

SOUTH AFRICA / JUDGMENT

Tayob v Lifestyle Furnishers CC (In Liquidation) (14835/2020) [2024] ZAGPPHC 1283 (29 November 2024) [2024] ZAGPPHC 1283

COURT

North Gauteng High Court, Pretoria

BEFORE

MPN Mbongwe

CASE / FILE NUMBER

14835/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 14835/2020

(1)

REPORTABLE: Yes/No

(2)

OF INTEREST TO OTHER JUDGES: Yes/No

(3)

REVISED.

DATE

29/11/2024

SIGNATURE

In

the matter between:

MAHOMED
MAHIER TAYOB
Applicant
And
LIFESTYLE
FURNISHERS CC (in Liquidation)
Respondent
LIFESTYLE
FURNISHERS CC
First
Plaintiff
SHIRISHKUMAR
JIVAN KALIANJEE N.O.
Second
Defendant
TRACY
HILL N.O.
Third Defendant
NURJEHAN
ABDOOL GAFAAR OMAR N.O.
Fourth Plaintiff
CHETAN
KUMAR VENILAL TANNA N.O.
Fifth
Plaintiff
MUHAMED
RISWAN ABOOBAKER
First
Defendant
MAHOMED
MAHIER TAYOB
Second
Defendant
MARK
GREGORY LAROS
Third
Defendant
MUHAMED
ZIAAN HOOSEN
Fourth
Defendant
ZAHEER
CASSIM N.O.
Fifth
Defendant
NAROTAM
GOVIND PATEL N.O.
Sixth Defendant
(in
their capacity as the joint trustees of insolvent Estate
Rizwan

Aboobaker with Master's Ref. T764/18)
MASTER
OF THE HIGH COURT
Seventh
Defendant
COMPANIES
AND INTELLECTUAL PROPERTY Eighth
Defendant
COMMISSION

JUDGMENT

MBONGWE J

INTRODUCTION

[1] This is an interlocutory application wherein the Applicant, Mr Tayob ("Tayob"), a business rescue practitioner, seeks an order in terms of Rule 47 that the First Respondent, Lifestyle Furnishers CC in liquidation ("Lifestyle"), pays an amount of R500 000 (Five Hundred Thousand Rand) as security for his costs in an action Lifestyle has instituted against him to recover the total debt of Lifestyle in the amount of R82 618 765.00

(Eighty Two Million Six Hundred and Eighteen Thousand Seven Hundred and Sixty Five Rand) for which Lifestyle seeks to hold Tayob liable in terms of section 64 of the Close Corporation Act 69 of 1984.

[2] Lifestyle's claim is predicated on the allegation that Tayob had been grossly negligent in his conduct of the business rescue process resulting in the placement of Lifestyle in liquidation. The Respondents allege that by his said conduct Tayob had rendered himself liable, in the context and terms of the provisions of section 64 of the Close Corporations Act 69 of 1984 ("the CC Act"), for payment of the total amount of Lifestyle's debt standing at R82 618 765.00 (Eighty-Two Million Six Hundred and Eighteen Thousand Seven Hundred and Sixty-Five Rands).

[3] Cited as the defendants in the action proceedings are Mr Aboobaker, the sole member of Lifestyle (First Defendant), Tayob (Second defendant) as well as Mr Laros and Mr Hassan (Third and Fourth Defendants), respectively. The latter two defendants had been engaged by Tayob to oversee the administration of the business rescue process. The Fifth and Sixth Defendants are the trustees of the insolvent estate of Aboobaker. No relief is sought against the Seventh and Eighth Defendants.

[4] The claim is defended by Tayob and Leroy who have also individually brought applications in terms of Rule 47 seeking that Lifestyle provides security for costs in the amounts of R500 000,00 (Five Hundred Thousand Rand) and R1m (One Million Rand), respectively. The present hearing is in respect of the application brought by Tayob.

