REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Number: HC-MD-CIV-ACT-DEL-2020/04174

In the matter between:

BETSERAI MOYO	**PLAINTIFF**
and	
GRIDHAWK SECURITY COMPANY	**1st DEFENDANT**
SAVEMOR SUPERMARKET	**2nd DEFENDANT**
JONATHAN PATRICK MYBURGH	**3rd DEFENDANT**
JANDRE JANSEN VAN VUUREN	**4th DEFENDANT**
ROBERTO KATJINAMUNENE	**5th DEFENDANT**
HENDRICK SIMUPURENI	**6th DEFENDANT**
KEFAS KUUTONDOKUA	**7th DEFENDANT**

Neutral Citation: *Moyo v Gridhawk Security Company* (HC-MD-CIV-ACT-DEL-2020/04174) [2021] NAHCMD 199 (30 April 2021)

Coram: RAKOW, J
Heard: **12 April 2021**
Delivered: **30 April 2021**

Flynote: Civil Procedure - Practice – Security for Costs - Rule 59 - Security for costs - *Incola* claiming security for costs against peregrinus - Liability to pay security for costs- The Namibian Constitution- Chapter 3 - Article 12 – Right to a fair trial Article 22 – Justifiable Limitations.

Summary: The plaintiff a *peregrinum* of this court, instituted a claim on her behalf and that of her minor son against the defendants for the alleged wrongful death of her husband as a result of an assault on him by the defendants. The claim is for damages caused by the wrongful death of her husband and her further alleges that the death and subsequent losses she and her son are experiencing can be attributed to the conduct of the defendants. The first to the fourth defendants defended the matter and filed a notice in terms of rule 59(1) of the court seeking security for costs from from the plaintiff as she is a *peregrinum* of this court. The requests for the provision of security were opposed by the plaintiff.

Held that, the onus is on the applicant to prove that they are entitled to a claim for the security of costs.

Held that, an *incola* does not have a right which entitles it to the furnishing of security for costs by *peregrinus*, as the court has the discretion to grant or refuse such security and further that the question of security for costs is not one of substantive law but one of practice.

Held further that, when the court exercises its discretion on whether or not a *peregrinus* is required to furnish security for costs, it must have regard to all relevant facts as well as considerations of equity and fairness to both parties. No one should be required to furnish security beyond his/her means to an *incola*. Neither should a non-domiciled foreigner be compelled to perform the impossible.

Held that, with due regard being had to the Bill of Rights, courts should be slow to limit rights guaranteed under Chapter 3 of the Namibian Constitution and if a limitation is necessary, such limitation should infringe such rights as little as possible, this includes the decision on whether or not to set security of costs.

Held further that, in some instances, if a *peregrinus* is ordered to furnish security, his/her chances of prosecuting the action against the *incola* would effectively be prevented, therefore each case should be decided upon its own merits.

ORDER

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1. The application to furnish security for costs brought by the defendants is hereby dismissed with costs.
2. Costs are capped in terms of rule 32(11) of the High Court rules.
3. The matter is postponed to 18 May 2021 at 1h30 for a case planning conference.

JUDGMENT

RAKOW, J:

Background

[1] The plaintiff in this matter is Ms. Betserai Moyo who resides in Harare, Zimbabwe. She is the wife of the late Mr. Hlaisanani Zhou and they have a minor son, Sean Zhou together. She instituted action against the defendants for damages caused by the wrongful death of Mr. Zhou and alleges that the death and subsequent losses she and her son are experiencing can be attributed to their conduct. The first to the fourth defendants defended the matter but no defence was noted by the fifth, sixth, and seventh defendants who were employees of the first defendant at the time of the incident.

[2] It is alleged in the particulars of claim that on 3 June 2020 the late Mr. Zhou entered the premises of a Savemore shop at Etemba Plaza Shopping Centre and was accused of stealing a small bottle of wood glue whereafter he was severely assaulted by the third to the seventh defendants which ultimately caused him to succumb to the injuries sustained during the assault on the same day.

[3] After the summons was served on Gridhawk Security Company, Theo's Spar Othiwarongo cc t/a of Etemba Savemor, Mr. Jonathan Mybers, and Mr. Jandre Janse van Vuuren, defended the matter and filed a notice in terms of rule 59(1) of the court seeking security for costs from Ms. Moyo as she is a *peregrinum* of this court. These requests were for different amounts but totaled an amount of N$350 000.00. The requests for the provision of security were opposed by the plaintiff.

