

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

**CASE NO: 13656/2004**

**DATE: 2/8/2006**

**UNREPORTABLE**

**In the matter between:**

**ITEC HOLDINGS (PTY) LTD**

**Applicant**

**And**

**J BOTHA N.O**

**Respondent**

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**JUDGMENT**

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**MOKGOATLHENG AJ**

**Introduction**

- [1] This is an application pursuant Rule 47(1) for an order against the respondent to furnish security for the applicant's costs in the amount of R100, 000, 00 alternatively in an amount to be fixed by the Registrar.
- [2] The respondent has issued a summons against Itec Pretoria (Pty) Ltd and Itec Holdings (Pty) Ltd, the applicant. In the first claim of it's particulars of claim the respondent alleges that certain of it's assets which are in the possession of the applicant, were disposed off without value.

- [3] In the second claim, the respondent alleges that during July 2000-November 2000, the applicant with its consent collected debts in the amount of R700.000.00 accruing to the respondent, that the applicant has not paid over this amount to the respondent.
- [4] The respondent seeks an order in terms of section 26 of the Insolvency Act 24 of 1936 to set aside the said dispositions, and payment of the amount of R700.000.00.
- [5] On the 23<sup>rd</sup> September 2002 this court ordered the liquidation of MNL Office Equipment (Edms) (Bpk) (MNL). The respondent was appointed by the Master of the High Court as a liquidator. H P Strydom was appointed as a commissioner in terms of the Company's Act 61 of 1973.
- [6] In his report H P Strydom made the following findings;
- (a) that certain assets were disposed to Itec Pretoria (Pty) Ltd alternatively Itec Holdings (Pty) Ltd without value, and
  - (b) Itec Pretoria (Pty) Ltd, and Itec Holdings (Pty) Ltd during 2000 collected debts in the amount of R700.000.00 from "MNL" debtors, that this amount was not paid over to "MNL".
- [7] H P Strydom in his report states that there were prospects of success that through an action against Itec Pretoria (Pty) Ltd and Itec Holdings (Pty) Ltd, these funds and assets would be recovered.

- [8] The respondent states that he is not obliged in his official capacity to furnish security for costs to the applicant, that the action he has instituted in his official capacity is not vexatious, without merit or any reasonable prospects of success.
- [9] The only creditors who have proved claims against “MNL” are ABSA BANK Limited which instituted sequestration proceedings, and the South African Revenue Services.
- [10] The respondent contends that ABSA BANK Limited in terms of sections 106 and 118 of the Insolvency Act 42 of 1936 is obliged to contribute if there is no sufficient free residue to meet expenses, costs and charges in the liquidation estate of “MNL”.
- [11] The respondent submits that unless the applicant can show that ABSA BANK Limited will not be in a position to pay a contribution to the free residue to meet the applicant’s costs if the respondent is not successful in the action he has instituted, then, there is no possibility that the applicant’s costs order will not be paid.
- [12] The respondent states that it is not fair and equitable that he be obliged to furnish security for costs, that it is also not fair and equitable that the action against the defendants be suspended pending the furnishing of security for costs.
- [13] The applicant contends that according to paragraph 1.2 of H P Strydom’s report,

- (a) the physical assets of MNL Office Equipment (Pty) Ltd (“MNL”) were allegedly removed to the premises of Itec Pretoria (Pty) Ltd PS Storage, Terence Knox and Colleen Calitz streets;
- (b) amounts totalling R700.000.00 were allegedly collected by Itec Pretoria (Pty) Ltd from “MNL”’s debtors, and
- (c) an amount of R2215.56 was a credit allegedly due in respect of a trading credit by the applicant.

[14] The respondent states that Itec Pretoria (Pty) Ltd was wound up by special resolution registered at the office of the Registrar of Companies on 31 October 2003, that the claims against the applicant are alternative claims to those against Itec Pretoria (Pty) Ltd, and that there is no basis in fact or law of such claims against the applicant.

[15] The applicant states that the respondents recovered the assets referred to, and says the amount of R700.000.00 collected by Itec Pretoria (Pty) Ltd from the “MNL”’s debtors was collected by the latter for and on behalf of Distribution (Pty ) Ltd (“Distribution”).

