REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

***EX TEMPORE* JUDGMENT**

Case no: A 76/2013(B)

In the matter between:

MYNARD SLABBERT — **FIRST APPLICANT**

A P VAN STRATEN — **SECOND APPLICANT**

and

MICHAEL JOHN LANE, N.O — **RESPONDENT**

Neutral citation: *Slabbert v Lane* (A 76/2013(B)) [2013] NAHCMD 375 (17 September 2013)

Coram: GEIER J

Heard: **17 September 2013**

Delivered: **17 September 2013**

Flynote: Costs - Security for costs - The court must carry out a balancing exercise - On the one hand it must weigh the injustice to the applicant if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the respondent if no security is ordered and if the main action or application of the plaintiff or applicant fails and the defendant/respondent finds himself unable to recover from the plaintiff/applicant the costs which have been incurred by him in his defence of the claim.

Costs - Security for costs - Court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, 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

Practice - Security for costs - Incola claiming security for costs against peregrinus - Incola does not have a right which entitles him as a matter of course to furnishing of security for costs by peregrinus - Court has judicial discretion - Court should have regard to particular circumstances of case, and to considerations of fairness and equity to both parties - Peregrinus pursuing claim in official capacity as liquidator - If peregrinus ordered to furnish security, his chances of prosecuting his action against incola would be effectively be prevented -

Costs - Security for costs – Court's discretion - Factors taken into account in exercising of discretion – here respondent's statutory role and duties which he was obliged to perform as liquidator taken into account – here public interest element coming into play – not in public interest that respondent should be prevented to exercise statutory functions and office – this constituting important factor justifying decision not to order security to be given -

Summary: The facts upon which the court exercised its discretion in favour of respondent appear from the judgment.

ORDER

The application for security for costs is hereby dismissed.

JUDGMENT

GEIER J:

[1] The respondent in this application for security for costs has lodged an application in this court in terms of which it seeks to review a decision of the Deputy-Master of the High Court to dismiss his objection against the first applicant's claim in the insolvent estate of Riaan and Mathilde Botes.

[2] The applicants demand security for the cost in this review in the amount of N$350 000-00. No objection was raised in respect of this amount.

[3] The applicants essentially based their applications on two grounds:

a) the fact that the respondent is a *peregrinus* of this court; and
b) the fact that the respondent on his own admission has insufficient funds to cover the applicant's legal costs.

[4] The applicants rely on the basic rule which entitle an *incola* of this court to demand and receive security for costs.

[5] The applicants submit that they have discharged their onus in this regard on the basis of the respondent's admissions contained in the answering affidavit filed of record.

[6] I agree.

[7] It was in such circumstances submitted further that the court should order security unless special circumstance exist, which would enable the court to exercise its discretion in favour of the respondent.

[8] Applicant' contend that no such special circumstances exist or have been raised. In any event that this is not the test to be adopted by the court in the determination of this question.

[9] Applicants rely heavily on the general principle formulated in *Saker & Co Ltd vs Grainger* 1937 AD were the court stated at page 227:

> "The principle underlying this practice is that in proceedings initiated by a *peregrines* the Court is entitled to protect an *incola* to the fullest extent."

and that the court should be slow to absolve a *peregrinus* from the obligation to provide security.

[10] As regards the merits of the review it was submitted that such merits should not constitute a factor which should influence the court's decision. In this regard reliance was placed on the case of *Alexander v Jokl* 1948 (3) SA 269 (W) where Williamson AJ held that:

> 'The bona fides or the soundness of the claim of the peregrinus is at no time a factor which influences the discretion to be exercised in deciding whether or not an incola should be protected against possible loss in regard to the costs of defending the claim brought against him. The Court in ordering security for such a purpose does not in any way anticipate the eventual decision on the claim by investigating and weighing up at that stage the probabilities of success or the bona fides of the claim … '.[1]

[11] On behalf of the respondent reliance was placed on the decision of *Shepstone & Wylie v Geyser NO* 1998 (3) SA 1036 (SCA)[2] where Hefer JA stated – and with whom all the other judges of appeal concurred - :

