IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

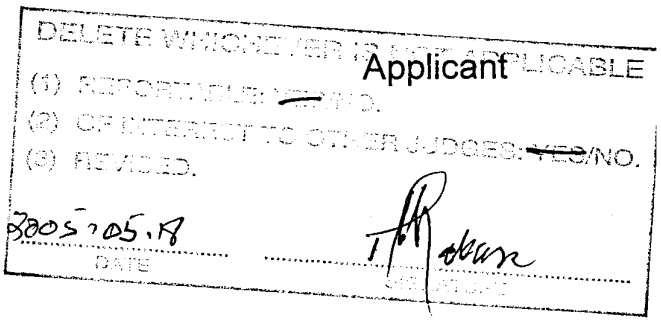
18/05/2005

CASE NO:20853/04

UNREPORTABLE

In the matter between:

LOUISE DIPPENAAR N.O. Applicant



and

WILHEIM BEMARKING BK 1st Respondent·

MARK EDWARD HENWICK 2nd Respondent

JUDGMENT

MABUSE AJ: [1]. This is an application by the Applicant that the Respondents should furnish security for her (Applicant's) costs of an action in terms of Rule 47(1) of the Uniform Rules of Court. The Applicant is

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LOUISE DIPPENAAR N.D. cited in his capacity as an Executrix of the Estate of Late Marius Gert Dippenaar. The Applicant is in that capacity, the Defendant in the main case. The First Respondent is a close corporation. The First Respondent is represented herein by the Second Respondent. The Second Respondent is Mark Edward Henwick. The First and Second Respondents are the 1st and 2nd Plaintiff's in the main action.

[2]. On the 14th September 2004, the Applicant delivered a Notice in terms of Rule 47(1) and in that notice requested the Respondents to furnish security in the sum of R2000000.00 for her costs of the main action. It is a requirement of the said Rule that the party that requires the other to furnish security it should furnish reasons therefor. The Applicant's reasons are that:

2.1 the First Respondent is a close corporation and there exists reasons to believe that if the Applicant successfully defended the main action the First Respondent will not be able to pay the Applicant's costs of the main action.

2.2 the main action is complex and wherein damages in the region of R8 million are claimed from the Applicant.

2.3 the quantum is, in the circumstances, substantial.

2.4 the First and Second Respondents' actions to institute their action *

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2.5 there exists reasons to believe that the Second Respondent shall not be able to pay the Applicant's costs of the action in the event where the Applicant should successfully defend the main action, and

2.6 the sum of R2000000.00 which is required for security is in respect of costs already incurred and prospective costs to be incurred for briefing the two Counsels, a senior and a junior.

This application is opposed by the First and Second Respondents. In their opposition, both the First and Second Respondents have relied on the Affidavit by the Second Respondent.

[3]. It would appear that on the 29th September 2004, the Respondents' Attorney wrote a letter o the Applicant's Attorneys in which letter, inter alia, they undertook to the Applicant ıs attorneys to furnish them with a balance sheet and promised further to communicate with them in due course. In a subsequent letter dated the 18th October 2004, the Applicant's Attorneys wrote, among others, the following:

"Wat betref ons klient se Versoek om Sekuriteit in terme van Hooggeregshof Reel 47(1), en u klient se onderneming om 'n balanstaat te voorsien, ontvang ons ook so spoedig moontlik u klient se voorstelle vir sekuriteit. Geliewe ontvangs te erken van hiredi skrywe".

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On the 29th October 2004, the Respondents' Attorneys wrote a letter to the Applicant's Attorneys. I n this letter, the said Attorneys, inter alia, acknowledged receipt of the Applicant's Attorneys' letter dated the. 18th October 2004 and in addition wrote the following:

“Ons sal vroeg die volgende week ons klient se voorgenome wysigings op u beteken en sal u ook salons instruksie betreffende u kennisgewing soos bedoel in terms van Reel 47(1) voorsien. Ons bedank u vir u tussentydse geduld".

[4]. It is obvious that despite the Applicant's Attorneys rule 47(1) Notice delivered on the 14th September 2004, and the Applicant's Attorneys' written repeated requests, the Respondents never furnished or offered at any stage to furnish any acceptable form of security. The Respondents' Attorneys made promises that they never fulfilled. This obviously became a cause of concern in the view of the Applicant's Attorneys. Consequently, the Applicant's Attorneys launched the present application on the 30th November 2004. It is quite interesting to note that at no stage before the 30th November 2004 did the Respondents dispute their obligation to furnish security. In fact, especially with regard to the First Respondent, the Respondents' Attorneys promised to furnish the Applicant's Attorneys with a balance sheet.

