



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 57607/14

16/3/2017

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

15/3/2017

DATE

SIGNATURE

In the matter between:

MTN SERVICE PROVIDER (PTY) LTD

APPLICANT/DEFENDANT

and

BRILLIANT CELLULAR CLOSE CORPORATION

RESPONDENT/PLAINTIFF

JUDGMENT

RANCHOD J:

Introduction

[1] This is an application in which the applicant seeks an order compelling the respondent to furnish security for applicant's costs. In the notice in terms of Rule 47(1) R2 000 000.00 was demanded as security for costs and that the

action proceedings launched by the respondent be stayed until security is provided.

[2] The respondent contests both its liability to give security and the amount.

[3] The applicant is the defendant and respondent the plaintiff in the action. For the sake of convenience I will refer to the parties as the defendant and plaintiff respectively.

Background

[4] The plaintiff has instituted an action against the defendant for damages in the amount of R33 million based on an alleged repudiation by the defendant of the franchise agreement concluded between the parties on or about 30 September 2010. The plaintiff claims that it elected to cancel the franchise agreement on or about 13 November 2011 based on the defendant's alleged repudiation.

[5] Prior to the institution of the current claim, and on 24 October 2011, the plaintiff had brought an urgent application under case number 2011/40453 in the High Court (Gauteng Local Division) seeking an order declaring the defendant's cancellation of the agreement to be unlawful and of no force and effect. This application was similarly based on the alleged repudiation of the agreement by the defendant.

[6] That application was dismissed on 11 November 2011 on the grounds that it was the plaintiff's conduct which constituted an irremediable breach of the franchise agreement and further that the defendant was, based on the plaintiff's repudiation of the agreement, entitled to cancel the agreement.

[7] On 5 December 2011 the plaintiff's application for leave to appeal was dismissed. Aggrieved with this outcome, the plaintiff approached the Supreme Court of Appeal for special leave against the judgment and order of

the High Court. The Supreme Court of Appeal dismissed the plaintiff's application for special leave to appeal with costs.

[8] The plaintiff initially failed to pay the costs of the urgent application, the application for leave to appeal and of the application for special leave to appeal in the Supreme Court of Appeal. The defendant had writs of execution issued but the sheriff rendered nulla bona returns. The plaintiff eventually paid the costs after about four years in April, 2016.

[9] It is therefore hardly surprising that the defendant seeks security for costs in the action that the plaintiff has instituted. The defendant says it seeks security for costs as there is serious doubt that the plaintiff will be able to meet any adverse costs order in the action. The defendant says that the plaintiff has ceased trading and it is also common cause that the plaintiff does not have any realisable assets.

[10] The defendant further avers that the plaintiff lacks prospects of success in the pending action and that the action constitutes vexatious proceedings.

[11] It is apparent from the papers that the plaintiff has raised vague and bare denials to the factual grounds set out in the defendant's application for security for costs and simply asserts that full legal argument will be advanced during the hearing of the matter.

[12] Under the Companies Act of 1973 provision for security by a company was to be found in section 13. The new Companies Act 71 of 2008 does not contain an equivalent provision to s13. In *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) it was held (I quote the headnote):

'In terms of the common law mere inability by an incola to satisfy a potential costs order was insufficient to justify an order for security. Something more was required, namely that the action was reckless or vexatious. Absent s 13, there was no legitimate basis for differentiating between an incola company and an incola natural person. And

because our superior courts have a residual discretion arising from their inherent power to regulate their own proceedings, it must follow that an incola company could at common law be compelled to furnish security for costs. 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 were satisfied that the contemplated main action (or application) was vexatious or reckless or otherwise amounted to an abuse. (Paragraphs [15] – [16] at 50C – 51B.).’

[13] The plaintiff is a close corporation. A similar provision for security has been retained in s8 of the Close Corporations Act 69 of 1984. However, the defendant does not rely on s8 of the Close Corporations Act. Counsel for the plaintiff submitted during oral arguments that the plaintiff should therefore be treated as an individual.

[14] During oral submissions the parties were ad idem that this application should be determined on the basis of the common law as the defendant is not relying on s8 of the Close Corporations Act and the question to be determined is whether the plaintiff’s action is vexatious or reckless or otherwise amounts to an abuse of the process of court.

[15] The plaintiff has simply made bare denials that it would not be able to meet any adverse costs order. It has not been candid with the court as to how it would meet any adverse costs order if it did not succeed in the action it has instituted against the defendant. It has no assets, is presently not trading and does not have any realizable assets.

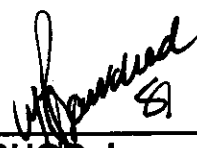
[16] In addition, an important consideration is the prospects of success of the action. Plaintiff’s counsel submitted that the prospects of success is not relevant because if this court made a finding in that regard it would pre-judge the trial court’s finding. The submission is without merit. I have no doubt that the trial court would bring its own independent reasoning to bear in the matter and make a finding accordingly.

[17] I have already mentioned earlier that the plaintiff lost in the urgent application for a declarator in the Gauteng Local Division of this court. The plaintiff's cause of action was based on an alleged unlawful repudiation of the contract by the defendant. The court, per Hodes AJ, determined that the defendant was legally entitled to terminate the contract based on the plaintiff's own material breach and repudiation of the contract. The plaintiff's claim in the pending action in this court is also based on an alleged repudiation of the contract by the defendant. As I said earlier, an application by the plaintiff for leave to appeal failed and so did a special application for leave to appeal in the Supreme Court of Appeal. In these circumstances in my view the prospects of success are poor in the pending action.

[18] It took several writs of execution where nula bona returns were returned by the sheriff and about four years before the plaintiff eventually paid defendant's costs in the urgent application and that of the leave to appeal. The plaintiff also makes the startling claim that the truth of the plaintiff's allegations in the previous application was not properly investigated. In effect the plaintiff is attempting to challenge the findings of that court in this court, which is impermissible. This and all the other facts are, in my view, a clear indication that plaintiff is acting vexatiously, is abusing the court process and seeks to annoy the defendant whilst having poor prospects of success in the action.

[19] I make the following order:

1. The plaintiff/respondent is ordered to give security for defendant's/applicant's costs.
2. The Registrar of this Court is to determine the amount of the security to be provided by the plaintiff/respondent.
3. The action proceedings are stayed until the security for costs as determined by the Registrar is provided by the plaintiff/respondent.
4. The plaintiff/respondent is to pay the costs of the application.



RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant	: Adv T.J.B Bokaba (SC)
	: Adv K. Manyage
Instructed by	: Macrobert Inc.
Counsel on behalf of Respondent	: Adv A.B Rossouw (SC)
Instructed by	: Van Zyl Le Roux Inc.
Date heard	: 10 November 2016
Date delivered	: 16 March 2017