BACKGROUND

FACTS

- [5] Lifestyle Furnishers CC was a retailer of household and office furniture with approximately 44 retail furniture stores, 7 warehouses and 3 distribution centres throughout the northern province of South Africa. Lifestyle primarily sold furniture on lay-by. Trading in that fashion is subject to the stringent provisions of section 62 of the Consumer Protection Act 88 of 2008, as amended (“the CP Act”). In terms of these provisions, inter alia, the seller retains possession of the goods sold on lay-by and is responsible for the storage of same at his expense until full payment therefor is made. In the event that he is unable to deliver the goods upon final payment being made, the seller is obliged, at the election of the purchaser, to make good by supplying goods of equal or better quality and or repay double amount that had been paid.
- [6] The business affairs of Lifestyle fell into disarray in 2010. By 2017 Lifestyle was in financial distress. On 17 October 2017 Mr Aboobaker took a resolution to place Lifestyle in voluntary business rescue. The relevant application in terms of section 128 of the Companies Act of 2008 resulted in Lifestyle being placed in voluntary business rescue and under supervision. Mr Tayob was appointed on 20 October 2017 to rescue the business of Lifestyle.
- [7] The Respondents allege that at the time of filing the resolution of 17 October 2017, Aboobaker was in discussion and had agreed with Mr Iser / Iser (Pty) Ltd, a creditor of Lifestyle, and a company called CGJC that the debt of Lifestyle to Iser in the amount of R6,524,690.00 be increased by R8m, which would be provided as post commencement funding by Iser and/or CGJC, to enable Lifestyle to come out of a compulsory business rescue into which it would have been placed in an application that was set down for hearing on 24 October 2017.
- [8] By his filing of the resolution of 17 October 2017, Aboobaker created a moratorium which, inter alia, precluded the hearing of the application on 24 October 2017. A further effect of the filing of that resolution was that it rendered Lifestyle illegible to receive the post commencement finance Iser and/or CGJC had intended to provide so as to get Lifestyle out of business rescue and resume trading.
- [9] It had taken approximately five months, including the December 2017/January 2018 (quiet period during which most manufacturing companies are closed for holidays) for Tayob to conclude that the business of Lifestyle could not be rescued. He made the decision to terminate the business rescue process and place Lifestyle in voluntary liquidation in terms of section 129 of the Companies Act of 2008.
- [10] Tayob has alleged to have received a written proposal from attorneys representing Iser, whom he describes as a purported creditor of Lifestyle who is in fact a debtor of Lifestyle. The proposal was that Iser was keen on engaging in negotiations with the director of Lifestyle concerning the debt owed to him. The proposal, however, appears not to have

gained favour and Lifestyle was placed in compulsory provisional liquidation on 20 March 2018 and in final liquidation eight months later in November 2018 on application by Iser or his company. The Second to the Fifth Respondents were appointed Lifestyle's final liquidators

ALLEGED ACRIMONIOUS RELATIONSHIP

- [11] Tayob has alleged that he is in an acrimonious relationship with the lead liquidator, Mr Kallianjee, which arose from occurrences involving three estates matters, including the present, in which both him and Kallianjee are involved. Tayob alleges to have become aware of improper conduct on the part of Kallianjee in all three estates. During October 2022 Tayob reported Killianjee's conduct to the offices of the Master of this court in Johannesburg and Pretoria as two of the estates fall under the jurisdiction of the office of the Master in Johannesburg and the present matter under the Pretoria office of the Master.
- [12] As a result of Tayob's reporting, the Master in Johannesburg ultimately removed Kallianjee from the two matters falling within the jurisdiction of his office.
- [13] During the same month, the Master in Pretoria directed that an investigation be conducted to establish the circumstances leading to the liquidation of Lifestyle.
- [14] Tayob has alleged that there was a lengthy delay in the finalisation of the investigations ordered by the Master and that the relevant report ('the Kets Report') only became public in February
2024. The delay of the report had in turn caused a delay in the progress of this application particularly on the part of Tayob who was eagerly awaiting the findings in the report which he believed would include facts that would enable him to provide informed

responses in his replying affidavit to the Respondents' answering affidavit. Tayob further alleged that as a result of crucial findings in the Kets report which are relevant in the determination of this application, he had found himself obliged bring those findings to the attention of this court. The only way he could do so was to file what is referred to in the papers as a supplementary founding affidavit to which he attached and introduces the Kets report. This step together with the Respondents' basis for objection thereto is discussed later hereunder.