[5]. The principles of both common law and statutes determine the bases on which security is furnished. It is trite law that the Court has under any given circumstances a discretion whether or not to order any security to be given. In the case of **ECKER v DEAN 1938 A 102 at 110** De Wet J.A. stated that: " The Court has inherent jurisdiction to prevent the abuse of its process by staying proceedings or ordering security in certain circumstances but as pointed out by Solomon J.A., in Western Assurance Co. v Caldwell's Trustee (1918, AD at P 274) this power ought to be sparingly ecercised and only in very exceptional cases." Regarding the requirement that the First Respondent should furnish security, section 8 of the close corporation Act NO.69 of 1984 provides that:

" When a corporation in any legal proceedings is Plaintiff or Applicant or brings a counterclaim or counterapplication, the Court concerned may at any time during the proceedings if it appears that there is reason to believe that the corporation or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the Defendant or Respondent, or the Defendant or Respondent in reconvention, if he is successful in his defence require security to be given for those costs, and may stay the proceedings till the security is given".

[6]. One way of establishing the ability of the First Respondent to pay the Defendant's costs of the action is by having a look at its balance sheet. No balance sheet has been furnished. This point has already been discussed. In paragraph 8 of his Affidavit, the Second Respondent states: "Ek nog 'n afskrif van die Eerste Repondent se balansstaat hierby aan gemerk Aanhangsel "MH1". In paragraph 13, he goes further and states:

> "AD PARAGRAPH 5".
>
> Die balansstaat is reeds hierby aangeheg, gemerk Aanhangsel "MH1 ".

These allegations were made notwithstanding that no balance sheet was attached to the Second Respondent's Affidavit. The balance sheet was not available even at the hearing of this application. It seems in the circumstances that this is a quintessence case in which a Court should order the furnishing of security.

[7]. With regard to the case of the Second Respondent, different considerations apply. It must be emphasised that it is always entirely the discretion of a Court whether or not in any given case, a party is ordered to furnish security for the costs of the action. See the case of ***ECKER V DEAN*** supra. It is immaterial therefore whether such a party is an *incola or a

peregrinus of that particular Court. The basis on which the applicant requires the Second Respondent is that:

" Daar bestaan rede te glo dat die Tweede Eiser nie in staat sal wees om die regskoste van die Verweerder te betaal nie in geval waar die Verweerder die aksie suksesvol sal verdedig".

From the authorities consulted, it would seem that as far as incolae are concerned, it not sufficient to state that a party has no means or will have no means to pay the other party's costs. On p iio of the abovementioned caso ECKER v DEAN, the court stated that:

"Notwithsatnding dicta to the contrary, it seems to me that the correct principle underlying these decisions is that every application for security must be decided on the merits of the particular case before court, bearing in mind that the basis of granting an order for security is that the action is reckless and vexatious". This decision was followed by the court in the case of **Ramsamy NO and Others v Maarman NO and Another 2002(6) SA 159 on p 172** where the Court stated that:

" As a general rule then, mere inability of a plaintiff or applicant as the case may be, who is an incola, to satisfy a potential costs order against him is insufficient in itself in a case of this kind to justify an order that he furnish security for his opponents's costs. Something more than this is required

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before that can be done."

There are instances where the court will be justified in ordering an incola to lodge security for the costs of the other party. For instance the court in *Ramsamy* IS case stated on p 172 that: " Notwithstanding then what on my findings were very poor prospects of recovering any substantial costs from the applicants, they could in my be ordered to furnish security for such costs only if I was satisfied that their main application was (a) vexatiuos or(b) was reckless or (c) amounted to an abuse of the process of this court".

As the applicant, in compliance with the provisions of Rule 47(1) , has based her appliacation on the Second Respondent's inability to pay the costs, I will only pay attention on that ground. In the premises the Court is not satisfied that Second Respondent should be ordered to furnish security in terms of Rule 47(1).

[8] The Second Respondent, however gas left much to be desired. Firstly the second Respondent has misled this court into believing the he has authority to act for the First Respondent. The second Respondent has made an all encompassing affidavit which included matters that related to the First Respondent. He has not placed any written authority before this court as proof that he has been duly authorised to act for the First Respondent.

(9) The Court also takes a dim view of the fact that the Second Respondent did not take his affidavit seriously. It is not clear why in paragraph 8 of his Affidavit the Second Respondent states that: “Ek heg hierby 'n afskrif van die Eerste Respondent se balansstaat hierby aan gemerk Aanhangsel “MHI" . In the first placeno power of attoney was placed before this court in which he would have been authorised to make this allegation on behalf of the 1st Respondent,. Secondly the said annexure MNI was not attached to the affidavit. See also paragraph 13 of his affidavit.

{10} The 2nd Respondent misled the court into believing that he was a member of the a close corporation when he knew he was not. No explanation was proffered why he chose to place incorrect information before court. IN the circumstances the court has decided to mulct him with an order of costs.

[11] Accordingly the court makes the following order:

{1}. THAT the First Respondent be and is hereby ordered to furnish security in terms of Rule 47 of the Rules of this Court within TEN $\{10)$ days after its determination.

[2} THAT the amount of security payable as security by the First Respondent shall be determined by the Registrar of this Court.

{3) THAT the application against the Second Respondent to pay security in terms of Rule 47 of the Rules of this Court be and is hereby dismissed.

{4} THAT the First and Second Respondents be and are hereby ordered to pay the costs of this application.

M P MABUSE A.J.