[16] The applicant says that the amount of R700.000.00 was collected pursuant to a written cession of book debts given by “MNL” in favour of “Distribution”, that these collected funds were properly applied to reduce “MNL’s” indebtedness to “Distribution” which arose as a result of the latter having supplied the former with office machinery and consumables. The applicant states that the cession was security for the credit facilities provided to “MNL”. Phillip

James Perking the chief operations officer of “Distribution” confirms this.

- [17] The applicant contends that it was wrongly joined in the action, because it is not indebted to “MNL” on any basis.
- [18] On the 7 March 2001 under case number 6070/2001 Leornard Pienaar a director and shareholder of “MNL” instituted action against the applicant and Itec Pretoria (Pty) Ltd on substantially the same cause of action. In the said action Leornard Pienaar seeks an order for the payment of R2.8 million.
- [19] Leornard Pienaar alleges that “MNL” has ceded all it’s claims against the applicant and Itec Pretoria (Pty) Ltd on the 25 January 2001.
- [20] The applicant disputes commissioner H P Strydom’s findings and recommendations in paragraph 2and 3 of his report, and avers that “MNL” has no cause of action whatsoever against it, that there are no prospects of success for “MNL” against the applicant in the present action.
- [21] The applicant contends that if the creditors have given the respondent permission and an undertaking in terms of sections 106 and 118 of the Insolvency Act 42 of 1936, then they should indemnify the respondent in respect of any order to furnish the applicant’s costs.
- [22] The applicant argues that the costs of successfully defending the action will not be administration costs in the liquidation estate of

“MNL”, that there is no obligation on ABSA BANK Limited as the sequestrating creditor of “MNL” to indemnify the respondent against a costs order in his representative capacity.

## **THE LEGAL PRINCIPLES**

[1] Section 13 of the Companies Act 61 of 1973 provides that;

*“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 a reason to believe that the company or body corporate or, if it 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”.*

[2] The court in granting relief exercises a discretion “upon a consideration of all relevant features, without adopting a predisposition either in favour or against granting security”.

See *Shepstone & Wylie and others v Geysers* 170 1998 (3) 1036 SCA at 1045 I-J.

[3] In *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 ALL ER 534 (LA) at 540a-b 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 of 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”*

## **ANALYSIS**

- [1] The respondent does not suggest that he will not be able to pursue the action if he is ordered to furnish security for the applicant's costs.
- [2] In the action instituted by the respondent he cites the applicant in the alternative to Itec Pretoria (Pty) Ltd, as the second defendant.
- [3] The applicant has filed a special plea wherein it contends that;
  - (a) the first defendant was wound by special resolution registered at the office of the Registrar of Companies on the 31 October 2003,
  - (b) the claim against the first defendant allegedly arose during the period July to November 2000,
  - (c) the liquidator of the first defendant was appointed by the Master on the 8 March 2004,
  - (d) no notice of those proceedings was ever given in terms of section 359(2)(a) of the Companies Act No 61 of 1973 (the Act), and
  - (e) in the premises the proceedings against the first defendant are to be considered abandoned in terms of section 359(2)(b) of "the Act".
- [4] On the 25 February 2001 MNL Office Equipment (Pty) Ltd by a special resolution ceded its right, title, interest and claims it had against Itec Pretoria (Pty) Ltd and Itec Holdings (Pty) Ltd to

Leornard Pienaar who was the managing director of MNL Office Equipment (Pty) Ltd (Leornard Pienaar accepted the cession).

[5] Leornard Pienaar alleges that MNL Office Equipment (Pty) Ltd, Itec Pretoria (Pty) Ltd and the applicant amalgamated in May / June 2000

[6] Leornard Pienaar says in pursuance of the said amalgamation;

(a) the office equipment of “MNL” would be taken over by the ITEC Pretoria (Pty) Ltd at an amount of R250.000.00,

(b) that the first and or the second defendant were obliged to pay the creditors of “MNL” or Leornard Pienaar,

(c) that the client base of “MNL” would be taken over by the Itec Pretoria (Pty) Ltd at an amount of R800.000.00

(d) that on the 30 August 2000 Itec Pretoria (Pty) Ltd and Itec Holdings (Pty) Ltd repudiated the amalgamation agreements which repudiation was accepted by “MNL” and or Leornard Pienaar during October 2000.

