THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Nos: 19217/2012 & 19219/2012

In the matter between:

JAKOBUS HENDRIK LOUW NEL **Applicant**

And

MAVERICK TRADING 487 CC t/a THE LITTLE BIG BOOK STORE
(Reg No: 2003/046307/23) **1st Respondent**
COALITION TRADING 182 CC t/a THE LITTLE BIG BOOK STORE
(Reg No: 2003/041918/23) **2nd Respondent**
LOUISE NORMA KILLIAN **3rd Respondent**

In re:
MAVERICK TRADING 487 CC t/a THE LITTLE BIG BOOK STORE
(Reg No: 2003/046307/23) **1st Plaintiff**
COALITION TRADING 182 CC t/a THE LITTLE BIG BOOK STORE
(Reg No: 2003/041918/23) **2nd Plaintiff**
LOUISE NORMA KILLIAN **3rd Plaintiff**

And

JAKOBUS HENDRIK LOUW NEL **Applicant**

Coram: **KOEN AJ**
Heard: **16 February 2016**
Delivered: **1 March 2016**

JUDGMENT

KOEN AJ

[1] This is an application for security for costs relating to two separate actions which have been consolidated. The applicant in this matter is the defendant in both matters and the respondents the plaintiffs. For ease of reading I intend to refer to the parties as they are referred to in the main actions.

[2] In each case a close corporation ("the corporation"), as first plaintiff, together with Ms Killian, as second plaintiff ("Ms Killian"), have instituted proceedings against the defendant ("Mr Nel") in which the court is asked to order Mr Nel to render a true and proper statement of account of the profits generated by the corporation, and a statement of account indicating any balance outstanding in respect of the purchase price of the business of the corporation purchased by him. An order directing that the accounts to be rendered are debated is also sought, as well as costs.

[3] In each of the cases the plaintiff alleges that Mr Nel was employed in a managerial position by the corporation. Mr Nel had, it is alleged, purchased the business of each corporation and was to pay the purchase price in question from the operating profits generated by the business. It is alleged, further, that because of his position as an employee in a managerial position Mr Nel was obliged to render to the plaintiffs a true and proper statement of account of all the profits generated as well as to furnish documents indicating income, assets, liabilities and expenses. Finally, the allegation is made by the plaintiffs that Mr Nel had been withdrawing cash and profits from the corporations and depositing them into an account over which he exercised sole control in breach of his fiduciary obligations towards the plaintiffs.

[4] In the pleas he has filed in each matter Mr Nel takes two points *in limine*. The first of these is that each corporation has not taken a proper resolution to institute the proceedings against him. Secondly, he pleads *in limine,* that any duty to account relied upon by the plaintiffs arising out of his employment as a manager could be a duty owed only to a corporation and not

to one of its members, namely, Ms Killian. For the rest, the allegations made by the plaintiffs are met with a denial.

[5] The summonses in each action were issued during October 2012 and the pleadings are closed. In each matter, some three months after a pre-trial conference in terms of rule 37 (8) had taken place, Mr Nel delivered a notice in terms of rule 47(1) calling upon the plaintiffs jointly and severally to furnish security for costs in the amount of R150 000. The notice calling for the furnishing of security stated that the security was demanded from the plaintiffs on the basis that there is reason to believe that they will be unable to pay Mr Nel's costs if he is successful in his defence.

[6] Because security for costs was not furnished pursuant to the delivery of the notices in terms of rule 47(1) this application was launched.

[7] Mr Nel bases his application for security for costs as against the corporations on the allegation that there is reason to believe that they will be unable to pay his costs if he is successful in his defence as contemplated in section 8 of the Close Corporations Act 69 of 1984. In this regard Mr Nel alleges that he has been unable to recover the costs incurred in previous litigation between himself and the corporations and that an amount of approximately R97 000 is still owing - this after the credit balances in the corporation's bank accounts had been attached and all available funds paid over pursuant to writs of execution issued in regard to the taxed bills. He also attaches to his affidavit copies of the corporations' latest bank statements which reflect that they do not have anything like sufficient funds to enable them to settle the balance owing in respect of costs.

[8] The allegations made in the affidavit filed in support of the application for security for costs by Mr Nel relating to the corporation's inability to pay costs in the event that he is successful in his defence are not refuted by the plaintiffs. I am satisfied that Mr Nel has

established by credible evidence that there is reason to believe that the corporations, if unsuccessful, will be unable to pay his costs.

[9] That, however, is not the end of the matter. In *Shepstone & Wylie and Others v Geyser* NO 1998 (3) SA 1036 (SCA) it was held that *"The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim". Shepstone & Wylie* also makes it clear that the proper exercise of discretion in regard to security for costs requires of a court that *"... it must decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security"* (at 1045l to 1046C).

[10] Moreover, a court in the exercise of its discretion must *"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"* (see *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at 48G.)

