IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

26/09/2022 .....
DATE SIGNATURE

Case No:18620/2018

In the matter between:

APEX COMMODITIES (PTY) LTD	Applicant
and	
AGRI TRADING SERVICES (PTY) LTD (in final liquidation)	First Respondent
JOHANNES ZACHARIAS HUMAN MULLER N.O.	Second Respondent
GERT LOUWRENS STEYN DE WET N.O.	Third Respondent
HAROON ABDOOL SATAR MOOSA N.O.	Fourth Respondent

In re:

AGRI TRADING SERVICES (PTY) LTD (in final liquidation)	Applicant
and	

APEX COMMODITIES (PTY) LTD First Respondent

STEVEN HOCHFELD N.O Second Respondent

Date of Hearing: 24 November 2021

Date of Judgment: 26 September 2022

JUDGMENT

BARNES AJ

Introduction

1. This is an application in which the applicant, Apex Commodities (Pty) Ltd ("Apex"), seeks an order that the first respondent, Agri Trading Services (Pty) Ltd (in final liquidation) ("ATS"), be ordered to furnish security for costs in the sum of R3 Million, in respect of the main application instituted by ATS described below.

2. In addition, Apex seeks an order that ATS be required to pay the costs of a joinder application brought by Apex in terms of which the third and fourth respondents, who are joint liquidators of ATS with the second respondent, were joined in this application.

3. ATS opposes the relief sought by Apex.

4. In what follows, I shall set out, first, the facts giving rise to the main application in respect of which security for costs is sought, and second, the applicable law pertaining to security for costs. Thereafter I shall consider whether Apex has made out a case for an order for security for costs against ATS. Finally, I shall consider the question of the costs of the joinder application.

The Main Application

5. On 1 November 2016, Apex and ATS concluded four SAGOS contracts for the buying and selling of Bulgarian sunflower meal pellets of a specified quality and quantity. During or about March 2017, a dispute arose between the parties pertaining to these contracts.

6. On 6 October 2017, ATS referred the dispute arising from the contracts to arbitration.

7. Apex took the view that the referral to arbitration was time barred in terms of clauses 16.2.2 and 16.2.3 of the contacts ("the time barring clauses") and accordingly, on 20 October 2017, gave notice of its intention to raise a special plea to this effect.

8. On 14 March 2018, ATS launched an application in this Court for the extension of the time periods referred to in the time barring clauses in terms of section 8

of the Arbitration Act 45 of 1965 ("the Arbitration Act"). This is the main application.

9. On 28 November 2019, ATS was placed in final liquidation by the Gauteng Local Division of this Court.

10. On 12 October 2020, Apex brought this application for security for costs against ATS in respect of the main application.

The Applicable Law

11. The procedure in terms of which an application for security for costs is made is governed by Uniform Rule 47. It provides:

> "(1) A party entitled and desiring to demand security shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which security is claimed and the amount demanded.
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> ...
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> (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 to it may seem meet."

12. The rule, which deals with the procedure to be followed, applies to all cases in which security is sought in the High Court. It deals with procedure and not with substantive law. For the substantive law on security for costs regard must be had to the common law and the relevant statutory provisions.

13. The general rule of our common law, as laid down in *Witham v Venables*,[1] is that an *incola* plaintiff cannot be compelled to furnish security for costs.

14. However, in the case of a company, there existed, until recently, an exception to this general rule. Section 13 of the Companies Act 61 of 1973 provided as follows:

> "Where a company or other body corporate is plaintiff in any legal proceedings, the Court may 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, require sufficient security to be given for those costs and may stay all proceedings till the security is given."

15. The 1973 Companies Act was repealed and replaced by the Companies Act 71 of 2008. The new Companies Act does not contain a provision equivalent to the old section 13.

