FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No : 1891/2012

In the matter between:-

BUILD ON CONSTRUCTION (PTY) LTD 1st Applicant

K P NOONAN 2nd Applicant

and

RASDI CC Respondent

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 8 MARCH 2013

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[1] This is an application for leave to appeal against the judgment of Thamage, AJ delivered on 13 December 2012, dismissing applicants' application to compel respondent to furnish security.

[2] The application has been referred to me by the Acting Judge President to deal with it as Thamage, AJ's acting stint has come to an end.

[3] In considering whether there is a reasonable possibility that another court may come to a different conclusion I shall keep the following *dictum* of the Supreme Court of Appeal in mind:

> "And it must be remembered that in adjudicating on whether to order security for costs, a court exercises a narrow or strict discretion, with which a Court of Appeal will only interfere if the court below failed to exercise such discretion judicially or did so on an incorrect factual finding or on the basis of wrong legal principles."

Refer to **Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig** 2012 (1) SA 247 (SCA) at par [19] p 255D.

[4] In order to assist me I requested both parties to provide me with written heads of argument for which I thank them. I thereupon considered the matter in chambers with the approval of both parties in accordance with the procedure adopted by Musi, JP in the matter of **Michael Dlomo v The State**, case no 129/2007 (unreported judgment of this court delivered on 8 December 2011). The previous Companies Act, 61 of 1973 was to a large extent repealed and replaced by the Companies Act, 71 of 2008. Section 13 of the 1973 Act dealing with security for costs does not have a corollary in the new Act. Whether this is due to an oversight or deliberate is uncertain. Section 8 of the Close Corporations Act, 69 of 1984 contains a provision similar to section 13 of the 1973 Act, except that it also makes provision for security to be given by a plaintiff or applicant in reconvention. Notwithstanding amendments to the Close Corporations Act and the repeal of certain sections thereof with the promulgation of the 2008 Companies Act, section 8 thereof remains intact. The main purpose of the repealed section 13

was (and in my view of section 8 of the Close Corporations Act is)

> "to ensure that companies (and close corporations) who are unlikely to be able to pay costs and are therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success, thus causing their opponents unnecessary and irrecoverable legal expense". (Words in brackets added.)

Refer to **Giddey NO v J C Barnard & Partners** 2007 (5) SA 525 (CC) at par [7] and **Kini Bay Village Association v Nelson Mandela Metropolitan Municipality and Others** 2009 (2) SA 166 (SCA) at par [10] p 171F – G and the following *dictum* by Maya JA, writing for the Full Bench of the SCA at par [10] of the last-mentioned judgment:

> "The party seeking security must, however, first establish, by credible testimony, that its opponent, if unsuccessful, will be unable to meet an adverse costs order."

[5] An application for security must be considered in two stages. The applicant for security bears the onus to establish that there is reason to believe that the respondent close corporation, if unsuccessful, will be unable to pay the applicant's costs, failing which the application will be unsuccessful. Although it is generally accepted that a close corporation resisting an application under section 8 should produce its financial statements in support of an averment of

its ability to pay costs if so ordered in the main action, it cannot be disregarded that the overall onus to establish the first stage of the enquiry remains on the applicant, who cannot rely on speculation or vague averments, but whose application must be supported by credible testimony on affidavit. If the applicant cannot discharge the onus, that is the end of the enquiry, but once the applicant for security discharges its onus, the court must then exercise its discretion whether in fact to order that security be furnished or not.

[6] Applicant relies on six grounds of appeal. The first three deal with the alleged failure by Thamage, AJ to consider the respondent's financial position. The fourth ground relates to the failure to find that respondent's cause of action was unsustainable. Grounds five and six deal with Thamage, AJ's reference to a party's right of access to court in accordance with section 34 of the Constitution. It is alleged that he erred in finding that an order granting security would violate respondent's right of access to court. This last aspect may be dealt with immediately. Thamage, AJ never indicated that the application was dismissed on the basis that an order granting security would violate respondent's right of access to court. He merely referred to the provisions of section 34 in passing.

[7] It is applicants' case that respondent has been working with them on a number of projects as subcontractor, that it does not possess any assets, that it requested first applicant to

make purchases on its accounts with suppliers and that first applicant on various occasions lent money to respondent to purchase material. The last two averments are denied by respondent, but it is important to note that even on applicants' version, respondent did not fail to comply with its contractual obligations pertaining to the alleged loans or the purchases on first applicant's account. If respondent was in default regarding these, I would have expected applicants to make an issue thereof. These are therefore neutral aspects in the circumstances, but what is clear is that respondent has been a subcontractor for many years and is still in business. Bearing in mind the lack of credible evidence provided by applicants pertaining to the fears that respondent would be unable to settle a costs order granted against it, I do not believe that another court may find that respondent's failure to make full and detailed discovery of its financial position should be held against it.

[8] First applicant and respondent are members of a joint venture. This is akin to a partnership between legal entities. It is clear that applicants were at all times hands-on regarding the project and in possession of all relevant financial and other documentation regarding it. Respondent and its member on the other hand, were not at all involved in the management and/or administration and/or bookkeeping of the project. Like all partners, respondent is fully entitled to delivery of all relevant documentation, debatement of accounts and invoices in respect of the joint venture, auditing of its financial statements and payment of any amount that

might be due to it as member of the joint venture. The joint venture has not been dissolved and liquidation has not taken place, alternatively this has not taken place more than three years prior to institution of action. There can be no argument that respondent's claim has become prescribed. Insofar as applicants rely on the defence that the matter should be referred to arbitration, they would be fully entitled to plead such a special plea. However, such a plea can never be a plea in abatement, but is merely a dilatory plea insofar as the cause of action may be postponed. In adjudicating such a plea, the court may decide against an order staying the proceedings subject to arbitration, but may entertain the dispute. However it is not necessary for purposes hereof to enquire more fully into the merits of the main dispute, save to state that no case has been made out that respondent embarked upon vexatious litigation.

[9] In conclusion I therefore find that there is no reasonable possibility that another court may come to a different conclusion as that reached by Thamage, AJ.

[10] The following order do issue:

10.1 The application for leave to appeal is dismissed with costs.

J.P. DAFFUE, J

On behalf of applicants: Adv L.A. Roux

Instructed by:
Goodrick & Franklin Inc
BLOEMFONTEIN

On behalf of respondent: Adv P.R. Cronje
Instructed by:
Phatshoane Henney Inc
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