IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO.: 7914/2018

In the matter between:

N[….] H[….] obo E[….] R[….] H[….] Plaintiff/Respondent

and

SCHINDLERS LIFTS SA (PTY) LIMITED First Defendant/First Applicant

OLD MUTUAL LIMITED Second Defendant/Second Applicant

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 01 September 2020.

Vahed J:

[1] The plaintiff, as mother and natural guardian of her minor son, E[….] R[….] H[….] ("E[….]"), instituted action in delict against the defendants for damages. The total claim is of the order of R7 250 000,00. The damages claimed are said to have arisen out of an incident which occurred on 21 July 2015 at the Gateway shopping centre, in Umhlanga and which is more properly known as the *Gateway Theatre of Shopping.* That property is alleged to be owned by the second defendant. The incident giving rise to the claim is alleged to have occurred when E[....]'s foot became trapped between the step of an escalator and the fixed adjacent side wall. It is alleged that the escalator was operated and or managed

by either or both of, the defendants. Thus, the allegations continue, the minor sustained serious injuries with serious and severe *sequelae.*

[2] When this action was commenced, and it is common cause, the plaintiff and E[....] resided permanently in the United Kingdom at an address, being residential property, described in the particulars of claim. It is also common cause that the plaintiff does not own un-mortgaged immovable property, or any property for that matter, within South Africa.

[3] After institution of action, and arising out of those facts, both defendants, in terms of Rule 47(3) of the Uniform Rules of court, demanded security for costs in the sum of R600 000,00 each. The defendants are separately represented.

[4] The plaintiff initially resisted her liability to provide security for costs, both on the ground that she as was acting in a representative capacity the minor would be non-suited if she was ordered to provide security, and secondly she sought refuge in the provisions of section 28 of the Constitution, in that E[....] would be stripped of his rights.

[5] That resulted in the present conjoined applications where the defendants, as applicants sought an order that the plaintiff as respondent furnish the required security.

[6] As originally conceived the request for security was that the sum of R600 000,00, in cash, be paid into each of the trust accounts of the defendants' respective attorneys. Both security applications were opposed. They largely mirrored each other and the plaintiff put forward the same stance in opposing the relief sought in disputing liability in having to provide security.

[7] However, stating that she was acting on advice, the plaintiff tendered an amount of R150 000,00 as security for both defendant's costs, alleging tha.t that sum of money was to be the product of a loan that she was able to raise.

[8] Answering, supplementary answering and replying affidavits were then exchanged.

[9] By the time the matter came before me as an opposed application on 5 August 2020 the dispute between the plaintiff and the second defendant, in so far as it related to the furnishing of security, had been settled. On that date, and by

consent between the plaintiff and the second defendant I made an order that the plaintiff be directed to provide security for the second defendant's legal costs and that that security would take the form of payment in cash to the plaintiffs attorney's trust account in the sum or R75 000,00 together with certain explanatory and ancillary orders relating thereto.

[10] As between the plaintiff and the first defendant, and with regard to the first defendant's claim for security for costs, the matter was adjourned to enable the parties to deliver full written argument on that question so as to avoid a physical hearing, given the complications and restrictions imposed upon court proceedings by the Covid-19 pandemic and the so called "lockdown regulations" that were in place on that date. To that end the parties were agreed that I would deliver this judgment without the need for oral argument either unfolding physically in a court room or by some or other electronic format. I am grateful to Mr Boulle and Mr Lauw, who appeared for the first applicant and respondent respectively, for the heads of argument and supplementary written argument that they furnished to me.

[11] Much has been made in the heads of argument and the written argument delivered by both sides as to the entitlement to security and as to the onus of proof in circumstances where an *incola* demands security for costs from a *peregrinus.* There has been much discussion about the import of the decision in *Magida v Minister of Police* 1987 (1) SA 1 (AD). In my view the plaintiff incorrectly understands *Magida* as holding that an *incola* has no right to claim security from a foreign litigant. What was decided in *Magida,* after reviewing the common law, was that an *incola* does not have a right which entitles him or her as a matter of course to the furnishing of security for costs by a *peregrinus.* The court has a judicial discretion in that regard. As will be seen, those two statements contain a material distinction. *Magida* did not hold that an *incola* has no right to demand security - the entitlement to reqaest security for costs remained unaffected. That important distinction in understanding *Magida* underpins the rest of the argument and what unfolds in the remainder of this judgment. For completeness it is worth recalling that in' *Magida* the conclusion was arrived at by considering that:-

a) In Roman Dutch Law a non-domiciled foreigner (such as the present plaintiff) would normally be required to furnish security in the form of a surety or sureties and this was achieved by means of a *cautio fideiussoria;*

