

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2016/00315

In the matter between:

GERSHON BEN-TOVIM

APPLICANT

and

CHRISTOPER PETER VAN ZYL N.O

1st RESPONDENT

RYNO ENGELBRECHT N.O

2ND RESPONDENT

EUGENE JANUARIE N.O

3RD RESPONDENT

Neutral citation: *Ben-Tovim v Van Zyl N.O* (HC-MD-CIV-MOT-GEN-2016/00315) [2018]
NAHCMD 95 (13 April 2018)

Coram: UEITELE J

Heard: 28 November 2017

Delivered: 13 April 2018

Flynote: *Practice-* Rule 59 - Security for costs - Liability to pay security for costs - Determination of quantum - whether it is proper for it to be done by a judge - Delay in filing a demand for security for costs.

Summary: The respondents, as applicants, commenced proceedings in this Court on 13 October 2016 in terms of which they sought the provisional sequestration of Mr Ben-Tovim, as respondent in that application, and the placing of his assets in the hands of the Master of the High Court. On 28 November 2016 Mr. Ben-Tovim gave notice that he will oppose the applicants' application. This is an application in terms of which the court is required to determine an application for security for costs at two different levels. First, the court is required to determine the issue of the respondents' liability to pay security for the applicant's costs. Second, and if the court finds that the respondents are so liable, the court is required to determine the amount of security for costs to be paid by the respondents. On 7 November 2017 Mr Ben-Tovim gave the respondents notice under Rule 59(1) that he requires the respondents to furnish him with security for costs in the amount of N\$ 500 000. He gave his reason for requiring the respondents to furnish security for costs, being the fact that the respondents are peregrines of this court. The respondents oppose the applicant's application for security of costs on the following grounds: that the application for security for costs must be dismissed because of the delay in bringing the application. The respondents furthermore oppose the application on the basis that the application had been launched for improper purpose, namely to delay the adjudication of the sequestration application. The third basis on which the respondents urged the court to dismiss the application for security for costs is the contention by the respondents that, the amount claimed as security, being the sum of N\$ 500 000 is unreasonable and unsubstantiated.

Held that – Mr. Ben-Tovim is entitled to demand security for his costs, but whether the Court will order the party from whom security of costs is demanded to provide the security depends on how the Court will exercise its discretion.

Held that – there is no indication that Mr. Ben-Tovim has waived his right to ask for security for costs. The respondents have not demonstrated how they are prejudiced or will be prejudiced by the alleged delayed request for security for costs.

Held further that – the respondents referred to the failure by Ben-Tovim to comply with certain court orders relating to the filing of his answering affidavits. The delays were explained and on the basis of the explanation provided, the court condoned his non-compliance with the court orders. The court is therefore unable to find, as urged by the respondents' that the application was brought solely to frustrate or delay the sequestration application.

Held furthermore – the fact that the amount demanded as security for costs is unsubstantiated can in the court's view never be basis for the dismissal of the application.

Held that – the court has to carry out a balancing act. The court is of the view that the scale must tilt in favour of Mr Ben-Tovim for the court to order the respondents (the applicants in the main application for sequestration) to provide Mr. Ben-Tovim with the security of costs he demands. In his application Ben-Tovim alleges that there is a probability that if he successfully opposes the sequestration application it may be difficult, if not impossible, for him to recoup his costs. The respondents do not dispute this allegation by Mr. Ben-Tovim. The respondents furthermore do not establish that an order directing them to provide security for costs might well result in them being unable to pursue the litigation in this Court. Consequently, the court is of the view that Mr. Ben - Tovim is entitled to demand security for costs from the respondents.

ORDER

- 1 The respondents are ordered to furnish security for costs to the applicant (Mr. Ben–Tovim) in a manner, form and quantity to be assessed by the Registrar.
- 2 The parties must, not later than 7 days from the date that this judgment is issued, approach the Registrar to request a meeting where at the assessment of the nature, form and quantum of the security for costs is to be made.
- 3 The matter is postponed to **30 May 2018 at 08:30** for status hearing on the case management roll of Justice Geier.
- 4 The respondents must subject to Rule 32(11) pay the applicant's costs of the application for security of costs.

JUDGMENT

UEITELE J:

Introduction

[1] This is an application in terms of which the court is required to determine an application for security for costs at two different levels. First, the court is required to determine the issue of the respondents' liability to pay security for the applicant's costs. Second, and if the court finds that the respondents are so liable, the court is required to determine the amount of security for costs to be paid by the respondents.