The arguments

[4] The defendants argued that it is common cause that the plaintiff is a peregrinum of this court and that she does not own any property in Namibia which would satisfy a cost order against her. Further, they referred there court to A.C Cilliers Law of Costs[1]in that, it is trite law that a peregrinum should provide security for costs to protect the *incola* from the increased price tag, uncertainty, and inconvenience. They further argue that the plaintiff failed to indicate what means are available to her in Zimbabwe, that she has a fixed address, and the nature of her character. It is further their contention that this matter can not be said to be a matter of public interest and that the plaintiff failed to show how the outcome of the matter would be in the public interest.

[5] The legal principles derived from *Schütz v Pirker and Another*[2]:

'-An inclola claiming security for costs is not entitled as a matter of course to the furnishing of security for costs.

-It is a question of practice that a presiding judge should hold an inquiry to investigate the merits of the matter fully.

-The court must carry out a balancing exercise.

-On the one hand, there is the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security; and

-On the other hand, there is an injustice to the defendant if no security is ordered and at trial, the plaintiff's claim fails and the defendant is himself unable to recover from the plaintiff the costs which have been incurred in the defense of the claim.'

[1?] 2nd Edition p 64

[2?] *Schütz v Pirker and Another* 2015 (1) NR 231 (HC).

[6] On behalf of the plaintiff, it was argued that it is clear from the particulars of the claim that she is residing in Harare, Zimbabwe and depended on the deceased to support their minor son for N$4000 per month and support her in the amount of N$2000 per month. Since the death of the deceased, she and her child are destitute and rely on the goodwill of their respective families. The court however has the discretion to consider the circumstances of each case as to whether it is fair and equitable to both the *incola* and *peregrinus* to require furnishing of security of costs. In each case the court is to take into account the circumstances of the *peregrinus* and whether an order for security for costs may effectively preclude it from proceeding with its case. The court must guard against unreasonable barriers in the way of litigation to the extent that justice may be denied – and the court was in this instance referred to the matter of *Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd*[3]*.*

[7] It was further argued that in terms of rule 59(8) there is an exception in that a person to whom legal aid is rendered by or under a law or who is represented by the Government Attorney is not compelled to give security for the costs of the opposing partly unless the managing judge directs otherwise. The argument is that in the current instance, the plaintiff is receiving legal aid in the broader sense as she is being represented by the Legal Assistance Centre and therefore entitled to be exempted from providing security under this rule.

The legal considerations

[8] Rule 59 reads as follows:

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

(2) …….

(3) …….

[3] *Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd* 2009 (5) SA 602.

(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) …….

(6) Security for costs is, unless the managing judge otherwise directs or the parties otherwise agree, given in the form, amount and manner directed by the registrar.

(7) …….

(8) A person to whom legal aid is rendered by or under a law or who is represented by the Government Attorney is not compelled to give security for the costs of the opposing party, unless the managing judge directs otherwise.'

[9] The ground provided as reason for the security of costs request by the defendants all relates to the fact that the plaintiff is a *peregrinus* of our court. In *Mahon v Mahon*[4] Davis J said the following:

' that the onus is on the applicant to prove that she is entitled to a claim for the security of costs. Furthermore, it is fairly trite law that the process involves two separate stages, (1) an allegation to be proved by the applicant that the respondent is a *peregrinus*; (2) if that is proved, then the Court will need to be persuaded to exercise a discretion as to whether to grant the order so sought. See *MTN Service Provider (Pty) Ltd v Afrocore (Pty) Ltd*[5]

[10] In the current matter, it is common cause that the plaintiff/respondent is a *peregrinus* of the court and the parties seeking security have the task to convince the court that it should exercise discretion in their favour. In *Magida v Minister of Police*[6] Joubert JA went into an in depth investigation of the Roman Law and Roman-Dutch law

[4] *Mahon v Mahon* (18974/2008 & 14918/2008) [2008] ZAWCHC 78 (21 December 2008).
[5] *MTN Service Provider (Pty) Ltd v Afrocore (Pty) Ltd* 2007(6) SA 620 (SCA) at paras 6-7'.
[6] *Magida v Minister of Police* 1987 (1) SA 1 (A).

regarding the duty to furnish security. During his investigations, he found the following guiding principles, which in my opinion, are still valuable considerations today [7]:

‘ The conclusion to be drawn from my investigation of the sources of our common law is that an *incola* by claiming security for his costs against a non-domiciled foreigner did not assert a right flowing from substantive law. In other words, an *incola* did not have a right which entitled him as a matter of course to the furnishing of security for his costs. It was a question of practice in the Dutch courts that a Judge should hold an inquiry to investigate the merits of the matter fully. The approach of the Judge was not to protect the interests of the *incola* to the fullest extent. He had a judicial discretion to grant or refuse the furnishing of security by means of a *cautio fideiussoria* by having due regard to the particular circumstances of the case as well as consideration of equity and fairness to both the *incola* and the non-domiciled foreigner.