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[1] At p281

[2] Also reported in the [1998] 3 All SA 349

'In my judgment, this is not how an application for security should be approached. Because a Court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, 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. (Compare *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group* (Pty) Ltd (No 1) 1997 (4) SA 908 (W) at 919G--H; *Wallace NO v Rooibos Tea Control Board* 1989 (1) SA 137 (C) at 144B--D.). I prefer the approach in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 (CA) at 540a --b where Peter Gibson LJ said:

'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.'[3]

[12] These principles where approved by Strydom CJ and adopted in this jurisdiction by the Supreme Court in *Northbank Diamonds Ltd v FTK Holland BV* 2002 NR 284 (SC)[4] and the, there preferred, approach, as adopted from the English decision of *Keary Developments Ltd v Tarmac Construction Ltd and Another* as quoted in these decisions, as adopted further in *Hepute v Minister of Mines & Energy* 2008 (2) NR 399 (SC) at [30] [5].

[13] It would appear further that also considerations of 'equity and fairness' come into play if one considers that Joubert JA's dictum in *Magida v Minister of Police*

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[3] At 1045I – 1046C

[4] At p 290

[5][30] What the court is engaged in is a balancing exercise. As was said in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 (CA) at 540a - b:'The court must carry out a balancing exercise… '.

1987 (1) SA 1 (A) as appearing at page 14 D to F[6] was seemingly approved in Namibia's *North Bank Diamond Ltd* decision.[7].

[14] It was against the backdrop of these authorities contented that the following factors should absolve the respondent from the requirement to furnish security for costs.

(a) Had he, the respondent not repaid the first applicant the sum of N$1,154,341.00 at the expense of other costs in the administration of the insolvent estate of Baobab Financial Services, he would have been in the position to meet the first and second applicant's demand for security;

(b) The respondent has also been authorised to prove a claim in the amount of N$2,326,531.00, plus interest and costs, against the insolvent estate Botes, by a special meeting.;

(c) There may be some security, in the form of funds, in the amount of N$1 863 503.80, held by the second applicant, which may become due to Baobab in the event of such claim proving to be successful.

[15] In addition the court was entreated to take into account the important consideration that the respondent does not approach the court, in the main review application, in his own right, but by virtue of his appointment as liquidator, which obliges him to carry out his statutory functions under the auspices of the Master of the Cape Town High Court.

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[6] Notwithstanding the obsolescence of the *cautio juratoria* as security on oath we must bear in mind that our common law principles which underlie its granting are still applicable in our modern practice when a *peregrinus* in his answering affidavit deposes to his inability to furnish security for costs owing to his impecuniosity, since it must be left to the judicial discretion of the Court by having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both the *incola* and the *peregrinus* to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs. Nor is there any justification for requiring the Court to exercise its discretion in favour of a *peregrinus* only sparingly. It follows that the following dictum in Saker & Co Ltd v Grainger 1937 AD 223 per De Wet JA at 227, viz: 'The principle underlying this practice is that in proceedings initiated by a *peregrinus* the Court is entitled to protect an *incola* to the fullest extent,'should be read subject to the qualification that it is only applicable after the Court, in the exercise of its judicial discretion in accordance with the principles hereinbefore stated, had come to the conclusion that the *peregrinus* should not be absolved from furnishing security for costs.

[7]at p 286 I to J and at p 287 D

[16] In this regard Hefer JA's consideration of the impact of this type of role, as set out in the *Shepstone & Wylie* case, was relied upon where the Learned Judge of Appeal remarked:

'Turning to the remarks about the public interest and litigation against the very persons who are alleged to have caused the company's financial ruin, I have already indicated that the public interest may indeed come into play in appropriate cases. I also accept that a liquidator should not be discouraged from pursuing a claim based on the conduct which has impoverished the company (Henochsberg at 28; Beaton v SA Mining Supplies (Pty) Ltd 1957 (2) SA 436 (W) at 439G--440C)…'.[8]

[17] In addition, and although it was essentially conceded that the merits of the main application were not of direct relevance, it was submitted, on the strength of the *Hepute* matter, that the court should at least have regard to the nature of the main case.

[18] Some argument was addressed on this issue. Ultimately counsel were however agreed that this factor, (and particularly when it came to the merits of this application), should not weigh with the court save that the court would legitimately be entitled to take into account the nature of the claim in an opposite case.