[2] The applicant in this application for security of costs is a certain Gershon Ben-Tovim, an adult male businessman and an entrepreneur who resides on Farm Ehuuro No. 120 in the Erongo Region of Namibia. The applicant is thus an *incola* of this Court. (I will for purposes of this judgment refer to the applicant as 'Mr Ben-Tovim').

[3] The respondents, in the application for security of costs, are Christopher Peter Van Zyl as first respondent, Mr Ryno Engelbrecht as second respondent and Mr Eugene Januarie as the third respondent. The respondents are all adult male insolvency practitioners practicing under the name and style of Mazars Recovery and Restructuring, at Mazars House, Railto Road, Century City, Cape Town, Western Cape, Republic of South Africa. The respondents were appointed liquidators of Greencoal Holdings (Pty) Ltd, a company with limited liability incorporated in accordance with the company laws of the Republic of South Africa. I will for purposes of this judgment refer to the respondents jointly as 'the respondents'.

The Background to this application

[4] A brief background of this matter is this. The respondents, as applicants, commenced proceedings in this Court on 13 October 2016 in terms of which they sought the provisional sequestration of Mr. Ben-Tovim, as respondent in that application, and the placing of his assets in the hands of the Master of the High Court. On 28 November 2016 Mr. Ben-Tovim gave notice that he will oppose the applicants' application. When he filed his notice of intention to oppose the application for the sequestration of his estate, Mr. Ben-Tovim was represented by the law firm Francois Erasmus & Partners.

[5] The matter was docket allocated to me during January 2017 and I case managed the matter for the period between February 2017 and November 2017. During one of the case management conferences that was held during that period, that is February 2017 to November 2017, Mr. Ben-Tovim made the allegations that prior to the sequestration application he was married in community of property to a certain Sarah Ben-Tovim. This allegation led to the

matter being postponed to enable the respondents to file an application for the joinder of Sarah Ben-Tovim as a second respondent.

[6] After Sarah Ben-Tovim was joined as a second respondent to the sequestration application and after all the pleadings were served on her, I postponed the matter to 7 June 2017 for a status hearing in order to determine hearing dates for the sequestration application. At the status hearing of 7 June 2017 I granted leave, to Mr. Ben-Tovim to file his answering affidavit on 7 July 2017 and to the respondents' to file their replying affidavits if they so wished by not later than 28 July 2017. I further ordered that that the respondents must file their heads of arguments by no later than 4 August 2017 and that Mr. Ben-Tovim file his heads of arguments by 11 August 2017, I then postponed the matter to 17 August 2017 for hearing the main sequestration application.

[7] At the hearing of the application on 17 August 2017 Mr Ben-Tovim who appeared in person indicated that his legal practitioners of record, Francois Erasmus & Partner, had withdrawn as his legal practitioner off record and he asked the court to postpone the matter in order for him to secure legal representation. I accordingly postponed the matter to 6 September 2017 for a status hearing. At the hearing of the 6 September 2017 I granted leave to the parties to file additional affidavits and I thereafter postponed the matter to 28 November 2017 for hearing the main sequestration application. On 7 November 2017 Mr Ben-Tovim gave the respondents notice under Rule 59(1) that he requires the respondents to furnish him with security for costs in the amount of N\$ 500 000. He gave his reason for requiring the respondents to furnish security for costs, being the fact that the respondents are *peregrines* of this court.

[8] On 24 November 2017 the respondents gave notice to Mr. Ben-Tovim that they dispute Mr. Ben-Tovim's entitlement to security for costs. The contention that Mr. Ben-Tovim was not entitled to security for costs led to this application which I sat down for security of costs for hearing on 28 November 2017 (this was the day that was initially reserved for hearing the main sequestration application).

[9] After hearing arguments from counsel, I postponed the matter to 1 December 2017 for judgment. On 1 December 2017 judgment was not ready and I further postponed the matter to 28 March 2018. On that day the judgment was still not ready and I postponed the matter to 20 April 2018. May I pause here to tender my apology to the parties for the delay in rendering this

judgment. With this brief background I now proceed to consider the application for security of costs.

The application for security of costs

[10] The affidavit in support of the application for security for costs was deposed to by Ms Eva Shifotoka, the legal practitioner representing Mr Ben-Tovim. In the supporting affidavit Ms Shifotoka advanced the following reasons for demanding security from the applicants. The respondents are *peregrines*, resident in Cape Town and that no security for his legal costs have been tendered. He further contends that in the event that he manages to successfully oppose the sequestration application against him, it may be difficult if not impossible to recoup his costs of opposing the application.

