

SOUTH AFRICA / JUDGMENT

Sivraj v Caspian Freight CC (AR652/12)

[2014] ZAKZPHC 24 (13 May 2014)

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COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Steyn, Moodley, Mbatha

CASE / FILE NUMBER

AR652/12

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IN THE HIGH COURT OF SOUTH AFRICA

KWA-ZULU NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR652/12

DATE: 13 MAY 2014

In the matter between:

K Sivraj.....Appellant

And

Caspian Freight CC.....Respondent

J U D G M E N T

STEYN J

[1] The appellant appeals with the leave of the Supreme Court of Appeal of South Africa against the judgment and order of Madondo J in which he granted the following relief:

“(a) The respondent is directed to furnish the Applicant with security for costs in an amount to be determined by the registrar.

(b) That the proceedings under case no. 15342/2010 be stayed until such order has been complied with.

(c) That the respondent be ordered to pay the costs of the application.”

He further ordered that security be furnished in the form of a bank guarantee.

- [2] The appellant, Kiranchand Sivraj, is an adult businessman from Durban and accordingly an incola of the court. The respondent is a duly registered close corporation with its principal place of business at Phoenix Industrial Park, Phoenix.
- [3] In the application before the court a quo an order for security of costs was sought in terms of Rule 47(3) on the following three (3) grounds:
- (a) The appellant has poor prospects of being able to satisfy a costs order which might be made against him in the action;
 - (b) The appellant has poor prospects of success in the action; and
 - (c) The action is brought for an improper purpose and therefore amounts to an abuse of the process of court.
- [4] It is necessary, at this early stage of the judgment to state that this court in main will deal with the grounds listed under
- (a) and (b) since the court a quo was not satisfied that the third ground was substantiated, when it held:

“The last ground is that the action is brought for an improper purpose amounting to an abuse of the process. Well, in this case it is very difficult to say whether or not that is the case, regard being had to the history between the parties because there have been a plethora of proceedings between these parties in various forums. That will be determined by the Court which will be seized with the trial relating to the claims presently instituted by the respondent.” (Page 87 lines 22-25 and page 88 lines 1-3.) (My emphasis)

- [5] Mr Pillay, acting on behalf of the appellant, submitted that the evidence before the Court did not support any finding that the claim of the appellant was either reckless, vexatious or an abuse of the process. Accordingly, so it was argued, the Court ought not to have directed an incola to provide security of costs, in circumstances where it was not required to do so in terms of common law.
- [6] Mr Dutton, acting on behalf of the respondent, submitted to us in his written heads that there were strong grounds that supported and favoured the costs order. He inter alia listed the following grounds:
- (a) The plaintiff’s version was improbable, since Jappie J found that ‘it simply would not have made economic sense’ for the defendant to have hired the vehicle at a rate of R66 000,00 a month’. The improbability stems in large part from the fact that the vehicle was worth only in the region of R200 000,00.
 - (b) The case before Jappie J did not include the alleged profit-share which now forms part of the present action. The probabilities are even more remote with the inclusion of an extremely lucrative claim which was simply not pursued in the previous action.

- (c) In addition, there is not a shred of documentary evidence to support the plaintiff's version of the oral contract, whether by email, written confirmation of the contract or in any other form whatsoever.
- (d) The plaintiff has fundamentally changed his case. No claim for a profit-share or debatement of account was made in the first action. The claim is potentially enormous and it is highly unlikely that such a failure would have occurred had the profit-share agreement in fact been concluded.
- (e) The plaintiff's case on the aspect of the profit-share agreement is alarmingly inconsistent.
- (f) There was no allegation in the first action of amendments to the oral contract to the effect that the debt would only be payable on demand. An allegation appears to have been incorporated into the present claim in order to avoid the problem of prescription.
- (g) The defendant has previously had difficulty obtaining satisfaction of a cost order against the plaintiff.

In addition, when the matter was argued, he submitted that the Court a quo had regard to section 173 of the Constitution of the Republic of South Africa, 1996 and used its inherent power to regulate its own process when it made the order.

Legal Framework

- [7] Even though Rule 47 does not deal with the grounds upon which a court would grant a costs order, it is necessary for the sake of completeness to consider the procedure before we consider the merits of this appeal. Rule 47 of the Uniform Rules of Court provides as follows:

"47(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed and the amount demanded."

