

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE 15/4/2005
:
PATENT NO: 97/10365

In the matter between:

DC II Paymaster SA (Pty) Ltd

Plaintiff/ Applicant

and

Tellcall Television Systems (Pty) Ltd

Defendant/Respondent

JUDGMENT

**BOSIELO
J**

[1] PREAMBLE

- 1.1 On the 4th April 2005 and after I had heard submissions from both counsel, I made an order strictly in accordance with the applicants/defendant's notice of motion. Due to serious time-constraints I reserved my reasons for the judgment which I undertook to furnish at a later date. What follows hereunder are my reasons. This is an interlocutory application by the defendant/applicant for a order compelling the plaintiff/respondent to provide security for the defendant's costs in the main action in an amount to be determined by the Registrar in terms of section 17 of the Patents Act No 57 of 1978 (the Patents Act) read with Rule 47 of the Uniform Rules

(the Rules). Concomitant with this order, the defendant prayed for an order staying the action until such time that the plaintiff has paid the security and a punitive order of costs against plaintiff. I pause to state that this application is strenuously opposed by the plaintiff/respondent.

[2] **BACKGROUND**

2.1 The plaintiff/respondent is the owner/patentee of the South African Patent no 97/10365 which he purchased from the liquidator of CVS Travelhost International (Pty) Ltd (CVS) whose sole director was Paul Andoniou. I find it necessary to state for purposes of clarity that the same Paul Andoniou is the sole director of the plaintiff/respondent. Plaintiff/Respondent has instituted in the main action against defendant interdicting and/or restraining the defendant from infringing the South African Patent No 97/10365, together with a claim for damages and costs of suit. The defendant is opposing the main action and has raised a number of defences including a counterclaim for revocation of the patent. I interpose to state the defences raised by defendant are not relevant for purposes of this application. No date has been allocated for the hearing of the main action.

2.2 During or about 16th February 2004, the defendant/applicant issued its first request to the plaintiff/respondent for security. On 26th February 2004, the plaintiff/respondent denied its liability to pay security. Following hereupon, defendant/applicant served its first request for security in terms of Rule 47 of the Uniform Rules on 15th March 2004. After the notice of bar which had been served on the defendant/applicant was uplifted on the 29th July 2004, the defendant/applicant served its second

request for security on the plaintiff/respondent on 10th August 2004. On the 24th August 2004, the plaintiff/respondent gave its notice of intention to contest its liability to provide security. During 21 September 2004, defendant/applicant was furnished with the plaintiff's financial statements as proof that the plaintiff's financial health was such that it was in a strong financial position to satisfy any costs order which could be made against it. On 28th September 2004, the defendant advised plaintiff of various discrepancies in its Alleged Financial Statements. The application for security was served on 25th October 2004.

[3] **GROUND FOR REQUIRING SECURITY**

- 3.1 The defendant requires the plaintiff to provide security for its costs on the basis that the plaintiff may not be able to satisfy a costs order which may be granted against it in the main action. The underlying reasons for the Defendant's suspicion are the following:
 - 3.1.1 the Defendant was unable to locate my fixed assets motor vehicles or other assets registered in the Plaintiff's name;
 - 3.1.2 the Defendant was unable to obtain any trade references in respect of Plaintiff;
 - 3.1.3 the Defendant was unable to obtain any bank code in respect of the Plaintiff;
 - 3.1.4 the Defendant was unable to obtain any credit rating in respect of the Plaintiff;
 - 3.1.5 the Defendant was unable to establish any payment pattern in respect of the Plaintiff;
 - 3.1.6 the Defendant was advised not to afford any credit ratings to the Plaintiff and that any dealings with the

Plaintiff be conducted by way of bank guaranteed cheques;

3.1.7 despite demand, the Plaintiff failed to provide Defendant with a list of assets from which its liability to pay costs could be established;

3.1.8 the Plaintiff failed to submit its tax returns for the year 2003/2004;

3.1.9 despite demand, the Plaintiff failed to provide Defendant with its bank accounts from which it could reasonably be established if the Plaintiff has the necessary means with which to meet or satisfy a possible adverse cost order;