[11] The respondents opposed the application on three grounds. Firstly, Mr. Ben-Tovim allegedly delayed in requesting security for costs from them. Secondly, the respondents were appointed by the High Court of South Africa (Western Cape Division) and as court appointed liquidators, they must not be discouraged to pursue claims against persons who are alleged to have caused the financial ruin of a company that is the subject of liquidation. Thirdly, the amount claimed as security, being the sum of N\$ 500 00 is unreasonable and unsubstantiated.

The relevant legal provisions on security for costs

[12] Questions related to the issue of security for costs, are governed by the provisions of rule 59 of this Court's rules. The relevant parts of rule 59 read as follows:

'(1) A party entitled to demand security for costs from another must, if he or she so desires, as soon as is practicable after the commencement of proceedings, deliver a notice setting out the grounds upon which the security is demanded and the amount claimed.

(2) If a party contests the amount of security only that party so objecting must, within three days after the notice contemplated in subrule (1) is received, give notice to the requesting party to meet the objecting party at the office of the registrar on a date pre-arranged with the registrar and that notice must state the date of the meeting and the date must not be more than three days after the notice of objection to the amount of security is delivered to the party requesting the security.

(3) The registrar must determine the amount of security.

(4) If the party from whom security is demanded contests his or her liability to give security or if he or she fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within 10 days of the demand or the registrar's decision, the other party may apply to the managing judge on notice for an order that such security be given and that the proceedings be stayed until the order is complied with.

(5) ...'

[13] A reading of rule 59(1) suggests that there are normally two aspects to an application for security for costs. The first is the question of liability to pay security for costs. In short the first question is whether or not a party is entitled to demand security for costs from the other party. The second is, if the party's liability to provide security for costs is determined, the amount of security payable.

[14] An *incola* respondent does not, however, have a *prima facie* right to be furnished with security for costs by a *peregrine* applicant. Whether or not the latter should furnish an *incola* with security for its costs lies within the discretion of the court.¹ In exercising its discretion, the court must have regard to the particular circumstances of the case as well as considerations of equity and fairness to both the *incola* and the *peregrine*.² Factors that our courts have taken into account when deciding whether or not to order a *peregrine* to provide security are his impecuniosity and whether an order compelling him to furnish security would deprive him of the right to litigate against an *incola*; whether he is economically active within the jurisdiction of the court; and whether execution of the court's judgment is possible in the jurisdiction in which he resides. None of these factors are, however, decisive.

[15] Historically, our courts were predisposed in applications for security for costs against a *peregrine* to protect the *incola* 'to the fullest extent'.³ As such, it found in favour of a *peregrine* 'only sparingly and in exceptional circumstances'. The general rule was that unless the *peregrine* had unburdened immovable property within the jurisdiction of the court to satisfy any costs order, security had to be furnished. The South African Supreme Court of Appeal in

¹ *Schutz v Pirker and Another* 2014 NAHCMD 341 delivered on 12 November 2014.

² *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14E-F.

³ *Wilderness Air Namibia (Pty) Ltd v Van Rensburg* (LC 66/2011) [2013] NALCMD 44 (28 November 2013) and *Saker & Co Ltd v Grainger* 1937 AD 223 at 227.

*Shepstone & Wylie & Others v Geyser NO*⁴ rejected this approach to security for costs applications, and gave guidance on the proper exercise of the court's discretion in such applications. In so doing, it said this:

'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 ... I prefer the approach in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER (CA) at 540 A-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."

[16] This approach was subsequently endorsed by the Supreme Court in *Hepute and Others v Minister of Mines and Energy and Another*.⁵

Is the applicant entitled to the order for security for costs?

[17] From the above stated principles I am satisfied that Mr. Ben Tovim is entitled to demand security for his costs, but whether the Court will order the party from whom security of costs is demanded to provide the security depends on how the Court will exercise its discretion. The South African Constitutional Court in *Giddey NO v JC Barnard and Partners*⁶, stated as follows in relation to the balancing exercise:

'To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An application for security will therefore need to show that there is a probability that the plaintiff company will be unable to pay costs. The respondent company, on the other hand, must establish that the order for costs might well result in it being unable to pursue the litigation and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospect of

⁴ *Shepstone & Wylie & Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045I-1046C.

⁵ *Hepute and Others v Minister of Mines and Energy and Another* 2008 (2) NR 399 (SC) 2007 (1) NR 124 (HC).

⁶ *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) para 8.

success. Equipped with this information, a court will need to balance the interest of the plaintiff in pursuing the litigation against the risks to the defendant of an unrealisable costs order.’