b) If a non-domiciled foreigner was unable to give such sureties, the law allowed for *cautio juratoria* which was security by oath or juratory security. In order to avail oneself of the *cautio juratoria* a non-domiciled foreigner had to state, under oath, amongst others, that *' though he did his best he was unable to find* a *surety' ;*

c) There was always a danger that non-domiciled foreigners could very easily swear that they could not find sureties. The only practical solution to prevent such abuse was apparently to ensure that the inquiry at all times was alive to such tendency on the part of non-domiciled foreigners;

d) The *cautio juratoria* has fallen into disuse in South African law but the· common law principles that underlie its granting are still applicable to our modern practice where a *peregrinus* in his or her answering affidavit deposes to his or her in ability to furnish security for costs owing to his or her impecuniosity;

e) In order to avoid security on the basis of impecuniosity, a *peregrinus* must take the court into its confidence and disclose all relevant facts to enable a court to properly assess its position (bearing in mind the observed historical tendency in *Magida* for non-domiciled foreigners to allege impecuniosity).

[12] In my view therefore the starting point is that a *peregrinus* should furnish security for costs and that starting point is unaffected by the decision in *Magida.*

[13] Having set out those principles and my understanding of the decision in *Magida* it is now not necessary to become distracted by questions of onus. The matter must simply be approached on the basis that a court has a broad discretion to exercise and the fact that one party is a *peregrinus* will feature

heavily in the exercise of that discretion. That fact, i.e. that one of the parties is a *peregrinus* is not simply one that is thrown into the mix so to speak. It must be given special attention because it stems from the established origin of local courts protecting an *incola.*

[14] In *BMW Industrial Technology (Pty) Ltd and others v Baroutsos* 2006 (5) SA 135 (W) at paragraphs 36 and 37 the proposition was stated thus:-

> "[36] The reasons why a court may exercise a discretion in favour of ordering security for costs where an *incola* is sued by a peregrine plaintiff are too well known and readily understandable to require restatement. The reasons are based on a desire, in proper circumstances, to protect an *incola.* 'Proper circumstances' include general considerations of equity and fairness to both parties.
>
> [37] The equity and fairness of directing security for costs where an *incola* is sued by a peregrine plaintiff is far more readily apparent than the equity and fairness of requiring a peregrine plaintiff to give security for the judgment likely to be obtained against him on a counterclaim by an *incola.* In the first instance, the claim has been brought by the *peregrinus;* he has chosen to litigate against the *incola.* In the second case, the claim for which security is sought is brought by the *incola* and not the *peregrinus;* it is the *incola* who has chosen to litigate insofar as his claim is concerned. Where the *incola* is a defendant in convention, he is such involuntarily. He has no choice in the matter. In the case of a counterclaim, the *incola* acts voluntarily and chooses to sue. Having done so, he now turns to his peregrine opponent and requires that the latter secures the *incola's* counterclaim."

[15] As pointed out in the first defendant's argument, that proposition is also neatly encapsulated in *International Trade Administration Commission and another v Carte Blanche Marketing* CC *and another: in Re Carte Blanche Marketing* CC *and another v International Trade Administration Commission and others* [2019] ZAGPPHC 33:-

> "[7] It is trite that the Court as a discretion whether or not to order security for costs. This applies even in the case of a *pereigrinus* applicant or plaintiff who

does not own immovable property in South Africa. However, the discretion has to be exercised judicially, taking into account all the relevant facts, as well as considerations of equity and fairness to both parties.

[8] At the end of the exercise of the Court's discretion lies the principle that where the Court has come to the conclusion that the *peregrinus* who initiated the court proceedings should not be absolved from furnishing security for costs, the Court is entitled to protect an *incola* defendant to the fullest extent."

[16] Contending that this matter had to be decided on what was referred to as "case-specific features" the plaintiff submitted that I ought to take into account the fact that:-

a) The plaintiff was a single mother acting in a representative capacity on behalf of a minor child in circumstances where the father of the minor child did not comply with his maintenance obligations;

b) Any adverse order for costs that ultimately might be made would be one borne by the minor and not by the plaintiff as she was not acting mala *fide;*

c) That the plaintiff was merely seeking justice against well-known listed companies which had a duty to ensure the safe operation of escalators on their premises;

d) There was no suggestion that the claim was not being instituted *bona fide;*

e) That she was clearly not a *vagabundus* and that she had a fixed residence in a first world country;

f) That there was no suggestion that she was not a honourable person;

g) That she had no means to raise cash in circumstances where what was demanded of her would stretch her resources to beyond their limits;

h) There was no suggestion that the merits were not in the minor's favour;

i) The court had to ensure that justice was done to a minor who was injured at a very tender age.