THE REVIEW APPLICATION

- [15] It is common cause that Kallianjee has filed an application for the review and setting aside of the Johannesburg Master's decision to remove him in the two estate matters and that Tayob has filed his
- opposition to that application which is pending.

- [16] I interpose to state that Tayob has expressed the view that Kilianjee has used his position as the lead liquidator of Lifestyle to influence the institution of the action proceedings against him as a vendetta for his removal by the Master.

THE CLAIM

[17] The jurisdictional grounding for Lifestyle's claim against Tayob (and Laros) is formulated as follows:

"The Respondents' claim is based on the fact that the business of Lifestyle, including the business conducted while it was in business rescue, was carried on recklessly and/or with gross negligence and/or with intent to defraud its creditors and/or for fraudulent purposes within the meaning of section 64 of the CC Act. In the case of Laros, the recklessness alleged relates to the period that he was the business rescue administrator of Lifestyle. In his capacity as such, Laros was part of the management of Lifestyle and had intimate knowledge regarding the business of Lifestyle, which includes the manner in which Lifestyle carried on business" and,

"...The allegations of fact and of law to support the cause of action, more particularly against Laros, have been set out fully in paragraphs 21 to 30 of the particulars of claim."[1]

DISCUSSION

[18] Section 64 of the Close Corporations Act of 1984 provides, in short, for the personal liability for the debt of a close corporation of its directors or any person who has knowingly been a party in the carrying on of the business of a close corporation in a manner that is reckless and/or vexatious and/or grossly negligent and/or with the purpose to defraud the directors or creditors of the close corporation.

NATURE AND PARTICULARS OF LIFESTYLE'S CLAIM

[19] Relying on the provisions of section 64 of the Close Corporations Act in the claim against Tayob, Lifestyle alleges the following in its particulars of claim:

PARA 19 During or about the period from commencement of its business in

2010 to date of its liquidation, 20 March 2018, the business of

Lifestyle was carried on:

19.1 recklessly, and/ or

19.2 with gross negligence, and/ or

19.3 with intent to defraud creditors; and/ or

19.4 for fraudulent purposes, within the meaning of section 64(1) of the Close Corporations Act ..."

PARA 20.12 it [Lifestyle] adopted a resolution to voluntarily commence business rescue proceedings and place itself under supervision when:

20.12.1

20.12.2 “it could not be rescued without receiving substantial post commencement funding (“PCF”);

20.12.3 It knew it had no prospect of receiving PCF pursuant to its voluntary commencement of business rescue proceedings;

20.12.4 it knew and had participated in an application launched by CGJC in the Court to place it in business rescue in terms of section 131(1) of the new Companies Act and where, had that application succeeded, Lifestyle would have received substantial PCF from Iser and/ or CGJC;

20.12.5 had it received the PCF from Iser and/ or CGIC, there would, on the strength of what Lifestyle had told Iser and CGJC (which turned out to be false), have been a reasonable prospect of it being rescued;

20.12.6 with knowledge that the CGJC application was enrolled for hearing in this court on Tuesday, 24 October 2017 and having acquiesced therein, it lodged its resolution for voluntary business rescue on Friday evening, 20 October 2017.