[18] I now turn to consider the specific circumstances of this case. But before I consider the specific circumstances of this case, I will briefly deal with the grounds of objections raised by the respondents. The respondents’ first basis of opposition is the contention that the application for security for costs must be dismissed because of the delay in bringing the application. Mr. Ben-Tovim alleges in his affidavit that he gave instruction to his erstwhile legal practitioners to demand security for costs as early as February 2017 and they neglected to execute his instruction. There is no indication that Mr. Ben–Tovim has waived his right to ask for security for costs. The respondents have not demonstrated how they are prejudiced or will be prejudiced by the alleged delayed request for security for costs. I am therefore not prepared to dismiss the application for the security for costs for that reason.

[19] The respondents furthermore oppose the application on the basis that the application had been launched for improper purpose, namely to delay the adjudication of the sequestration application. The respondents referred to the failure by Mr. Ben-Tovim to comply with certain court orders relating to the filing of his answering affidavits. The delays were explained and on the basis of the explanation provided, I condoned the non-compliance with the court orders. I am therefore unable to find, as urged by the respondents’ counsel that the application was brought solely to frustrate or delay the sequestration application.

[20] The third basis on which the respondents urged me to dismiss the application for security for costs is the contention by the respondents that, the amount claimed as security, being the sum of N\$ 500 000 is unreasonable and unsubstantiated. The fact that the amount demanded as security for costs is unsubstantiated can in my view never be a basis for the dismissal of the application. I say so for the following reason. In the matter of *Martucci v Mountain View Game Lodge (Pty) Ltd*⁷ Masuku J said:

’ [12] From a reading of the relevant subrules, I am of the view that the matter of the nature, form and amount of security is ordinarily a matter exclusively for the decision of the registrar. That this is the case is plain from reading subrule (3). This suggests that it is only in exceptional circumstances, probably envisaged in subrule (6) that the managing judge would prescribe the form, amount and manner of giving security to be furnished.

⁷ *Martucci v Mountain View Game Lodge (Pty) Ltd* (I 2295-2015) [2016] NAHCMD 217 (22 July 2016).

[13] I am of the considered opinion that there is a policy reason behind primarily giving the license to determine the form, amount and manner of the security for costs should assume, to the registrar. The registrar is the hands and feet of the court and in a sense, an expert when it comes to matters of costs, the tariffs and other related technical matters. For that reason, it would seem to me, it is on that basis that the ordinary office fitting to determine the amount, form and manner of the security to be furnished, once liability to pay costs has been established, is that of the registrar.'

[21] I now return to the specific circumstances of this matter. In the present matter the facts are that the respondents are *peregrine* of this court, they all reside in South Africa and they were appointed as liquidators of Greencoal Holdings (Pty) Ltd by virtue of a certificate of appointment issued by the Master of the High Court of South Africa dated 27 November 2014. They carry their profession in South Africa. They have not alleged in their affidavit whether they lodged any security for the performance of their duties with the Master of the High Court in South Africa (Western Cape Division). Mr. Ben-Tovim is an *incola* of this court.

[22] It is against this background of these facts that, I have to carry out a balancing act. I am of the view that the scale must tilt in favour of Mr Ben-Tovim for me to order the respondents (the applicants in the main application for sequestration) to provide Mr. Ben-Tovim with the security of costs he demands. I say so for the following reasons. In his application Mr. Ben-Tovim alleges that there is a probability that if he successfully opposes the sequestration application it may be difficult, if not impossible, for him to recoup his costs. The respondents do not dispute this allegation by Mr. Ben-Tovim. The respondents furthermore do not establish that an order directing them to provide security for costs might well result in them being unable to pursue the litigation in this Court. Consequently, I am of the view that Mr. Ben-Tovim is entitled to demand security for costs from the respondents.

[23] For the reasons set out in this judgment I make the following order:

1. The respondents are ordered to furnish security for costs to the applicant (Mr. Ben-Tovim) in a manner, form and quantity to be assessed by the Registrar.
2. The parties must, not later than 7 days from the date that this judgment is issued, approach the Registrar to request a meeting where at the assessment of the nature, form and quantum of the security for costs is to be made.

3. The matter is postponed to **30 May 2018 at 08:30** for status hearing on the case management roll of Justice Geier.

5 The respondents must subject to Rule 32(11) pay the applicant's costs of the application for security of costs.

SFI Ueitele
Judge

APPEARANCES:

APPLICANT:

W Boesak

Instructed by Conradie & Damaseb, Windhoek

1st to 3rd RESPONDENTS:

A Corbett

instructed by Fischer, Quarmby & Pfeifer, Windhoek