[17] Some of those factors might be relevant to the present consideration. However, it is also important to consider the case from the first defendant's perspective in that there is an inconvenience to be considered when one has to recover costs abroad notwithstanding that the world currently may be in an age of globalisation. That did not prevail when principles now being applied had originally emerged. In *Browns the Diamond Store* CC *v Van Zyl* [2017] ZAGPJHC 70 the following was said:-

> "[23] So although in this age of globalisation, suing a peregrine in his own jurisdiction to recover costs may be less arduous, the extra burden of costs and delay in enforcing a judgment abroad is an obvious reality that cannot be ignored. It, therefore, comes as no surprise that as recently as in 2015, the Supreme Court of Appeal in *Exploitatie- en Beleggingsmaatshappij Argonauten 11 BV* could still recognise this to be a primary reason for why a peregrine plaintiff should provide security. In fact due to the sliding Rand, litigation in the United Kingdom has become even more prohibitive. That said, even if Browns were to bring proceedings in the United Kingdom to recover its costs, the respondent's reticence to make full disclosure of his assets and liabilities in the United Kingdom will preclude, hinder or add to the burden of enforcement against any such assets that do exist abroad. This, in my view, is a further factor that weighs in favour of granting an order for security for Browns' costs in the main action."

[18] The first defendant correctly submits that the representative capacity of the plaintiff is irrelevant. The question is whether the first defendant will be able to seek satisfaction for any costs order that it might ultimately be the beneficiary of. It is correct that ordinarily a representative is not required to pay costs but that it not relevant to the question of security. Ultimately when assessing the ability to furnish security it must be that a court can look at what the minor's parents or family can provide. See in this regard *Barkers v Bishops Diocesan College and others* 2019 (1) SA 1 (WCC).

[19] It is also correct that the merits of the case are ordinarily irrelevant. That is so unless it can be demonstrated that there is a high degree of success or failure. In *Feigner v The Body Corporate of the Lighthouse Mall* [2011] ZAKZDHC

20 the court followed *Saker and* Co *Ltd v Grainger* 1937 AD 223 as authority for this principle. In the present case neither the plaintiff nor the first defendant convincingly contends for a high degree of success or failure. Accordingly, an analysis of the merits of the plaintiff's case as set out in her heads of argument cannot be weighed into the facts in exercise of my overall discretion.

[20] In the finer analysis there are, as was submitted, two simple questions that dispose of this matter:

a) Absent security will the first defendant be able to satisfy a costs order through local execution? The answer is clearly in the negative.

b) Secondly, has the plaintiff established, with cogent admissible evidence, that neither she nor her family can manage to provide security? Again, the answer is in the negative.

[21] In considering the second question sight must not be lost of the fact that the settlement achieved and turned into the order of court (referred to earlier) as between the plaintiff and the second defendant recognises that some form of security is necessary and that the plaintiff has the ability to raise some money in that regard.

[22] In the additional submissions that were delivered the first defendant records that prior to requiring this matter to be considered the first defendant delivered an open tender offering to accept the sum of R350 000,00 as security. There is no suggestion that that sum was excessive and, on an analysis of some of the figures involved in assessing the plaintiffs ability it seems that that figure is not outside of her reach. Clearly that sum is sufficient to enable the first defendant to take the litigation to a point sufficiently close to the trial. Should the need arise at some point in the future where the first defendant feels confident that it would be able to mount a case for additional and better security it can do so then. Of course, the plaintiffs affordability is again a question that might need to be considered at that point in time should the first defendant be advised that it proceed with such additional application. For the moment I am content to order that the plaintiff provide the required security in that amount.

[23] It follows also that the costs of the opposed application must follow the

result.

[24] Accordingly, I make the following order:

a) The plaintiff is directed to provide security for the first defendant's legal costs;·

b) The aforesaid security shall take the form of a payment in cash into the trust account of the first defendant's attorneys in the sum of R350 000,00 (three hundred and fifty thousand rand);

c) The first defendant's attorneys are directed to hold that sum of money, pending the final determination of this action, in trust in an interest bearing account, the interest accruing thereon to be for the benefit of the plaintiff;

d) In the event of the plaintiff failing to pay the aforesaid amount into the first defendant's attorneys trust account within 15 days of the date of this order, the first defendant is given leave to apply, on the same papers, suitably supplemented as may be necessary, for an order:

(i) dismissing the plaintiff's claim;

(ii) directing the plaintiff to pay the costs of the action.

e) The plaintiff is directed to pay the costs of this application.

Vahed J

Case Information:

Date set down for Hearing:	5 August 2020
Date of receipt of further submissions:	14 August 2020
Date of Judgment:	1 September 2020

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