

SOUTH AFRICA / JUDGMENT

Montcommerce v Murray and Roberts Limited (020727/2023) [2024] ZAGPJHC 402 (12 March 2024)

[2024] ZAGPJHC 402

COURT

South Gauteng High Court, Johannesburg

BEFORE

Maier-Frawley

CASE / FILE NUMBER

020727/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
CASE
NO: 020727/2023
1.

Reportable:

No
2. Of
interest to other Judges: No
3.
Revised
12
March 2024
In

the matter between:

MONTCOMMERCE
d.o.o
Plaintiff
and
MURRAY
AND ROBERTS LIMITED
Defendant

JUDGMENT

MAIER-FRAWLEY J:

1. This is an interlocutory application in terms of which the defendant seeks an order that the plaintiff furnish security for its costs in the sum of R2 million (or such amount as determined by the Registrar of Court) in the pending action instituted by the plaintiff against the defendant. It is common cause that the plaintiff is a foreign peregrinus which is registered in and operates from Croatia.
2. The plaintiff's claims in the pending action are predicated on the provisions of a written Service Level Agreement ('SLA')

concluded between the parties.[1] The plaintiff claims payment of amounts owing, but unpaid, in respect of services rendered[2] and expenses incurred by it,[3] as well as for the repayment of retention amounts held by the defendant in respect of various invoices, which have, save for the retention amounts reflected therein, been paid by the defendant. It is common cause on the pleadings that these retention amounts represent 10% of the value of certain invoices rendered by the

plaintiff to the defendant. The aggregate total value of retention amounts that are payable to the plaintiff is alleged to be approximately R1.3 million.

3. It is not in dispute that services were rendered and expenses incurred by the plaintiff pursuant to the parties' implementation of the SLA, also, that the defendant has not paid the contractually agreed retention amounts. However, in its plea, the defendant has denied liability to pay any of the amounts claimed by the plaintiff, alleging, amongst others, that it is excused from doing so on account of the alleged sub-standard or defective quality of the works performed by employees who had been recruited by the plaintiff, which defects required remedial work at substantial cost to it, in consequence whereof the defendant has suffered damages. It has therefore instituted a conditional counterclaim for damages,[4] the amount of which, once liquidated, it seeks to set-off against any payments it may be found to be liable to pay to the plaintiff. In addition, it has raised a special plea of prescription in respect of three of the plaintiff's claims, and various other special pleas, one of which comprises a technical objection based on alleged irregularities pertaining to the summons; another of which is tantamount to an exception, referring as it does to excipiable matter in the particulars of claim; and another which seeks a stay of the proceedings and enforcement of an arbitration clause in the SLA. The plaintiff filed a replication in the action in which it contested the merits of the special pleas. The plaintiff further raised a special plea of prescription to the defendant's counterclaim.
4. The demand for security for costs is predicated upon the defendant's apprehension that the plaintiff will be unable to satisfy any costs order made against, on grounds that: (i) the plaintiff is a foreign company (ii) who has no fixed address and owns no assets or

immovable property within this court's jurisdiction or the Republic of South Africa and because (iii) in the defendant's view, the plaintiff's pleaded claims are frivolous or vexatious or lack merit, in contrast to the defendant enjoying 'substantial prospects of success' in resisting payment to the plaintiff, whether on account of the plaintiff's alleged breach of its obligations under the SLA or by virtue of the defendants' counterclaim in an amount exceeding the plaintiff's claims or because the plaintiff's claims have prescribed.