[11] Having regard to these general principles I turn to consider the nature of the claims which form the subject matter of the consolidated actions. These are actions for the rendering and abatement of an account allegedly due by Mr Nel. Although in the pleadings the existence of a fiduciary duty is denied by Mr Nel, he takes a somewhat different view in his replying affidavit in the application for security for costs where he concedes, correctly in my view, that as a result of his employment as a manager he did owe a fiduciary duty towards the corporations. It is also clear from the affidavits in the application for security for costs that, in fact, funds were transferred from the corporations' bank accounts to those of Mr Nel. Mr Nel also states that he used his personal bank account to fund the operations of the corporations including payment of

creditors. In fact, on his version he did this to the complete exclusion of the bank accounts of the corporations with the result that, in effect, the corporations had only one creditor, namely himself. On my reading of the affidavits, it seems clear that it was only Mr Nel who was instrumental in the making of these payments by the corporations to himself. Finally, I pause to add that the amounts involved are alleged to be considerable, running into many millions of Rand.

[12] It must be observed, further, that the application for security for costs has been brought at a very late stage of the proceedings. Whilst this is not necessarily fatal it is a factor which counts against Mr Nel. This is because not insignificant costs have already been incurred in bringing the matter to the verge of trial.

[13] There is another factor which, I think, is of some importance. Mr Nel contends that the cases against him can be disposed of by way of the points *in limine* he has taken. The points are simple, namely that corporation has not resolved to sue him, and that Ms Killian cannot enforce in her name a duty owed by him to the corporations. As to the first point counsel for Mr Nel indicated that he wished the court to refer the question whether or not a resolution had been taken to sue Mr Nel to oral evidence. He proposed to call the other 50% member of the corporations to testify that such a resolution had not been taken. I declined to allow this to happen, because it seemed to me quite undesirable that a court determining an application for security for costs should hear evidence on the merits of the dispute itself, so as to assess the prospects of success of the plaintiffs in the consolidated actions. But what is clear is that the battle lines are clearly demarcated. Whether or not Ms Killian can enforce the claims seems to me to be a matter for legal argument. Why these issues cannot be separately determined in terms of rule 33(4) was not explained to me. If a separation was ordered the issues could be disposed of swiftly and relatively inexpensively. If Mr Nel is correct in regard to the points in *limine*, then he could succeed in his defence with relatively little cost, without effectively depriving the plaintiffs of the right to make their case. In weighing the interests of the parties referred to in *Shepstone &*

Wylie, it seems to me that this it is a compelling reason not to order that security be furnished with the likely effect that the plaintiffs are denied recourse to the courts.

[14] In the circumstances, on the basis of what is contained in the affidavits filed in the security for costs application, it seems to me that it cannot be said that the corporations have no reasonable prospect of being able to establish that Mr Nel is under a duty to account to them. It cannot be said, in my view, in the light of what is known about them at this stage, that the corporations' claims are not made in good faith. The corporations appear to me to have instituted claims which present triable issues and I think that an injustice would be done if they were to be prevented the opportunity of prosecuting their claims because they might be unable to furnish security for costs.

[15] This leaves the claim for security for costs against Ms Killian. In this regard one must turn to the common law. As a general rule something more than an inability to pay is required, and the court must be satisfied that the action is vexatious or reckless or amounts to an abuse of process. The power to order security in these circumstances is one, it is well settled, which ought to be sparingly exercised and then only in exceptional circumstances (see *Ecker v Dean* 1938 AD 102 at 111).

[16] Mr Nel argues that Ms Killian has not shown that she is entitled to an accounting because any fiduciary duty which flowed from his employment by the corporations is one which is owed only to the corporations and not to its members. He may well be right (although this need not be decided at this stage), but is it enough of a reason to order her to furnish security for costs? The difficulty which I have with the proposition is that her participation in the proceedings seems to me to add nothing of any substance to the costs which might have to be borne by Mr Nel if he succeeds in his defence. She and the corporations are represented by the same legal team, are engaged in the resolution of essentially the same dispute, about which it seems overwhelmingly likely the same evidence will have to be considered. Whether or not she is entitled to the

rendering of an account and the debate there of in her own right is a matter which I cannot see will take up any significant amount of time or add any significant layer to the costs of the action. As stated above it appears to be an issue capable of resolution by legal argument on a narrow point. In the circumstances of this case, then, I am not satisfied that this is a matter which calls for the exercise of the court's power to order Ms Killian to furnish security for costs.

[17] As to costs I see no reason why the normal rule, which is that costs follow the result, should not apply.

[18] In the circumstances I make the following order:

The application is refused with costs.

KOEN AJ

APPEARANCES

For the Applicant:	Mr CW Kruger Instructed by: VanDerSpuy Cape Town
For the Respondents:	Mr C Hendricks Instructed by: Marais Muller Yekiso