20.12.7 it was precluded by section 129(2) (a) of the new Companies Act from adopting such resolution on 17 October 2019 because liquidation proceedings had been initiated against it and were, at 17 October

2017, still pending;

PARA 20.13 it remained in business rescue from 20 October 2017 to 18 March 2018 notwithstanding that:

20.13.1 its factual and commercial insolvency position was not improving and was deteriorating;

20.13.2 it continued to trade in insolvent circumstances and, more particularly, to incur credit when it had no reasonable prospect of honouring it by repayment;.....”

THE DUTIES AND OBLIGATIONS OF A BRP

[20] A BRP is appointed by application to the court for the purpose of facilitating the rehabilitation of a company in financial distress by; (i) the temporary supervision of the company and the management of its affairs, business and property; (ii) a temporary moratorium on the rights of creditors of the company; (iii) to develop a business

rescue plan, i.e. to develop a plan on how the company is to be rescued. The plan must be considered with the affected people, more particularly the creditor at a meeting arranged and presided over by the BRP in terms of section 151 of the Companies Act of 2008.

[21] If BRP finds evidence which indicates that, prior to commencement of business rescue, the company entered into voidable transactions or that the directors of the companies failed to perform any material obligations relating to the company, then the BRP must take necessary steps to rectify the matter and may direct the management of the company to take appropriate steps to fix the problem.

[22] If BRP during investigation finds that the directors of the company traded recklessly or committed fraud, or contravened any applicable law, he must forward the evidence to an appropriate authority for investigation and possible prosecution. The BRP must also direct the management to take steps to rectify the matter, including recovering

any assets of the company that may have been misappropriated.

RESPONDENTS' DETAILED CASE AGAINST TAYOB

[23] At paragraph 29 of the particulars of claim it is stated that:

29.1 Tayob did not take over full management and control of Lifestyle in substitution for its members and pre-existing management as stipulated in section 140(1) (a) of the New Companies Act but delegated his responsibilities in full to Laros and Aboobaker;

29.2 Tayob did not seek and Aboobaker did not offer to assist Tayob in either establishing what caused Lifestyle to be in financial distress or what steps could be taken to rescue it and more particularly Tayob did not seek and Aboobaker did not provide to Tayob;

29.2.1 all books and records that relate to the affairs of Lifestyle as required by section 142(1) of the New Companies Act;

29.2.2.1 any material transactions involving Lifestyle or its assets, and occurring within 12 months immediately before the business rescue proceedings began;

29.2.2.2 any court, arbitration or administrative proceedings, including pending enforcements proceedings, involving Lifestyle;

29.2.2.3 the assets and liabilities of Lifestyle, and its income and disbursements within immediately preceding 12 months;

29.2.2.4 the number of employees, and any collective agreements or other agreements relating to the rights of employees;

29.2.2.5 any debtors and their obligations to Lifestyle; and

29.2.2.6 any creditors and their rights or claims against Lifestyle;

29.2.3 Tayob failed to report to either this Court or the CIPC as required by section 140(3) read with section 132(3) of the New Companies Act notwithstanding that the business rescue of Lifestyle did not end within 3 months of the start thereof;

29.2.4 Tayob failed, as required by section 141(1) of the New Companies Act, as soon as practicable after being appointed or at all, to investigate Lifestyle's affairs, business, property and financial situation and to consider whether there was any reasonable prospect of Lifestyle's business being rescued;

29.2.5 Tayob failed, notwithstanding that it was clear that there was no reasonable prospect of Lifestyle's business being rescued, to

29.2.5.1 so inform the Court, Lifestyle and all affected persons in the prescribed manner as required by section 141(2)(a)(i) of the New Companies Act; and

29.2.5.2 apply to the Court for an order discontinuing the business rescue proceedings and placing Lifestyle into liquidation as required by the section 141(2)(a)(ii) of the New Companies Act;

29.2.6.1 voidable transactions, or the failure by Lifestyle or its sole member, Aboobaker, to perform any material obligation relating to Lifestyle thereby disabling himself, as required by section 141(2)(c)(i), from taking the necessary steps to rectify such matters and directing Lifestyle's management to take appropriate steps;