[19] In this vein it was submitted further that the court should take into account that:

'… the first applicant had submitted an affidavit for proof of a claim *inter alia* for payment of N$1 736,231.78 against the estate of Baobab. These 'costs' were in fact advanced to Baobab in respect of litigation by the first applicant. The first applicant accordingly enjoyed an administrative claim only against Baobab for the recovery of his loan to Baobab to fund such litigation and administration. First applicant advanced to and on behalf of Baobab a total sum of N$1,192,421.50. Baobab repaid the first applicant the sum of N$1,154,341.00 leaving a balance of some N$38 000.00 owing by Baobab to the first applicant.

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[8] At p1047A - B

First applicant does not have any claim against the insolvent estate of Botes whatsoever. Firstly, any claim would lie against Baobab and not against the Botes estate; and secondly, first applicant has already been paid by Baobab almost all the funds advanced to Baobab. When the first applicant submitted his claim against the insolvent estate, he owed approximately N$ 38 000.00 by Baobab and nothing by the insolvent estate. First applicant would have known this and accordingly his claim was fraudulent.'

[20] Finally respondent contended that this application for security was merely 'a ploy to deny Baobab its valid claims in Namibia'.

[21] In respect of the last-mentioned factor, it can immediately stated that it cannot be said that the applicants had launched this application in a frivolous manner and without any basis - although it may very well be that the applicants considered this application to be a useful procedural tool, available to them, to obtain a tactical advantage vis-a-vis the respondent - which they were however legitimately entitled to employ. I will accordingly not take this factor into account when exercising my discretion in this case.

[22] Although I am bound by virtue of the authority of the *Hepute* decision to have some regard to the nature of the main case, which I do, I will mainly exercise my discretion with reference to the other factors advanced by the respondent.

[23] While I also recognise that there is some risk that the respondent may eventually not have sufficient funds to pay applicant's costs, and that the applicant, as *incola*, should be protected – and - while I recognise that there is a legitimate expectation in such premises that the applicant be granted the security it seeks - as the applicant should be protected against the possible loss in regard to costs - it can on the other hand not be argued away that the respondent may indeed be able to prove a claim on behalf of Baobab to the tune of N$2,326,531.00 against the insolvent estate Botes, which estate admittedly holds funds to the tune of N$1,863 583.83. In this regard it is significant to take into account further that Baobab is the only outstanding creditor with a claim in regard to these funds. It would appear

therefore that there is some prospect, that should such claim prove successful, that sufficient monies would eventually be realised to pay for the applicant's costs in the main review.

[24] The factor which however carries the most weight in my view is the respondent's statutory role and the duties which he is obliged to perform as liquidator. It is the public interest element that here comes into play by virtue of this office and which militates that I should not shut him out to exercise those duties, by ordering him to provide the amount of security as claimed, an amount, which I need to add, has not even been quantified in any manner, although this aspect was left uncontested.

[25] In addition: on the papers there is a dispute in regard to the legal steps and proceedings which are expected to be taken in the main review. I should add that the mere demand of N$ 350 000.00, unaccompanied by any breakdown as to how same was computed, would, in the normal course of events, have detracted from the veracity of the applicant's case. However in view of the provisions of Rule 47(2) and (3) the applicant could have disputed the amount claimed, which it decided not to do.

[26] In the final result – and - after taking into account all the factors advanced in favour of excusing the respondent from providing security for costs - at the same time weighing the injustice of possibly preventing the respondent from ultimately pursuing Baobab's claims, in his capacity as liquidator - against the possibility that the applicants' might find themselves eventually unable to recover their costs - against the factor that the moneys, availabe in the Botes estate, might be paid over to respondent – and - which factor is somewhat enhanced by the probability that Boabab's claim there may yield sufficient funds to cover legal costs - I lean towards exercising my discretion against the applicants.

[27] In addition I believe that also the dictates of equity and fairness - as well as the important consideration that the doors of the court might be shut to a litigant,

should I accede to this application - should drive me to exercise my discretion against the granting of this application.

[28] In circumstances however - where the applicants had a strong *prima facie* case - and - where the court's discretion could just as easily have fallen in applicant's favour - I consider it equitable that each party bear its own costs.

[29] In the result the application is dismissed.

H GEIER

Judge

APPEARANCES

APPLICANTS: J A N Strydom
Instructed by MB De Klerk & Associates,
Windhoek.

RESPONDENT: A W Corbett

Instructed by Fisher, Quarmby & Pfeifer,
Windhoek