was not complex, did not warrant the employment of senior counsel and a junior. It is not the complexity of the matter that decides the employment of the stature of counsel, but the importance and value of the interest sought to protect. There are various beneficiaries to the family trust which is by all account substantial, to all parties concerned. I am of the view that the plaintiffs were justified in employing the services of two counsels and accordingly entitled to the concomitant costs thereof as well.

[20] In the result the application for security for costs by the sixth defendant is dismissed with costs inclusive the costs of employing the services of two counsel.

N.M MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE

06 FEBRUARY 2018.

DATE OF JUDGMENT

16 FEBRUARY 2018.

PLAINTIFFS' ADV

M, NOWITZ S.C.

INSTRUCTED BY

STEVE MERCHAK ATTORNEY

6TH RESPONEDNT'S ADV

MICHAEL R MELLENS SC, with

ADV GR GORY W. AMM

INSTRUCTED BY

SCHINDURS ATTORNEYS

[1] 2015 (6) SA 440 (CC) at 453.

[2] SA 1964 (3) SA 114 at l 18 D- E

[3]

[2001] ALL SA 266E.

[4] 2013 (I) SA 65 (GNP) at 69.

[5] Vide Van Zyl v Euodia Trust (Pty) Lid 1983

- [3] SA 394 (TPA) at 396 D-E
- [6] 92394/ 2009) [2010] ZAFSI-JC 149 (25 November 2010),
- [7] 1987 (I) SA 812 (WLD) at 820J.
- [8] 1987 (1) SA 1 (AD) at 1 SD.
- [9] 1999(3) SA 517 (BHC) at 548 A, 549C-J.
- [10] 2012 (I) SA 355 (WCC) at 360C-G.
- [11] 2008 (4) SA I (SCA) at para21.
- [12] 2003 (1) SA 189 (NmS).
- [13] 2002 (6) SA 159 (CPD) at 173 H-J.
- [14] 2011 (2) SA 294 (OSJ) at 294 at 294 at 297 F-J.
- [15] 1998 93) SA 1036 (SCA) at 1046B

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