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

The general rule under common law is that an incola of the Republic would not be called upon to give security for costs. This has been recognised by Van Dijkhorst J in *Van Zyl v Euodia Trust* (Edms) Bpk 1983 (3) SA 393 (T) at 396C-D:

“Reeds in 1928 het die Kaapse Hooggeregshof in Witham v Venables Menz 291, na ondersoek van die ou skrywers, die gemeenregtelike reëls wat betref sekuriteit vir koste soos volg opgesom: ‘... that no person who is either civis municeps or incola of this colony, can, as a 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 nec 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.’”

The general principles regarding the furnishing of security for costs were unequivocally stated by De Wet JA in *Ecker v Dean* 1938 AD 102 at 111:

“The Court has inherent jurisdiction to prevent abuse of its process by staying proceedings or ordering security in certain circumstances, but as pointed out by Solomon JA in Western Assurance Company v Caldwell’s Trustee 1918 AD at 274 this power ought to be sparingly exercised and only in very exceptional circumstances.” (My emphasis)

[8] In *Zietsman v Electronic Media Network* 2008 (4) SA 1 (SCA) Streicher JA, at para 21, stated:

“I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party’s prospects of success would depend on the nature of the dispute in each case.”

[9] More recently in *Argentarius No. 1 (Pty) Ltd v South African Financial Exchange and Others* [2012] ZAGPJHC 136 (25 July 2012) at para 7 the court held:

“[I]t is only with great reluctance and utmost care that a court will order incolae in South Africa to provide security for costs.”

[10] In *Shepstone & Wylie and Others v Geyser* NO 1998 (3) SA 1036 (SCA) at 1045-1046, Hefer JA stated:

*“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 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.”

There 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.” (My emphasis)

[11] The approach that should prevail when an appeal is heard on an award for security of costs was emphasised by the Constitutional Court in *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC) when it held:

“[19] The ordinary rule is that the approach of an appellate court to an appeal against the exercise of a discretion by another court will depend upon the nature of the discretion concerned. Where the discretion contemplates that the Court may choose from a range of options, it is a discretion in the strict sense. The ordinary approach on appeal to the exercise of a discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above.

[20] The issue that arises is the proper approach on appeal to the exercise of discretion under s 13. That question was left open in *Shepstone and Wylie and Others v Geyser NO*. A discretion in the strict sense would require that, legally speaking, a court could properly come to different decisions as to whether to award security or not. In *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another*, Cloete J, after a comprehensive discussion of the issue, concluded that the discretion conferred by s 13 is properly construed a discretion in the strict sense which may only be interfered with upon appeal in narrow circumstances. In reaching this conclusion, he emphasised four factors:

‘(1) Section 13 is essentially concerned with costs – a matter invariably held to involve the exercise of a discretion in a narrow sense.

(2) When s 13 is combined with the provisions of Rule 47, as it must be to give it practical effect, the Court is regulating its own procedure by deciding not only whether a litigant should be ordered to provide security for costs – a decision which may be made, in terms of the section, ‘at any stage’ of proceedings (and therefore in *medias res*) – but also, where it grants such an order, whether the litigant should be allowed to proceed until such security has been provided. The regulation by a Court of its own procedure is also a matter usually held to involve a discretion in the narrow sense.

(3) The discretion requires in essence the exercise of a value judgment and there may well be a legitimate difference of opinion as to the appropriate

conclusion.

- (4) Appeals against the exercise of the discretion conferred by s 13 should be discouraged in the absence of some demonstrable blunder or unjustifiable conclusion on the part of the trial Court, otherwise the decision on the merits of a matter before the Court would be delayed by an appeal on an application which (to use the words of Innes CJ in Warner's case (supra) at 310) 'marks no stage in the progress of the case but is quite outside and incidental to it.'" (Original footnotes omitted.) (My emphasis)

[12] The Supreme Court of Appeal in MTN Service Provider (Pty) Ltd v Afro Call 2007

- (6) 620 (SCA) refers to the applicable approach as follows:

[15] To my way of thinking this line of approach is indicative of a fundamental misdirection, because it fails to recognise the crucial dissimilarity in the legal substructures on which the two different applications are based. Against an insolvent nature person, who is an incola, so it has been held, security will only be granted if his or her action can be found to be reckless and vexatious (see Ecker v Dean 1938 AD 102 at 110). The reason for this limitation, so it was explained in Ecker (at 111), is that the court's power to order security against an incola is derived from its inherent jurisdiction to prevent abuse of its own process in certain circumstances. And this jurisdiction, said Solomon JA in Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 274, 'is a power which ... ought to be sparingly exercised, and only in very exceptional circumstances'. (See also eg. Ramsamy NO and Others v Maarman NO and Another 2002 (6) SA 159 (C) at 173F-I.)