29.2.6.2 reckless trading, fraud or other contravention of any law relating to Lifestyle thereby disabling himself from;

29.2.6.2.1 forwarding the evidence to the appropriate authority for further investigation and possible prosecution, as required by section 141(2)(c)(ii)(aa) of the New Companies Act; and

29.2.6.2.2 directing the management to take necessary steps to rectify the matter, including recovering misappropriated assets of Lifestyle as required by section 141(2)(c)(ii)(bb) of the New Companies Act.

[24] The primary reason behind the demand for the provision of security for costs is to protect a defendant in a claim that has been brought against him by a claimant who appears impecunious or would be unable

to pay the costs of the defendant should he be successful in his defence. Another consideration concerns the assessment of the nature of the claim that has been instituted. An order for the provision of security for costs will more likely than not be granted where an action has been instituted recklessly or is vexatious or is to serve the purpose of defrauding the directors or creditor of the close corporation/ entity.

SOURCES OF THE LAW FOR PAYMENT OF SECURITY FOR COSTS

- [25] While rule 47 of the Uniform Rules of Court entitles a defendant, in appropriate circumstances, to seek that the claimant provides security for costs. The rule only sets out the procedure to be followed, but falls short of stating the circumstances under which the order may be sought. It is therefore pertinent to have regard to the applicable sources of the law, being the common law and statutory law, which set out the jurisdictional grounding or justification for the provision of security for costs.
- [26] Prior to traversing the law regarding the demand for the provision of security for costs, it is pertinent to reiterate the cardinal principles laid down in *Fusion Properties 233 CC v Stellenbosch Municipality*[2], namely:

“There are at least three principles to be derived from... Giddey and Shepstone & Wylie.... First, a court seized with an application to compel a plaintiff or applicant to furnish security for costs retains an unfettered discretion. Secondly, the court needs 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 the costs in the litigation’ Third, the salutary purpose of section 13 is “to deter a would-be plaintiff from instituting proceedings vexatiously or in circumstances where their prospects are poor.”

THE COMMON LAW

- [27] The common law principle on the provision of security for costs envisions situations: - where the plaintiff, a natural or juristic person, is a peregrinus who has neither unencumbered property in the country the litigation is instituted in nor stable finances to demonstrate his ability to pay the costs of an incola defendant should the action be successfully defended. Actions instituted by insolvents, those pointing to an abuse of the process of the court, are vexatious or reckless are the focal points in the consideration of whether or not to grant an order for the provision of security for costs.[3]

RULE 47

- [28] Rule 47(1), (3) and (4) of the Uniform Rules of the Court which provide thus;

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

“(3) If the party from whom security is demanded contest 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) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default or make such other order as it may seem meet.”

STATUTORY PROVISIONS

[29] Our law recognised it as a general rule, even prior to the advent of the Constitution, that a local natural person (incola), could not be called upon to provide security for costs. That position is enshrined as a right in the Bill of Rights by the provisions of Section 34 of the Constitution.

[30] With regard to a demand for the provision of security for costs in relation to corporate entities, it is pertinent to distinguish the circumstances applicable in relation to a company vis-a-vis those applicable in respect of a close corporation.

CLOSE CORPORATION

[31] I find it convenient to commence by referencing to the provisions of section 13 of the old Companies Act of 1973 quoted hereunder which have been retained in section 8 of the Close Corporations Act 69 1984 and are as such still applicable to close corporations also with regard to the timing for demanding the provision of security for

costs, being:

“....at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound-up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence.”

The case *Fusion Properties 233 CC v Stellenbosch Municipality* (932/2019) [2021] ZASCA is authority that a defendant may ask an impecunious plaintiff close corporation to put up security for the Defendant's costs in case the claim is successfully defended.