5. In its response to the defendant's rule 47 Notice, the plaintiff contested its liability to provide security (or defendant's entitlement to security) as well as the amount of security claimed by the defendant, for the following reasons: (i) it denied any inability to pay costs, asserting that the defendant's apprehension in that regard was groundless and speculative (the implication being that it would be able to satisfy any costs order granted against it); (ii) the defendant is not per se entitled to security merely because the plaintiff is a foreign peregrinus who does not own property in the Republic of South Africa; (iii) the contention that its claim is frivolous or vexatious or lacks merit is groundless and lacks merit in law or fact; and (iv) the defendant is holding retention money belonging to the plaintiff, to the value of approximately R1,367,945.90 and is thereby sufficiently safeguarded in regard to its costs.
6. In its founding affidavit filed in these proceedings, the defendant persists with its contention that the plaintiff's status as a foreign peregrinus obliges it to furnish security for costs 'on that basis alone'. The defendant further contends that the plaintiff has failed to provide any evidence of its means and resources in support of its implicit stance that it would be able to satisfy any costs order granted against it. The defendant avers that the costs to be incurred in the matter will likely be substantial, given the technical complexity of the matter (both in respect of the claim and counterclaim) and 'the prospective need to deal with foreign witnesses.'^[5]
7. In the answering affidavit, the Plaintiff alleges that it is a mid-size company registered for engineering, mechanical and piping works in various industry sectors. It was established in 1996. Details of the plaintiff's work experience are depicted in annexure 'AA1' to the answering affidavit, which records, amongst others, the plaintiff's client list and projects it has worked on, including work done on behalf of the defendant.
8. The plaintiff contends that the defendant's pleaded defences (and counterclaim) do not enjoy prospects of success and are moreover not bona fide or inherently probable on account of the defendant's inaction and failure to notify the plaintiff, prior to the delivery of the plea and counterclaim, of its complaints against the plaintiff or the employees recruited by it (the 'recruits') to meet the required standards and/or specifications in terms of skills and qualifications decreed by the SLA or of the performance of sub-standard work by recruits. The defendant also did not notify the plaintiff of any need 'to undertake extensive remedial works at substantial cost to it' arising from the alleged defective or sub-standard work, including the nature and extent of any damages allegedly sustained by it as a result of the alleged breaches by the plaintiff of its obligations under the SLA.

Discussion

9. The defendant proceeds from the premise that the plaintiff's status as a foreign peregrinus obliges it to provide security to cover the defendant's costs in the event that the defendant succeeds in its defence and/or counterclaim

at trial. This position is presumably adopted based on dicta[6] in the case of *Exploitatie* -[7], where the following was said:

*“The appellants sought to avoid the general rule of practice that a peregrinus should provide security for an incola's costs by relying on the judgment in this court in *Magida v Minister of Police*, in which an impecunious peregrinus was excused from providing security, and making the bald and unsubstantiated averment that the appellants —*

‘. . . will be unable to furnish security for costs, due to the (respondent) failing to honour his debts towards them the (appellants) are hardly in a position to finance their own costs . . .!’ (footnotes omitted)

10. In *Exploitatie*, the appellants had pleaded poverty, on the one hand, whilst alleging, on the other hand, that the respondent would have no difficulty in recovering a costs order by suing them in Europe. The court held that the appellants could not have it both ways. If their financial status was relevant to the question of security, it was incumbent upon them to take the court into their confidence and make sufficient

disclosure of their assets and liabilities to enable the court to make a proper assessment thereof in the exercise of its discretion.

The court expressed the view that ‘[i]n the case of the first appellant, a private company, this is generally done by disclosing

its current balance sheet.’

11. The case of *Exploitatie* is distinguishable on its facts. In the present case, the plaintiff did not plead poverty, nor did it suggest that an order for security for costs would preclude it from pursuing its claims. The plaintiff denied that it is unable to meet any adverse costs order. In this regard, the plaintiff specifically relied on the defendant's failure to make out a case in support of the principal basis upon which it seeks security for costs, namely, its ‘apprehending that the plaintiff will be unable to satisfy any costs order made against it’, thereby obviating the need for it to put up any evidence of its financial position. In other words, the plaintiff argues that the defendant has failed to make out a *prima facie* case, in the absence of which it (the plaintiff) has no case to meet.[8]

12. In *Giddey*,^[9] the Constitutional Court approved of the balancing exercise proposed by the Supreme Court of Appeal in *Shepstone & Wylie's case*^[10] (adopted from the English case *Keary Developments Ltd v Tarmac Construction Ltd and Another*) namely, the need to balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against the potential injustice to a defendant who successfully

defends the claim, and yet may well have to pay all its own costs in the litigation. On how to perform the balancing exercise, the court had this to say:

“To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An applicant for security will therefore need to show that there is a probability that the plaintiff company will be unable to pay costs. The respondent company, on the other hand, must establish that the order for costs might well result in its being unable to pursue the litigation and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospects of success. Equipped with this information, a court will need to balance the interests of the plaintiff in pursuing the litigation against the risks to the defendant of an unrealisable costs order.”^[11]