[17] What also seems to have been of concern to the Court a quo, was the possibility that a security order could effectively deprive Afro Call of the opportunity to proceed with its claim. Had that possibility been established, it would indeed have constituted a valid consideration. In fact, it is part of the balancing act expected from the Court when deciding whether or not to grant a security order. This is borne out, for example, in the following statement by O'Regan J in Giddey NO (in para [8]:

"The Courts have accordingly recognised that in applying s 13, they 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.'" (My emphasis)

[13] This Court is mindful of the fact that courts of appeal are reluctant to interfere with the exercise of a discretion by the court of first instance. It is also recognised for the purposes of dealing with this appeal that the Court a quo exercised a discretion in the strict sense. A court of appeal will generally not substitute its own discretion for that of the trial court, unless it is satisfied that the Court of first instance failed through misdirection, or otherwise, to exercise its discretion properly. (See MTN supra at para 9.)

The approach by the trial court

- [14] As alluded to earlier in this judgment the presiding Judge was not convinced that the application could succeed on the third ground and hence this appeal should succeed or fail on the issue of whether the Court was correct in its finding to award security of costs, based on the first two grounds of the application.
- [15] I shall now deal with each of the two grounds. Firstly, was there sufficient reason to believe that the appellant would not be able to pay the respondent's costs if it was unsuccessful? The first thing on the presiding Judge's mind in consideration of this ground was the background to the application. He considered that the appellant had instituted an action under case number 15342/10 for payment of the sum of R990 000, it being the total arrears for monthly rental of a truck and for one-third of the net profits earned by the transport division of the respondent's business. Reliance was placed on an oral agreement entered into by the parties on 15 September 2006. On 1 February 2008 the appellant also launched a claim for the payment of the sum of R990 000, being the total arrear monthly rental calculated on the date on which the vehicle was returned to the respondent. This last-mentioned matter was then heard by Jappie J and on the evidence he granted an absolution from the instance. In addition it was taken into account that the new action was based on the same facts as the previous one. He also considered the proceedings that preceded the new action. At first blush it appears that numerous actions preceded the action for which costs was applied, but when the proceedings are analysed one reaches a different conclusion. The appellant was successful in the majority of the actions, one was decided in his favour, (see Jappie J's judgment at 356); one resulted in absolution being granted; one was settled between the parties and one was dismissed by Jappie J on 19 November 2010. It also could not be ignored that in the action instituted under case 652/2012, the respondent lodged a counterclaim, which was withdrawn by it on 8 October 2010. In my view the background is of no consequence in the light that the Court a quo was not convinced that there was an abuse of process.
- [16] In the founding affidavit before the Court a quo, the following facts were relied upon to show that the appellant would not be able to satisfy a costs order. It was alleged that the appellant's inability to pay the costs of the taxed bill of costs showed that appellant lacks the necessary funds to pay an adverse costs order. In addition it was averred that appellant failed to satisfy the debt since there was a nulla bona return and that the respondent had to go to great lengths to get the appellant to satisfy the costs order. Reliance was then placed on the fact that the truck was not registered in the name of the appellant but in the name of Morningdew Trading 387 CC.
- [17] In his opposing affidavit the appellant however denied that he would not be able to satisfy any costs order. He averred that the respondent was indebted to him for an amount that was far in excess of the bill of costs, accordingly he exercised the choice not to pay the amount. The matter was then finally resolved on the basis of a set off. He also disputed the nulla bona

return. He averred that he has sufficient funds and property to satisfy any costs order. He also asked the Court a quo to consider the content of paragraph 36 of the founding papers which states that he has access to financial resources.

- [18] The nulla bona return has been considered by the Court a quo as a decisive factor on whether the appellant is able to satisfy a costs order. It held:

“I have mentioned that a nulla bona return was returned in another case where he has been ordered to pay the costs. That was a case between him and the applicant. So, it is not far-fetched that he could fail to satisfy the costs order, he had done it before.”

(See record page 89 lines 16-19.)