If the non-domiciled foreigner was, however, unable to find a surety (fideiussor) he could, if he so wished, tender security by way of pledge (cautio pigneraticia) but he was not compelled to do so, according to Van der Linden in the 'fourth question' discussed in his note (g) to Voet 2.8.1 where he invokes the authority of Novella 112 c 2 and a decision of the Court of Holland in 1785. The Dutch jurists in their treatment of the subject of furnishing security by cautio fideiussoria or cautio juratoria certainly did not consider the dice to be loaded against a non-domiciled foreigner. On the contrary, their approach was most benevolent to the non-domiciled foreigner by stressing inter alia the following relevant aspects:

- Where the non-domiciled foreigner is a vagabundus without a fixed residence and has no country of his own ('die ginck dwalen, ende gheen seeckere woonplaats en hadde, geen eygen Landt ende Jurisdictie van dien Rechter en besadt') the Judge should be more readily disposed to order him to furnish adequate sureties (fideiussores) unless he possessed fixed property in respect of which he could furnish a hypothec. (Damhouder (op cit cap 99 nr 6).)
- No one should be required to furnish security beyond his means to an *incola*. Nor should a non-domiciled foreigner be compelled to perform the impossible. Van Alphen (1608 - 1691) Papegay ofte Formulier Boek (1682) Eerste Deel hoofstuk 24 request 9 'mandement van arrest op goederen om de Jurisdictie te fonderen nr 10': 'Niemand is gehouden te stellen cautie vorder as hykan...'
- The object of the cautio juratoria, based on considerations of equity and justice, was to prevent an impecunious non-domiciled foreigner from being deprived of his right to litigate against an *incola*. Peckius (op cit deel 16 nr 4 at 293):

[7] This is a long quotation but sets out the common law position quite well.

'Want genoomen den aanlegger was wel arm, ende soodanich dat hy geen pandt ofte borgh en hadde te stellen, niet te min een goedt ende eerlijck man, soude hy daarom van sijn recht versteecken werden, ende de quaede saacke sijn loop hebben? het I onrecht en mach omtrent het recht geen plaats hebben.' …..

- 'The sixth question is, Can this security be claimed from those who are so poor that free advocacy is vouchsafed them (those who are served pro Deo, and. without the use of stamps)? We approve rather of the opinion of those who say No. To wring an oath from those who are found in such poverty is simply to open a door for foul play.'
  The fact that a non-domiciled foreigner was an honourable man weighed in his favour. Van Alphen (loc cit); Voet
- On the other hand the fact that he was a dishonourable person (Van der Linden in the 'fourth question' in his note (g) to Voet 2.8.1) or a suspectus de fuga (Groenewegen ad Inst 4.11.4 nr 1) should be held against him.
- Where the non-domiciled foreigner resides at a place where the Court's order cannot be executed, the *incola's* application for a cautio fideiussoria will be granted more readily.'

[11] In *Hepute and Others v Minister of Mines and Energy and Another*[8] the court held that in an application for security of cost proceedings, the court has the discretion to grant or refuse such security and further that the question of security for costs is not one of substantive law but one of practice and the court does not enquire into the merits of the case but may have to have regard to the nature of the case.

[12] On the other hand, there are authorities available like the matter of South African *Television Manufacturing Co (Pty) Ltd v Jubati and Others*[9] where it was stated that:

'in the exercise of the Court's discretion, that hardship to the peregrini was not enough: there had to be some special fact inherent to the action itself which would persuade a court to exercise its discretion in favor of the peregrini.'

[13] Although Kannemeyer JA referred in the same judgement to the matter of *Santam Insurance Co Ltd v Korste*[10] and quoted with approval the conclusion of Jennett JP in that matter. He found after comparing several cases that in deciding whether to order security or not:

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[8] *Hepute and Others v Minister of Mines and Energy and Another* 2007 (1) NR 124 HC at para 10.
[9] *Television Manufacturing Co (Pty) Ltd v Jubati and Others* 1983 (2) SA 14 (E) at 19E.
[10] *Santam Insurance Co Ltd v Korste* 1962 (4) SA 53 (E).