COMPANIES

[32] The effect of the omission of the provisions section 13 of the old Companies Act of 1973 in the Companies Act of 2008 is that the prospects of an incola company's inability to pay the costs of a successful defendant is no longer per se an indicator for granting an order for the provision of security for costs. In order to regulate its own affairs without interfering with the deliberate omission by the legislature, the court in *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd*[4] pronounced the nature of a company's claim as a consideration instead, in the following terms:

“Absent section 13 there can no longer be any legitimate basis for differentiating between an incola company and incola natural persons... 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.”

APPLICANT'S BASIS FOR SEEKING SECURITY FOR COSTS

[33] Tayob has cited five grounds on which he relies for seeking that Lifestyle furnishes security for cost. The relevant bases are discussed hereunder.

33.1 THE INSOLVENCY OF LIFESTYLE

The insolvency of Lifestyle and inevitable inability to pay costs in the event that its claim fails or is successfully defended forms the pillar of Tayob contention for seeking payment of security for costs. This inability of Lifestyle has been confirmed in the Kets report to the Master's office in Pretoria.

Lifestyle's purported reliance on its funder in this litigation to counter Tayob's demand is refuted as of no moment by Tayob on the ground that, unless such funder is a party to the proceedings, costs cannot be recovered from him should the claim be successfully defended.

33.2 ALLEGED UNSUSTAINABILITY OF CLAIM

Tayob disputes the jurisdictional grounding and sustainability of Lifestyle's claim against him and, in particular, contends that the claim is unprecedented.

33.3 ALLEGED MOTIVE FOR THE CLAIM

Tayob contends that Kallianjee used his influence as the lead liquidator of Lifestyle to have the action proceedings instituted against him as a vendetta for his removal by the Johannesburg Master's office. He further contended that the action proceedings are nothing, but an ulterior motive to embarrass him by the attempt to force him to pay a debt he does not owe. He argued that for these reasons, the action proceedings are vexatious, reckless and will be of no benefit to Lifestyle or its creditors.

33.4 FURTHER ALLEGED DEMONSTRATION OF RECKLESS AND VEXATIOUS LITIGATION

In a further demonstration that the main action proceedings are reckless and vexatious, Tayob has alluded to an application in terms of rule 35(6) that had been filed against him on behalf of Lifestyle wherein an order was sought compelling him to discover documents that had

already been inspected and copied by Lifestyle's attorneys. That application had to be removed from the court roll. Tayob

contended that that application was an exercise to build up costs against him.

33.5 IMPERMISSIBLE FUNDING TO LIFESTYLE

In addition to standing to gain undue impunity from paying Tayob's costs should Lifestyle's claim be successfully defended, Lifestyle's funder will by virtue of this litigation be entitled to the massive costs the liquidation and gain preference for the full payment of his debt before the debts of other creditors of Lifestyle (who are not party to this litigation) can be considered, should Lifestyle be successful in its claim. It is apposite in this regard to refer to the provisions of section 104(3) of the Insolvency Act of 1936 which read thus:

“If any creditor has under subsection (1) of section 32 taken proceedings to recover the value or a right under section 25(4), to set aside the disposition of or dealing with property under section 26, 29, 30 or 32 of for the recovery of damages or a penalty under section 31, no creditor who is not a party to the proceedings shall derive any benefit from any monies or from the proceeds of any property

recovered as a result of such proceedings before the claim and costs of every creditor who was party to such proceedings have been paid in full.”

LIFESTYLE’S GROUNDS FOR OPPOSITION

[34] The Respondents have raised opposition to the rule 47 application based, firstly, on the late filing of the application; secondly, the irregularity of Tayob’s filing of a supplementary affidavit to the founding affidavit and, thirdly, the disputed liability of Lifestyle to furnish security for costs of the action.