In my view the Court a quo has overlooked the fact that the appellant averred that he failed to pay a previous costs order because he intended setting it off against monies owed to him, furthermore that some time had lapsed since the nulla bona return and that the appellant attested to the fact that he has money to pay any adverse cost order. In reaching the conclusion that he should be able to furnish security if he has money is to ignore the fact that he is not obliged to furnish security of costs unless exceptional circumstances exist. To put it differently, affordability is to be distinguished from liability. In the present matter the appellant denied that he was liable for any security.

- [19] Particularly weighty to the decision that security should be ordered, was the finding by the presiding Judge:

“[T]he prospects of a successful action are too remote, regard having had to a similar claim in which an absolution from the instance was granted.”

(See record page 90, lines 7 to 9.)

- [20] The success or otherwise relate to the second ground and accordingly it has to be decided whether it was justifiable to decide that the prospects of success were remote given the fact that another court had previously granted absolution from the instance. In my view this factor per se should not have swayed the Court a quo in exercising its discretion in favour of the applicant. Absolution from the instance should not be equated to a dismissal of a claim.

- [21] The learned presiding Judge distinguished the present matter from the facts of *Crest Enterprises v Barnett and Schlosberg* 1986 (4) SA 19 (C) on the following grounds:

“Firstly, this case is distinguishable from what the learned judge said. The respondent is by no means impecunious on his own version. He has sufficient (sic) that is how he puts it. He has sufficient funds and property to satisfy any costs which can be awarded against him so he does not fall under this category of being an impecunious litigant, he is not.” (See record page 88 and 89.)

In my view the Court a quo wrongly discerned the principles as stated by Berman J. The learned Judge in *Crest* went further than just stating the principles. He also stated the grounds on which an incola should be ordered to provide security at 21A-B:

“... be required to furnish its opponent with security for the latter’s costs where the action which it (the trust) has launched is either vexatious or reckless or amounts to an abuse of the Court’s process.”

To discern from the Crest judgment that one set of rules should apply to an impecunious litigant and another to an affluent litigant would infringe upon a litigant’s right to have access to justice. (See section 34 of the Constitution of the Republic of South Africa, 1996.) Such access was certainly envisaged by Berman J, years before the Constitution specifically provided for such right, when he held:

“That applicants in this case may never be able to recover any part of their costs if they succeed in the action brought against them by or on behalf of the trust cannot in my view outweigh in the balance the inalienable rights of an incola to call in aid the due process of the law in pursuing his (or its) claim and neither he (nor it) should be effectively deprived of the right to access to this Court (or have any impediment placed in the way of the exercise of the right) upon the basis solely of an inability to pay the costs of the opposing party should he or it subsequently fail in the prospective proceedings.”

[22] Lastly, it is necessary to deal with Mr Dutton’s submission that the Court a quo was justified in making the award, since it would be entitled to do so in terms of s 173 of the Constitution. I disagree and it appears that the authors Van Loggerenberg and Malan share this view. See their recent article “Security for costs by local companies. Back to 1909 in the Transvaal, or not?” 2013 THRH 609 at 615 where they submit as follows:

“Under section 173 of the Constitution a High Court cannot use its own process to impair the existing substantive rights of a plaintiff. It can only protect and regulate its own process. Under the common law, which we submit now again prevails in respect of companies, an incola company qua company cannot be ordered to furnish security for costs, that is, an incola plaintiff company has an unimpaired substantive right to pursue legal proceedings. Should a High Court order such incola company to furnish security for costs, its rights will be impaired. This can only be done by the legislature creating exceptions to the common law or by a High Court in the development of the common law. It cannot be done by a High Court under its inherent power to protect and regulate its own process.”

[23] From the Court a quo’s reasoning as a whole, the conclusion has to be that it misdirected itself in taking into account considerations that were not factually correct nor exceptional, and that it therefore erred in exercising its discretion in favour of the respondent. In the result its ultimate decision to grant security of costs cannot be sustained and its order should therefore, in my view, be set aside.

[24] The following order is made:

- (i) that the appeal be upheld with costs, such costs to include the costs of the application for leave to appeal, both in the Court a quo and the Supreme Court of Appeal.
- (ii) the order of the court a quo is set aside and replaced as follows:
 - (a) The application for security for costs is dismissed.
 - (b) The applicant is directed to pay the respondent’s costs.

MOODLEY J : I agree.

MBATHA J : I agree

Appeal heard on : 25 April 2014

Counsel for the appellant : Mr IT Dutton

Instructed by : P Pillay & Company

Counsel for the respondent : Mr I Pillay

Instructed by : Edward Nathan Sonnenbergs

Judgment handed down on : 13 May 2014

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