Relevant considerations in performing this balancing exercise will include the likelihood that the effect of an order to furnish security will be to terminate the plaintiff's action; the attempts the plaintiff has made to find financial assistance from its shareholders or creditors; the question whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff; as well as the nature of the plaintiff's action.”^[12] (emphasis added)

13. Although each party disavows the merits and strength of the other's pleaded case in these proceedings, such disavowal is based on the untested say-so of the respective deponents. Although the plaintiff has set out reasons for doubting the genuineness of the defendant's defences and counterclaim in the pending action, and although the defendant has not dealt with such allegations specifically or substantially (contenting itself rather with a generalised denial in respect of allegations not specifically dealt with in reply), it is neither practicable nor appropriate for me make an assessment of the parties' prospects of success in the action^[13] on the basis of untested or unsupported allegations in these proceedings.
14. Significantly, the defendant itself specifically avers that ‘the merits of the matter are contained in the pleadings and are not to be adjudicated herein’. In other words, the defendant contends that these proceedings are not the appropriate forum for determining the veracity of the parties' disputes as ‘a determination of the merits is for the court in the main action.’ In the replying affidavit, the following is further said:

“The plaintiff... seeks to adduce matters for consideration that should be placed before the Honourable Court in the main action and not this application...I addressed such issues in the manner I did in the founding affidavit not to detract from the purpose of these proceedings and not [to] unclearly (sic) burden this court with a determination of the merits which is for the Court in the main action.”

15. Given the defendant's aforesaid approach, it is hard to conceive how this court can make any determination that the plaintiff's action is either frivolous, vexatious or without merit, being one of the grounds relied upon by it for its apprehension that the plaintiff will not be able to meet a prospective costs order. That effectively neutralizes the third ground relied on by the defendant for seeking security for costs.
16. Ultimately, the onus is on the party seeking security to persuade a court that security should be ordered.[14] The plaintiff contends that the defendant has failed to meet the required threshold for relief, firstly because it failed to even make out a prima facie case for its primary contention that it has a reasonable apprehension that the defendant will not be able to satisfy a prospective costs order that may be made against it in respect of the defendant's various defences or its counterclaim, the essential contention being that the defendant failed to lay a factual

foundation for its apprehension and the plaintiff's inability to pay and secondly, because it entirely failed to establish any one of the three grounds upon which it relied for its alleged reasonable apprehension. The defendant, on the other hand, contends that its onus is to make out a prima facie case which requires no more than for it to say 'I reasonably apprehend'. This contention does not, however, accord with higher authorities on the subject.[15]

17. In *Mystic River*, [16] the Supreme Court of Appeal made it clear that 'security for costs is a discretionary remedy that a court may grant to a defendant who has a reasonable apprehension that the plaintiff will not be able to pay the costs of litigation if the plaintiff's claim fails. An incola is not, as a matter of course, entitled to demand security from a peregrinus claimant. It is at the discretion of the court to make such an order after an investigation of the circumstances and if equity and fairness to both litigants dictate that such an order be made. There is no justification for requiring the court to exercise its discretion in favour of a peregrinus only sparingly.' (emphasis added) That effectively disables the first ground relied on by the defendant for seeking security for costs.
18. As regards the second ground relied on by the defendant for requiring security for costs, it is not disputed that the plaintiff owns no immovable property in South Africa. Its entitlement to (and ownership of) retention monies that have been withheld by the defendant, is in dispute. That does not mean, however, that the plaintiff does not own assets or that it lacks funds overseas with which to settle any potential costs order that may be made against it. The prevailing Rand-Euro exchange rate will certainly inure to the benefit of the plaintiff, should any costs order be made against it.
19. In performing the balancing exercise referred to in *Shepstone & Wylie*, the following circumstances are relevant:

19.1. Other than the plaintiff not owning immovable property and having no fixed address in this country, the defendant has put up no evidence or primary facts in support of what remains a bald and unsubstantiated averment that the plaintiff will not be able to satisfy any costs order made against it. It has not shown that there is a probability that the plaintiff company will be unable to

pay costs, whether because of financial difficulties being experienced by the plaintiff or because it the plaintiff lacks financial liquidity to pay any costs order as it falls due. When all is said and done, the plaintiff's position is that the defendant's alleged apprehension that it will not be able to satisfy any costs order made against it, is speculative and groundless (i.e, lacks evidential foundation) and is hence unreasonable;[17]