16. Following the commencement of the new Companies Act, there were several judgments in which the High Courts had occasion to consider whether, absent a counterpart to section 13 in the new Companies Act, an *incola* company could be ordered to furnish security for costs. Those judgments, or at least some of them, were discordant on the topic.[2]

17. In 2015, the Supreme Court of Appeal ("SCA") handed down judgment in

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[1] (1828) 1 Menz 291.
[2] See in this regard the judgments cited in footnote 10 in *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA)

Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd[3] in which it clarified the legal position in respect of security for costs under the new Companies Act. The SCA held as follows:

> "[14] The onus is on the party seeking security to persuade a court that security should be ordered. As was the situation under s 13 in the past, a court in the exercise of its discretion will have regard to the nature of the claim; the financial position of the company at the stage of the application for security; and its probable financial position should it lose the action. The distinction to be drawn between the common law and that which prevailed in terms of s 13 is described thus by Brand JA in *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) paras 15 – 16:
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> > 'Against an insolvent natural 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 v Maarman NO* 2002 (6) SA 159 (C) 173 F-I)
> >
> > In the exercise of its discretion under s 13 of the Companies Act, on the other hand, there is no reason why the court should order security only in the exceptional case. On the contrary, as was stated in *Shepstone & Wylie* (supra) at 1045I – J, since the section presents the Court with an unfettered discretion, there is no reason to lean towards either granting or refusing a security order.'
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> [15] Accordingly, in terms of the common law, mere inability by an *incola* to satisfy a potential costs order is insufficient to justify an order for security; something more is required (*Ramsamy NO and Others v Maarman NO and Another* 2002 (6) SA 159 (C) at 172 I – J). As Thring J put it (*Ramsamy NO* at 172J – 173A) –
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> > '(w)hat this something is has been variously described in a number of decisions. Thus in *Ecker v Dean* ... it was said ... that the basis of granting an order for security was that the action was reckless and vexatious.'

[3] 2015 (5) SA 38 (SCA)

...

[16] Absent s 13, there can no longer be any legitimate basis for differentiating between an *incola* company and an *incola* natural person. And as our superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings, it must follow that the former can 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 is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse."

[17] According to Nicholas J in *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 SA 1331 (W) at 1339 E-F:

> 'In its legal sense vexatious means frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant *(Shorter Oxford English Dictionary)*. Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with for the sole purpose of causing annoyance to the defendant; abuse connotes a mis-use, an improper use, a use mala fide, a use for an ulterior motive.'

In *African Farms and Townships Ltd v Cape Town Municipality* 1963 SA 555 (A) at 565D – E Holmes JA observed:

> 'An action is vexatious and an abuse of the process of court *inter alia* if it is obviously unsustainable. This must appear as a certainty, and not merely on a preponderance of possibility. *Ravden v Beeten* 1035 CPD 269 at p 276; Burnham v Fakheer 1938 NPD 63.'"

(Emphasis added)

18. What is clear from the above is that before a Court may exercise its discretion to order security for costs it must be satisfied not only that the party against whom the order is sought would, if unsuccessful in the main application, be unable to satisfy an adverse costs order, but also that the main application is vexatious, reckless or otherwise amounts to an abuse.

19. I will consider each of these legal requirements in turn below.

Would ATS be unable to satisfy an adverse costs order?

20. ATS, in opposing this application, provided an extract from the estate bank account from which it is evident that, as at 13 January 2021, the estate bank account held the amount of R11 167 313.61 to its credit.

21. Apex, however, contends that that this pales into insignificance when weighed against the deficiency of assets reflected in the estate's statement of affairs, which is to the tune of R175 622 422.24. Apex contends further that it will rank as a concurrent creditor, and as such will have no prospect whatsoever to be paid from a deficit in excess of R164 million.

22. ATS, for its part, contends that since the estate account has funds of R11 167 313.61 available, it cannot be regarded as the proverbial "empty shell" against which a presumption can be made that the main application is vexatious or reckless and that it would be unable to satisfy an adverse costs order.

23. ATS contends further that while all legal costs incurred by Apex up until the liquidation of the company, would be treated as a concurrent claim in its estate, all legal costs incurred after the company's liquidation would be treated as part of the costs of the administration of the liquidated estate and would consequently be payable from the amount currently in the estate's bank account, prior to any payment to creditors.