34.1 BELATED APPLICATION FOR SECURITY FOR COSTS.

The respondents have raised objection to the application for security for costs on the ground that the application has been brought long after the action proceedings had been instituted. I deem it necessary to state that, in his supplementary affidavit, Tayob has stated that his erstwhile attorney had filed the notice in terms of rule 47, but could not bring the rule 47 application timeously due to the emergence of the covid-19 pandemic and the imposition of regulations restricting movement. The chronology of events Tayob relies on for disputing that his application was brought out of time is set out hereunder.

CHRONOLOGY

34.1.1 The summons in the action proceedings was issued on 28 February 2020 under case number 14835/2020 and served on the Third Defendant, Laros, on 5 March 2020, The Applicant and Laros entered appearance to defend on 18 March 2020. On 22 April 2020 Notice in terms of Rule 47 served on behalf of Tayob demanding that Lifestyle furnishes security for his costs in the amount of R500 000; On 24 April 2020 the Lifestyle filed a contestation of its liability to provide security for costs and invited Tayob to proceed with the relevant application. It is to be noted that by this time, the scourge of the covid-19 pandemic gaining momentum and had resulted in the issuing of the national regulations banning or severely limiting movement and gatherings.

34.1.2 In response to the invitation to bring the rule 47 application, Tayob’s attorney undertook to serve the application in terms of rule 47 “as soon as we are allowed to practice at our offices, on 4 May 2020.” The said date had been declared to mark the beginning of the relaxation of the stringent limitation of movement and end of the complete ‘shut down’.

34.1.3 Tayob’s erstwhile attorney passed on in July

2021. A notice of his firm's withdrawal as attorneys of record for Tayob and Laros was filed on 27 July 2021. According to Tayob, there had already been a period of inactivity in the matter which made him think the Respondents had abandoned the action. I can find no plausible backing for this assumption.

34.1.4 The Respondents allege that it was as a result of their attorney making enquiries in June 2022 about the legal representation of Tayob and Laros that a firm, Strydom Rabie Heijstek Inc, delivered a notice of substitution as attorneys of record for Laros. A few days thereafter, Mothilal Attorneys came on board as the attorneys of record for Mr Tayob and filed the present application on 11 October 2022 pursuant to the initial notice in terms of rule 47 that was served on 18 March 2020. The Lifestyle contested the demand to establish security for costs on 14 June 2023.

[35] It has to be stated that the Respondents' reliance on the provisions of rule 47(1) for the contention that the application was brought out of time cannot stand in the face of the provisions of section 8 of the CC Act in terms of which a demand/ order for security for costs can be made ".... at any stage of the proceedings."

2. IRREGULARITY OF THE SUPPLEMENTARY FOUNDING AFFIDAVIT

[36] As already indicated earlier, according to Tayob, the report of the investigations directed by the Master pertaining to the circumstances leading to the liquidation of Lifestyle was of paramount significance and worth waiting for if established facts were to be placed before the court. As it turned out, the report contains, in particular, two facts that are in the heart of the issue for determination, being whether Lifestyle / its liquidators will be able to honour an adverse order for costs should the action be successful defended. Tayob had no option, but to take the unusual step of filing a supplementary founding affidavit to introduce the report in these proceedings. On the face of it, the filing of the supplementary founding affidavit is undeniably an irregular step. However, the importance of the contents of the Kets report to this case makes it imperative that this court exercises its inherent powers in the interests of justice to allow the introduction of this report in the manner that has been done and to admit its contents, to the extent necessary, in evidence by virtue of the nature of the process by which the investigations concerned are conducted.