19.2. On the other hand, the plaintiff has not pleaded poverty. Nor has it complained that an order of security might well result in its being unable to pursue the litigation. It has also not expressly said that if an award for security for costs is made, the company will not be able to furnish it. It has however alluded to the fact that it has been trading for some 28 years, implying its financial stability or, at the very least, its financial ability to continue trading if a costs order is made against it. The brochure on which the plaintiff relied in this regard was utilized to illustrate that the plaintiff has remained in business – that it is not a fly-by-night company. On the other side of the scale, if no security is ordered and there is an unpaid cost order against the plaintiff, the defendant may possibly face inconvenience, delay and additional costs involved in enforcing same in a foreign jurisdiction.[18]

19.3. The plaintiff has averred that the defendant's defence and counterclaim for damages lacks bona fides for reasons provided in the answering affidavit. It has also set out the various attempts and demands it made to obtain payment (which were essentially ignored by the defendant), which signifies that it made a concerted effort to avoid litigation. Perhaps more significantly, it points toward the necessity and importance of the litigation to the plaintiff. Since the defendant has chosen not to substantially engage with these allegations, I will accept them in rebuttal of the suggestion by the defendant in its rule 47 notice that the plaintiff's claim is frivolous and/or vexatious.

19.4. The plaintiff states that its claim for payment of retention monies concerns only 10% of all invoices already paid by the defendant, save for the outstanding retention amounts. The defendant has in its possession, retention monies to the value of approximately R1.3 million. If the invoices rendered for services performed were indeed paid (except for the retention amounts), this would prima facie cast doubt on why the retention monies were then withheld from payment, especially at a time when no complaints of defective workmanship were made by the defendant or any other time prior to the institution of action against the defendant. Be that as it may, the plaintiff asserts that these monies, which are allegedly due, owing and payable to the plaintiff, are being retained by the defendant, which ought to sufficiently safeguard the defendant. The defendant asserts the contrary – that the monies are not payable due to defective workmanship – thus they cannot be thrown in the mix as a factor to be taken into account in this matter. The evidence either way is in my view equipoised.

20. Ultimately, in determining an application for security for costs, a two stage approach is applied. First, the defendant must discharge the onus of establishing a factual basis for its apprehension that that the plaintiff will not be able to pay the defendant's costs. That means

that the defendant must demonstrate, on a preponderance of probabilities, by credible testimony, an inability on the part of the plaintiff to pay any costs order that may be ordered against it in the pending action.[19] Second, once such a case is made out, considerations of fairness and equity will be considered in the exercise of the court's

discretion.[20]

21. The defendant has not crossed the hurdle of demonstrating a lack of financial ability on the part of the plaintiff, nor has it provided a factual foundation for an inference of financial inability to be drawn. I am accordingly not persuaded that the defendant has met the required threshold[21] for entitling it to the payment of security for costs.
22. The general rule is that costs follow the result. I see no reason to depart therefrom.
23. Accordingly, for all the reasons given, the following order is granted:
 1. The application is dismissed with costs.

AVRILLE MAIER-FRAWLEY

JUDGE OF THE HIGH COURT,

Date of hearing: 12 March 2024

Judgment delivered 12 April 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 12 April 2024.

APPEARANCES:

Counsel for Defendant: Adv D Hodge

Instructed by:

Tiefenthaler Attorneys Inc

Counsel for Plaintiff:

Adv T Ossin

Instructed by:

Lize-Marie Joubert Attorneys

- [1] As appears from the SLA, the project at which the employment candidates of the plaintiff rendered their services as employees of the defendant was the SAPPI Vulindlela Project for which the defendant was appointed by its employer SAPPI Saiccor to execute the boiler recovery project. Employees to be recruited by the plaintiff were defined in the SLA as 'the suitably skilled and qualified foreign nationals recruited by the [plaintiff] in Croatia or any other country as may be required from time to time in accordance with the Approved

Requisition and approved by [the defendant] in writing to render their services to [the defendant] at [the SAPPI Vulindlela Project situated in Umkomaas]

- [1] As appears from the SLA, the project at which the employment candidates of the plaintiff rendered their services as employees of the defendant was the SAPPI Vulindlela Project for which the defendant was appointed by its employer SAPPI Saiccor to execute the boiler recovery project.