24. There appears to me to be merit in ATS's submissions and I am not convinced that, on the evidence before me, it can be concluded that ATS would be unable to satisfy an adverse costs order against it.

25. It is, however, not necessary for me to finally decide this question. This is so because, even if I were to conclude that ATS would be unable to satisfy an adverse costs order against it, Apex is, in my view, unable to establish the next requirement, that is, the requirement that the main application brought by ATS is vexatious, reckless or otherwise amounts to an abuse.

26. It is to a consideration of this requirement that I now turn.

Is the main application vexatious, reckless or otherwise abusive?

27. The provision of the SAGOS contracts which is central to the main application launched by ATS is clause 16. It provides as follows:

> "16 Time limits and mandatory procedures for pursuing any claim
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> 16.1 The parties affirm that it is necessary that any dispute between them should be notified without delay and then pursued promptly. They therefore agree that, unless a party making a claim does so in accordance with time limits specifically relating thereto, as set out elsewhere in this document, or if no specific time limits apply, then in accordance with the requirements of clause 16.2, such claim shall be barred and deem to have been waived and abandoned for all purposes whatsoever.
>
> 16.2 .....

16.2.1 This clause regulates the time limits for making and pursuing any claim where such time limits are not specifically set out elsewhere in this document.

16.2.2 Any claim for any failure to deliver the commodities in accordance with this contract must, if such failure was not, and would not have been, apparent from a reasonable inspection on delivery be notified in writing to the other party within 28 consecutive days from the last day of the period of delivery and thereafter, if such claim has not been settled, then it must be referred in writing to the AFSA secretariat within 21 consecutive days from the date of such notification to the other party.

16.2.3 Any claim for any failure to perform in terms of this contract shall be notified in writing to the other party within 28 consecutive days from the date on which the other party could reasonably have become aware of such failure. Thereafter it must be referred in writing to the AFSA secretariat within 21 consecutive days from the date of such notification to the other party."

28. It is common cause that ATS did not comply with either the 28 day period or the 21 day period stipulated in the clauses above. As stated above, this gave rise to Apex's special plea to the effect that the arbitration was time barred and to ATS's application in this Court to extend the time periods stipulated in the contracts ("the main application"). The main application is brought in terms of section 8 of the Arbitration Act which provides as follows:

> "**8 Power of court to extend time fixed in arbitration agreement for commencing arbitration proceedings**
>
> Where an arbitration agreement to refer future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused, may extend the time for such period as it considers proper,

> whether the time so fixed has expired or not, on such terms and conditions as it may consider just but subject to the provisions of any law limiting the time for commencing arbitration proceedings."

29. Apex's argument is that while section 8 of the Arbitration Act affords a Court the discretion to extend the second time period referred to above (viz, the 21 day period within which the dispute must be referred to arbitration) it does not afford a Court the discretion to extend the first time period (viz, the 28 day period within which the dispute must be declared).

30. As authority for this proposition, Apex relies on the judgment of *Wilmington (Pty) Ltd v Short & McDonald (Pty) Ltd*[4] in which the Court held:

> "The creation of a dispute is a condition precedent to the commencement of arbitration proceedings. It is not a step which is taken to commence arbitration proceedings. It is only when a dispute actually arises between the parties that arbitration proceedings can be commenced and, accordingly, that some step can be taken to commence proceedings."[5]

31. The Court in *Wilmington* held further, with reference to section 8 of the Arbitration Act:

> "What s 8 deals with is a step which must be taken in terms of the agreement to commence arbitration proceedings after a dispute has arisen between the parties and not a step which might be taken before it can be said that a dispute has arisen which in terms of the agreement may form the subject matter of arbitration proceedings."

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[4] 1966 (4) SA 33 (D & CLD)
[5] At 34D -E

32. Apex contends that it is accordingly clear that section 8 of the Arbitration Act does not afford the Court a discretion to extend the first time period in terms of clause 16 of the SAGOS contracts and that ATS's main application is accordingly unsustainable in the sense of being vexatious, reckless or otherwise amounting to an abuse.