3.1.10 Andonious' past activities with CVS and its eventual liquidation which cast serious doubt on the Plaintiff's ability to pay its costs'

3.1.11 The unsatisfactory financial statements furnished by the Plaintiff.

[4] **THE RELEVANT STATUTORY PROVISIONS**

4.1 Rule 47 of the Uniform Rules provides that:

"47 Security for costs

- (1) A party entitled and desiring to demand security for costs from another shall as soon as practicable after the commencement of the proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.
- (2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.
- (3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the

registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with. "

4.2 Section 17 of the Patent Act, 57 of 1978 (the Patents Act) provides as follows:

"17 General Powers of Commissioner

- (1) Generally the commissioner shall in connection with any proceedings before him have all such powers and jurisdiction as a single judge has in a civil action before a provincial division of the Supreme Court of South Africa having jurisdiction at the place where the proceedings before the commissioner are held, including the appellate power referred to in Section 75.
- (2)
 - (a) The commissioner may also order that any party to the proceedings before him shall furnish security to the satisfaction of the commissioner in respect of any costs which may be awarded against such party in those proceedings, and may refuse, until such security has been furnished, to permit such proceedings to be continued.
 - (b) The commissioner may have regard to the prospects of success or the bona fides of any such party in considering whether such security should be furnished.

4.3 Section 13 of the Companies Act 61 of 1973 provides that:

"13 Security for costs in legal proceedings by Companies and bodies corporate.

Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is

reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given."

- 4.4 I interpose to state that the parties were ad idem that the Defendant bore the onus to prove that the Plaintiff will be unable to pay an adverse costs order should same be given against it.

[5] **THE EVIDENCE**

- 5.1 I find it necessary to state, as a necessary prelude, that, perhaps due to the patent animosity and acrimony between the parties, they "allowed themselves the liberty of filing unnecessarily lengthy and numerous affidavits and annexures which contributed to the prolixity of the papers. What was supposed to be a simple interlocutory application, turned out to be a prolonged and bitter legal battle. Unbelievable as it may sound, this simple interlocutory application has spawned 405 pages. Self-evidently this entails enormous costs to both parties. However as Marais JA aptly and eloquently remarked in *Williams v Harris* 1998 (3) SA 970 (SCA) at page 97 3D:

"Who chooses to ride a tiger will find it difficult to dismount it unscathed. Much the same can be said of the decision of the parties to this appeal to indulge in litigation rather than settle their differences in a less acrimonious and costly wa.v. .. However it is now too late for tears. ((

- 5.2 I have found this dictum to be apposite to this case. It is common cause from the affidavits filed that the Plaintiff was in

no position to dispute the allegations as contained in paragraphs 3.1.1; 3.1.2; 3.1.3; 3.1.4; 3.1.5; 3.1.6; 3.1.7; 3.1.8; 3.1.9 and 3.1.10 of the Defendant's papers. What the Plaintiff placed in issue pertinently is the correctness and authenticity of its financial statements which were furnished to the Defendant. I must state however that after Plaintiff's own auditor, a certain Jurgen Wrogemann disavowed the financial report dated 21 September 2004, the Plaintiff conceded that that financial report was incorrect. However it is common cause that Plaintiff initially, vehemently denied that that report contained serious discrepancies and had in fact furnished it to the Defendant purporting it to be its audited financial report. It is not without significance that Wroge man stated unequivocally that these were not audited balance sheets but a mere compilation report, which had not been audited by his company and further that they had not been signed by his firm. In essence Wroge man dissociated himself and his auditor's firm from the alleged balance sheets.