Employees to be recruited by the plaintiff were defined in the SLA as 'the suitably skilled and qualified foreign nationals recruited by the [plaintiff] in Croatia or any other country as may be required from time to time in accordance with the Approved Requisition and approved by [the defendant] in writing to render their services to [the defendant] at [the SAPPI Vulindlela Project situated in Umkomaas]

- [2] The plaintiff would provide to the defendant the service of recruiting employees in Croatia or any other country, to perform construction

related work, as may be required by the defendant from time to time. The said employees would be recruited for purposes of rendering

services to the defendant at the Project.

- [3] Expenses included, amongst others, the cost of airfare in order for employees recruited by the plaintiff for the defendant to travel from their country of origin to the project whereat they were to work, and to return to their country of origin upon expiry of their employment, it being agreed that the plaintiff would make the necessary travel arrangements on behalf of the defendant for the employees and invoice the defendant for such costs.

- [4] I.e., conditional upon the defendant's special pleas being dismissed.

- [5] In this regard, the defendant alleges that the expert testimony of 'Quantity Surveying experts' "may be necessary for rectification and further remedial works and ancillary costs. This, as with any construction and engineering dispute, will be time consuming, technical and accompanied by the concomitant high costs associated therewith."

- [6] 'Dicta' meaning a statement that expresses a principle.

- [7] Exploitatie-En Beleggings maatschappij Argonauten 11 BV and Another v Honig 2012

- (1) SA 247 (SCA), par 18

- [8] This is because, says the plaintiff, the defendant has not demonstrated any probability that the plaintiff will be unable to pay a prospective costs order made against it.

- [9] *Giddey NO v JC Barnard & Partners*

- [2006] ZACC 13; 2007

- (5) SA 525 (CC), paras 8 and 30, albeit that the court was dealing with a request for security for costs in terms of the Companies Act, 1973, which vests a court with a discretion to order an incola company that institutes action to furnish security for costs if there is reason to believe that it will be unable to pay the costs of its opponent.
- [10] See: *Shepstone & Wylie & Others v Geyser* NO 1998
- (3) SA 1036 (SCA) at 1046B, citing with approval the English case *Keary Developments v Tarmac Construction Ltd and Another*
- [1995] 3 All ER 534 (CA) at 540a–b.
- [11] *Giddey*, par 8.
- [12] *Giddey*, par 30.
- [13] The pleadings in the action contain *facta probanda* (material facts) in support of the respective cases, not the evidence (*facta probantia*) that will be used to prove the material facts pleaded.
- [14] *Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd* (20156/2014) [2015] ZASCA 93 (1 June 2015), par 14. In par 19, the Supreme Court of Appeal approved of what had been posited by Griesel J in *Golden International Navigation SA v Zeba Maritime* 2008
- (3) SA 10 (CPD) at par 18, namely, that the ordinary yardstick – a preponderance of probability – should find application in an enquiry such as the present.
- [15] *Giddey*, cited above, fn 9 & fn 11; *Boost Sports* cited above, fn 14.
- [16] *Mystic River Investments 45 (Pty) Ltd and Another v Zayeed Paruk Incorporated and Others* 2023
- (4) SA 500 (SCA), par 7.
- [17] Put differently, the plaintiff's position is that its financial ability will only become a factor requiring rebutting evidence once its lack of ability is established as a probability by the defendant.
- [18] This must be viewed in the light of what was stated in *Schleyer v Marchall* 2021 JDR 2098 (GP) at at para 37 and *B&W Industrial Technology (Pty) Ltd and Others v Baroutsos*
- [2005] ZAGPHC 93; 2006
- (5) SA 135 (W) at par 38. I align myself with the views of the learned Judge In B& W and the learned Acting Judge as expressed in *Schleyer*.
- [19] *Schleyer v Marchall* 2021 JDR 2098 (GP) at paras 34-35 & par 37.
- [20] *B&W Industrial Technology (Pty) Ltd v Baroutsos*
- [2005] ZAGPHC 93; 2006

(5) SA 135 (W) at par 38

[21] I.e., to show that there is a probability that the plaintiff company will be unable to pay costs.

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