[7] Leornard Pienaar pursuant a cession from “MNL” has instituted action against Itec Pretoria (Pty) Ltd and the applicant for an amount of;

(a) R1, 2 million in respect of creditors of “MNL” which were not paid,

(b) R800.000.00 in respect of the value of the client base of “MNL”,

- (c) R250.000.00 in respect of assets and fittings which were not returned to “MNL”,
- (d) R250.000.00 arising from the fact that “MNL” left their offices
- (e) R180.000 in respect of six months directors’ salary due to Leornard Pienaar, and
- (f) sundry other claims for an amount of R120, 000.00.

[8] Section 359(2) of Companies Act 61 of 1973 provides that,

- (a) Every person who, having instituted legal proceedings against a company which were suspended by winding-up, intends to continue same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks’ notice in writing before continuing or commencing the proceedings.
- (b) If notice is not given the proceedings shall be considered to be abandoned unless the Court otherwise directs”.

[9] The respondent did not institute proceedings before the winding up of the first defendant. The respondent has not approached this court for leave to proceed as required by section 359(2) (b) of “the Act”.

- [10] There is a distinct possibility that the applicant's special plea may be upheld.
- [11] On the 21<sup>st</sup> October 2005 this court granted a cost order against the respondent in favour of the applicant.
- [12] The applicant taxed the bill of costs in the amount of R12599.45. This bill was presented for payment on the 3 February 2006. Despite undertakings to pay the taxed costs, to date the respondent has not done so.
- [13] There is no indication that the respondent has requested ABSA Bank Limited to contribute to the payment of the taxed bill in terms of sections 106 and 118 of the Insolvency Act 24 of 1936.
- [14] The applicant's deponent states that he has represented the applicant in other litigation against "MNL", that the respondent has not made any recoveries that will render him able to pay the applicant's costs if it successfully defends the action, and says that at the time of the winding-up of the "MNL" it was insolvent.
- [15] The respondent has not controverted these allegations in a replying affidavit.
- [16] In my view it is distinctly probable that commissioner Strydom's findings that "MNL"'s assets have been disposed off to the applicant without value, or that the applicant collected an amount of R700.000.00 which accrues to "MNL" is factually flawed in view of the resolution dated the 28 February 2001 made by "MNL"

ceding all its right, title, interest and claims it has against the applicant to Leonard Pienaar, its erstwhile managing director. The respondent has not refuted these allegations in a replying affidavit.

- [17] The respondent has not even taken issue about the authenticity of the resolution purportedly made by “MNL”, neither has the respondent taken issue about the validity of the cession made by “MNL” in favour of Leonard Pienaar, nor the latter’s locus standi in instituting action against Itec Pretoria (Pty) Ltd and the applicant for payment of R2.8 million.
- [18] In my view there is merit in the applicant’s contention that “MNL” has no valid claim against it. I agree with the applicant that the respondent has failed to pay a taxed bill of costs because it has no free residue to do so, despite alleging that ABSA Bank Limited can be obliged to contribute to its costs.
- [19] The fact of the matter is that the respondent has failed or neglected to invoke sections 106 and 118 of the Insolvency Act 42 of 1936 against ABSA BANK Limited to contribute to the “MNL”’s free residue.
- [20] In my view the applicant is entitled to conclude that there is a possibility that the respondent will not be able to pay its costs should it be successful in defending the action instituted against it by the respondent.

[21] There is no merit in the contention that the respondent is in law not obliged in his official capacity to pay and furnish security for costs. This contention arises from the fallacious view that section 13 of the Companies Act 61 of 1973 is not applicable to a liquidator who seeks to set aside dispositions in terms of the Insolvency Act, that such liquidator should not be obliged to furnish security because section 13 of the Companies Act does not apply to a case where a liquidator is exercising a statutory power to recover for the benefit of the company (statutory claims). This is not the correct exposition of section 13 of Act 61 of 1973.

See *Shepstone* supra at page 1043B-1044I.

[22] In exercising my discretion I am persuaded that the applicant has shown compelling reasons for the proposition that the respondent should be ordered to furnish security for its costs.

[23] In the premises the application is granted with costs, the respondent is ordered to furnish security for the applicants' costs in the amount of R100.000.00.

[24] The plaintiff's action is stayed pending the plaintiff's compliance with this order.

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MOKGOATLHENG AJ

FOR THE APPLICANT: Adv I MILTZ, Instructed by FINDLAY  
& NIEMEYER INC.

FOR THE RESPONDENT: Adv. P G CILLIERS, Instructed by  
SCHABORT & BEKKER INC.

DATE OF HEARING: 24 MAY 2006

DATE OF JUDGEMENT: 2 AUGUST 2006