33. ATS, for its part, disputes this. It contends that the notice which it was required to dispatch to Apex within 28 days in terms of clause 16 of the SAGOS contracts constituted "some step" within the meaning of section 8 of the Arbitration Act and that a Court accordingly has a discretion to extend this time period.

34. ATS points out further that the *Wilmington* judgment on which Apex relies was handed down in the pre-constitutional era and that questions of interpretation of contract now fall to be dealt with reference to the judgments in *Barkhuizen v Napier*[6] and *Beadica 231 CC and Others v Trustees, Oregon Trust and Others.*[7] In *Beadica* the Constitutional Court confirmed that public policy imports values of fairness, reasonableness and justice and that these values underlie and inform the substantive law of contract.[8] The Constitutional Court confirmed further that where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy, a Court may

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[6] 2007 (5) SA 323 (CC).
[7] 2020 (5) 247 (CC)
[8] At para 73.

refuse to enforce it.[9]

35. ATS contends further that Apex's approach is overly simplistic and fails to take account of the judgments in the post Constitutional era which have effectively held that the pre-constitutional privileging of *pacta sunt servanda* is no longer appropriate under a constitutional approach to judicial control of enforcement of contracts.

36. It seems to me that the true issue may be the proper constitutional interpretation of section 8 of the Arbitration Act (and whether *Wilmington* falls to be re-visited in the new constitutional era). *Prima facie*, this appears to be question of whether the *Wilmington* interpretation may violate the right of access to courts under section 34 of the Constitution, rather than a question of fairness in contracts or *pacta sunt servanda*.

37. In any event, I note that in *Hillary Construction (Pty) Ltd v Roads Agency Limpopo (Pty) Ltd*,[10] Prinsloo J, appears to have expressed some doubt as to whether *Wilmington* was correctly decided (even without reference to constitutional principles).[11] It may be therefore that the constitutional issue does not even arise.

38. All things considered, I am of the view ATS's contentions are not without merit. While the main application may involve complex questions pertaining to the

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[9] *Beadica* at para 79.
[10] 2011 JDR 0984 (GNP)
[11] At paras 112 and 113.

interpretation of section 8 of the Arbitration Act and/or section 16 of the SAGOS contracts themselves, given the constitutional context within which such interpretation must now take place, ATS's arguments may well prevail. It cannot therefore be said, in my view, that the main application is unsustainable in the sense of being vexatious or reckless. It must be emphasised that vexatious and reckless in this context means *"improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant"* and *"an action [or application] is vexatious and an abuse of the process of the court inter alia if it is obviously unsustainable. This must appear as a certainty, and not merely on a preponderance of probability."*[12]

39. In my view, the main application cannot remotely be said to be *"improper"* or "*obviously unsustainable*" in the above sense. For this reason alone, Apex's application for security for costs cannot be granted.

40. It remains to deal with the question of the costs of the joinder application.

The costs of the joinder application

41. Apex contends that ATS took the *"obviously unsustainable"* point of non-joinder of the first respondent's co-liquidators and that this necessitated the *"incurrence of wasted costs"* in the bringing of the joinder application by Apex. Apex seeks an order that ATS pay these costs on the opposed scale despite

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[12] *Boost Sports Africa*, cited above, at para 17.

the fact the joinder application was unopposed.

42. I fail to understand Apex's contention that the non-joinder point was *"obviously unsustainable."* As ATS correctly points out, Apex was indeed obliged to cite all the liquidators in its application. Moreover, Apex brought the joinder application when the point was raised by ATS, which application was not opposed by ATS.

43. Given that the joinder application was necessary and unopposed, I am of the view that Apex is not entitled to the costs thereof.

44. In the circumstances, I make the following order:

Order

1. The application for security for costs is dismissed with costs.

2. The application for an order directing the first respondent to pay the costs of the joinder application is dismissed with costs.

BARNES AJ

Appearances:

For the Applicant: Adv P Sieberhagen

For the Respondents: Adv A J Wessels