'(i)t seems therefore that the nature of the case has been the dominant factor in those cases.'

In Korste supra, the court however came to the following conclusion:

' The reason for the rule being what it is, it follows that the Court should exercise its discretion in favour of a *peregrinus*, only sparingly and in exceptional circumstances.

[14] These principles were eventually summarized in *Ganga v St John's Parish*,[11] a labour court matter in the Cape Town Labour Court as follows, after looking at several decisions regarding costs:

'What we gain from the above is the following:

1. when the court exercises its discretion whether a *peregrinus* is required to furnish security for costs, it must have regard to all relevant facts as well as considerations of equity and fairness to both parties;
2. the court must consider the relevant provisions of the Constitution, which include sections 34 and 39, section 9 (the right to equality before the law), and section 23 (the right to fair labour practices); and
3. common law rules which limit a person's access to court should be applied in appropriate circumstances.'

The right of access to court

[15] Article 12 of the Namibian Constitution guarantees a person's fair trial rights and as such include the right of litigants to obtain a judicial determination of their disputes and cases. This right is of huge importance and as such requires active protection. In *Chief Lesapo v North West Agricultural Bank* [12] Mogoro J said the following regarding this right:

'The right of access to court is indeed foundational to the stability of an orderly society. It ensures peaceful, regulated, and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.'

[11] *Ganga v St John's Parish* (2014) 35 ILJ 1294 (LC).
[12] *Chief Lesapo v North West Agricultural* 2000 (1) SA 409 (CC).

[16] Any bar or obstacle on a litigant's right to access to court and to have his or her dispute adjudicated can therefore be seen as a limitation on such a right and only justified if it is justifiable under Article 22 of the Namibian Constitution. Courts should be slow to limit rights guaranteed under Chapter 3 of the Namibian Constitution and if a limitation is necessary, such limitation should infringe such rights as little as possible.

Applying the law to the current matter

[17] Scanty as the information about her lack of financial means may be, the plaintiff's allegations concerning her impecuniosity do derive some support from the fact that she states in her particulars of claim that she and her child are now destitute. It is further supported by the fact that she obtained legal assistance to prosecute her claim against the respondent to finality as well as from the allegation that an order compelling her to furnish security would effectively destroy her chances of prosecuting her action against the respondent.

[18] The plaintiff is further bringing this action not only on her behalf, but also on behalf of her minor child who was, due to the alleged conduct of the defendants, deprived of the amount of N$4000 per month which was contributed towards his support by his now-deceased father. The interest of the child should therefore also be considered when considering whether or not security should indeed be furnished. It cannot be said that it would, in the current matter, be in the interest of the minor child, although he is a *peregrinus* of this court, to be ordered to furnish security before the matter can proceed.

[19] I agree with the words of Joubert JA in *Magida v Minister of Police*[13] when discussing the approach to order security in matters like the one before court currently, is wrong and ' clearly constitutes a serious misdirection which amounts to an entire negation of the important principles of our common law underlying the *cautio juratoria,* the object of which was to come to the relief of *peregrinus* who, in the exercise of the Court's discretion, by having regard to all the relevant facts as well as considerations of equity and fairness to both parties, should be absolved from furnishing security by means of sureties (*fideiussores*). The Roman-Dutch authorities referred to supra emphasise that

[13] Supra

no one should be compelled to furnish security beyond his means and that a *peregrinus* should not on account of his impecuniosity be deprived from prosecuting his action against an *incola*.'

[20] This approach is even more correct today if one takes into account the protection guaranteed under article 12 of the Namibian Constitution which further operates on the principle that all persons are equal before the law. It is therefore not only the position according to our common law that a *peregrinus* should not on account of her impecuniosity be deprived of prosecuting her action against an *incola*, but it is the constitutional position we also find ourselves in.

[21] In light of the above, I find that the application to furnish security for costs brought by the defendants is hereby dismissed with costs. Costs are capped in terms of rule 32(11) of the High Court rules.

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E Rakow

Judge

APPEARANCES:

For the Plaintiff:	S Zenda Of The Legal Assistance Centre
For the First and Third Defendants:	F Pretorius Of Francois Erasmus & Partners Windhoek.
For the Second Defendant:	Adv Barnard Instructed by Cronjé & Co Windhoek.
For the Fourth Defendant:	C Jansen Van Vuuren Of Krüger, Van Vuuren & Co Windhoek.