3. RELIANCE ON EXTERNAL FUNDING

[37] It is axiomatic that being in liquidation, Lifestyle was not in a financial position to engage in the litigation it has instituted. The Respondents' opposition to Tayob's demand that Lifestyle

furnishes security for costs is buttressed on the contention that the demand is unnecessary as Lifestyle has a funder in this litigation is misplaced. This contention fails to take cognisance of the reality that Lifestyle's funder will impermissibly stand to benefit from the costs of the litigation should the claim succeed, without being liable to pay Tayob's costs in the event that he succeeds in his defence. I have already referred to the MTN case where the court stated the following with regard to the provisions of section 13 of the old Companies Act of 1973 which are

still exist in section 8 of the CC Act:

“One of the very mischiefs S13 is the intended to curb, is that those who stands to benefit from successful litigation by a plaintiff company will be prepared to finance the company’s own litigation but will shield behind its corporate identity when it is ordered to pay the successful defendant’s costs. A plaintiff company that seeks to rely on the probability that a security order will exclude it from the court, must therefore produce evidence that it will be unable to furnish security, not only from its own resources, but also from outside sources such as shareholders or creditors.” [Own emphasis]

THE KETS REPORT TO THE MASTER

[38] It is apposite at this stage to consider whether there is presence or absence in the report to the Master of information that is relevant for the determination of the core issues in this matter. It is, in my

view, the impact of the factual findings in the Kets report that ought to inform the decision whether or not to admit the report in evidence as sought by Tayob. The Kets report confirms, firstly, that Lifestyle is impecunious and will be unable to honour a costs order against it and, secondly, that Lifestyle is financed by its creditor in this litigation; a circumstance in casu that offends the provisions of section 13 of the old Companies Act, 1973 or section 8 of the CC Act, 1984. The fact that Lifestyle is in liquidation and the confirmation of its impecuniosity by the Kets report entitle Tayob to the order he seeks in this application.

[39] The Kets report to the Master is an important document without which this court would most likely not have been aware of facts that go to the heart not only of the liquidation of Lifestyle, but also those relevant in the determination of this interlocutory application. For this reason, it is in my view, in the interests of justice in both in the present hearing and for the hearing of the main case that the supplementary affidavit to the founding affidavit to which the Kets report attached be accepted in evidence.

ANALYSIS

[40] It is important to note that, unlike in the case of a company where the scope of considerations may be wider depending on nature and purpose of an action taken, it is a close corporation that is concerned in the present matter and the consideration is narrow. Actions that are reckless, vexatious, fraudulent or generally abusive of the process of the court are paramount considerations in the determination whether a plaintiff incola company should be ordered to provide security for costs. In the case of a close corporation the scope is narrowed by legislation. In terms of section 8 of the Close Corporations Act of 1984, it is the impecuniosity of the plaintiff close corporation or its being in de facto liquidation that informs the decision to order that it provides security for the costs of the defendant. It is worth reiterating that:

“The principles pertaining to real security by a close corporation will henceforth differ from that applicable to a company.”[5]

CONCLUSION

[41] This court is constrained on the facts of this case, particularly the station of the first respondent, to grant the relief sought by the applicant, Tayob.

ORDER

[42] The following order is made:

1. The first respondent is ordered to provide security for the costs of the applicant in the action instituted by the respondent and others against the applicant and others under case number 14835/2020 in an amount to be determined by the registrar;
2. The first respondent is ordered to pay the costs of this application.

MPN MBONGWE

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv PF Louw SC Instructed by: Mothilal Attorneys For the First Respondent: Adv HC Bothma SC; Adv K Reddy Instructed by: Vezi de Beer Inc Date of hearing: 21 February 2024 Date of delivery: 04 November 2024 Revised: 29 November 2024

THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES' LEGAL REPRESENTATIVES AND UPLOADED ONTO CASELINES ON 04 NOVEMBER 2024.

- [1] paras 7.1 and 7.2, respectively, of the Respondents' Answering Affidavit
- [2] unreported SCA case no. 932/2019 dated 29 January 2021 at para [24]
- [3] BP Southern Africa (Pty) Ltd v Trade Rose Investments (Pty) Ltd (13662/22) [2023] ZAGPJHC 1206 (18 October 2023)
- [4] 2007 (6) SA 620 (SCA) (12 September 2007)
- [5] See Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA)

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