5.3 In an attempt to cure such a glaring defect, the Plaintiff furnished the Defendant with unsigned Draft Financial Statements during 22nd October 2004 which were prepared by one Myburgh. It is common cause that Myburgh is not an auditor. It follows logically that these Draft Financial Statements have no evidential value whatsoever. Moreover, I should point out that Myburgh relies for his report, particularly on the value he attaches to the Plaintiff's electronic equipment and film rights (which incidentally are its only known assets) on appraisals and evaluations allegedly approved by some independent auditors. I find it necessary to state that the alleged independent valuator is one IZAK Fourie, who according to the affidavit of Vivian Hawkins was previously employed with him by CVS and

currently remains employed by the Plaintiff. It is clear here from that Fourie cannot, by any stretch of imagination, be described as an independent valuator. In any event, Fourie has himself seriously contradicted himself directly in the report which he prepared on 6th December 2004 and the affidavit which he signed on 2nd April 2005 regarding the method he used to evaluate the Plaintiff's assets. In my view, Fourie has seriously discredited himself.

- 5.4 As a last desperate effort to avoid having to furnish security, Plaintiff furnished defendant with his Latest Financial Statements under cover of his Answering Affidavit. At first glance those statements do not reflect the Plaintiff's cash-flow statement which one would ordinarily expect from any trading company. This is crucial as the previous Draft financial Statement by Myburgh reflected a negative cash flow of R 77 484-00. Of great importance, all three financial statements reflect a "revalued value" of the only assets owned by the Plaintiff i.e. the electronic equipment and the film library. However these "revalued values" differ drastically from one set of financial statement to the other. What is even more disconcerting, in my view, is that no valuation by a credible and independent valuator is attached to substantiate these valuations. Another fact which caused me serious consternation is the allegation by Andonious that he signed the Latest Financial Statements on 14 January 2005. On his own admission, Andoniou was out of the country on this crucial date. Regrettably and quite inexplicably, Andonious has failed to explain this blatant anomaly. In my view, these various irregularities cast a cloud of doubt on the correctness and authenticity of the Latest Financial Statements furnished by the Plaintiff. I am constrained to find, as I hereby do, that they have

little, if any probative value. Based on the above-stated exposition, I find that the Plaintiff failed to prove that it will be able to pay the costs of the Defendant should the Defendant succeed in its defence of the action. In my view the Defendant has succeeded to prove that justice requires that Plaintiff be ordered to furnish sufficient security to be determined by the registrar.

[6] **COSTS**

6.1 The Defendant prayed for a punitive order of costs against the Plaintiff. The primary reason advanced by the Defendant is that by refusing to furnish security, the Plaintiff acted unreasonably and in a vexatious manner. Mr Michau for the Defendant argued, quite zealously, that it is clear from the various financial statements furnished by the Plaintiff, that Plaintiff went to great lengths to mislead this court by providing false information. It is clear from the affidavits that Plaintiff resorted to various stratagems in an attempt to explain patent and inexplicable absurdities in his financial reports. All these were done for the sole purpose of avoiding to pay security. In my view such conduct amounts to an abuse of the court process which should not be countenanced by any court. Sadly such conduct, unless nipped in the bud, has the potential of precipitating the court into serious disrepute. I feel obliged to express this court's serious disapproval of plaintiff's despicable conduct by an appropriate order of costs. This court has a duty to instil on the plaintiff, including all other litigants, the virtues of responsible and ethical litigation. I can think of no cogent reason, either in equity or fairness, why the Defendant should be left out of pockets. As Marais JA aptly remarked in **Williams v Harris** (*supra*) those

"who choose to ride a tiger will find it difficult to dismount unscathed",

The plaintiff/respondent must be made to bear the bitter fruits of his ill-conceived actions.

In the result I make the following order

- {a} The plaintiff is hereby ordered to provide security for the Defendant's costs in the main action in the amount determined by the registrar in terms of Section 17(2) of the Patents Act, No 57 of 1978 and within the time stipulated by the registrar;**
- (b) The main action is hereby stayed pending the provision of security by the Plaintiff in terms of paragraph (a) above;**
- (c) The Plaintiff is ordered to pay the costs of this application on the attorney and client scale.**



L. O. BOSIELO

JUDGE OF THE HIGH COURT

FOR THE APPUCANT: ADV. MICHAU
INSTRUCTED BY: MESSRS JACOBSON & LEVY INC.
FOR THE FOURTH RESPONDENT: ADV. COHEN
INSTRUCTED BY: MESSRS GLYNNIS COHEN
DATE OF JUDGMENT:
HEARD ON: 5TH APRIL 2005