IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No 4445/07

Date:23/11/2007

In the matter between:

GLENRAND MIB FINANCIAL SERVICES (PTY) LTD	First Applicant/Defendant
GLENRAND MIB LTD	Second Applicant/Defendant
FREEFALL TRADING 65 (PTY) LTD	Third Defendant
DAVID JAMES HARPUR	Third Applicant/Fourth Defendant
ALLAN WALTER MANSFIELD	Fourth Applicant/Fifth Defendant
MARC SEAN SEELENBINDER	Sixth Defendant
LEON JANSE VAN RENSBURG	Seventh Defendant

and

THEODOR WILHELM VAN DEN HEEVER N.O.	First Respondent/Plaintiff
CHRISTIAAN FREDERIK DE WET N.O.	Second Respondent/Plaintiff
DEIDRE BASSON N.O.	Third Respondent/Plaintiff
PROTECTOR GROUP HOLDINGS (PTY) LTD (in liquidation)	Fourth Respondent/Plaintiff

---

MEYER, J:

[1] This is a security for costs application under the provisions of section 13 of the Companies Act 61 of 1973 read with Rule 47 of the Uniform Rules of Court.

[2] The respondents instituted action against the applicants and also against the third, sixth and seventh defendants. The first, second and third respondents are the liquidators of the fourth respondent company, which company was wound up as a result of an inability to pay its debts.

[3] The applicants have established the threshold requirement that the liquidators of the fourth respondent will be unable to pay the applicants' costs if successful in their defence in the pending action against them. This is undisputed and I am satisfied that the required reason to believe exists.

[4] The issue for decision is accordingly whether or not security should be compelled. S. 13 presents a court with an unfettered discretion and it should be approached *"… neither with a predisposition to granting security … nor with the predisposition not to grant security."* [Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (1) 1997 (4) SA 908 (W) at P 919G – I. Also: Shepstone & Wylie & Others v Geyser NO 1998 (3) SA 1037 (SCA) at pp 1045I 1046C; MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd (as yet unreported judgment of the SCA delivered on 12/09/07, para 16].

[5] Such approach has been endorsed by the Constitutional Court in Giddey NO v JC Barnard & Partners 2007 (2) BCLR 125 (CC). In delivering the judgment of the court, O'Regan J, in para 30, said this:

"On one side of the scale must be weighed the potential injustice to the plaintiff or applicant if it is prevented from pursuing a legitimate claim. This incorporates a recognition of the importance of the right of access to courts. On the other side of the scale must be placed the potential injustice to the defendant if it succeeds in its defence but cannot recover its costs. Relevant considerations in performing this balancing exercise would include the likelihood that the effect of an order to furnish security will be to terminate the plaintiff's action; the attempts the plaintiff has made to find financial assistance from its shareholders or creditors; the question of whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff; as well as the nature of the plaintiff's action."

[6] Adv PF Rossouw SC, who appeared for the respondents, relied on the nature of the respondents' claim, the *bona fides* thereof, and the submission that the conduct of the applicants has caused the financial difficulties of the fourth respondent, as factors that outweigh the prejudice to the applicants should they succeed and be unable to recover their costs.

[7] The respondents claim payment of the sum of R63, 382, 254.00, or in the alternative of the sum of R50, 000, 000.00, interest and costs. Their alternative

causes of action are founded on sections 26(1) or 31 of the Insolvency Act 24 of 1936, read together with section 340 (1) of the Companies Act, namely an alleged collusive transaction or an alleged dispositions without value; on theft; on unjust enrichment; on the *actio Pauliana*; and on breaches of fiduciary duties owed to the fourth respondent by its directors (the third and fourth applicants and the sixth and seventh defendants).

[8] The first applicant, a wholly owned subsidiary of the second applicant, acquired 65% of the issued share capital of the fourth respondent during January 2001. The remaining 35% of the shares were acquired by a company called Protector Group Management Company (Pty) Ltd ("PGMC"). The third and fourth applicants were then appointed as directors of the fourth respondent. Its financial director and managing director were at all material times the sixth and the seventh defendants.

[9] The applicants assert that, pursuant to a resolution of the board of directors of the second applicant not to remain invested (through the first applicant) in the fourth respondent, an agreement was concluded for the sale by the first applicant of its shares in the fourth respondent to a company to be identified, which was ultimately identified as the third defendant. The purchase price for the shares and other instruments sold, was R50 million, the funding for the transaction was to come from the IDC, and the purchase price was payable upon receipt by the purchaser of at least R50 million from the IDC. In terms of a

directors' report prepared by the sixth and seventh defendants and an executive report prepared by the seventh respondent and presented at a meeting of the board of directors of the fourth respondent on 2 March 2004, it was *inter alia* recorded that the third defendant had acquired 100% of the shareholding in the fourth respondent. The third and fourth applicants accordingly resigned as directors of the fourth respondent at that meeting in consequence of the sale by the first applicant of its shares in the fourth respondent. Soon thereafter, the third applicant was informed by the sixth defendant that the IDC had approved the transfer of funds and that the first applicant would be paid shortly. On 15 March 2004, the purchase price of R50 million was paid to the first respondent by way of a transfer of funds into the trust account of Edward Nathan & Friedland ("ENF"). On 22 June 2004, the funds were paid by ENF to the second applicant on behalf of the first applicant.

[10] The respondents assert that the fourth respondent sold its entire business as a going concern to a company, New Protector Group Holdings (Pty) Ltd ("NPGH"), for the purchase consideration of R72, 000.00. A loan agreement was concluded on 4 March 2004 between the Industrial Development Corporation ("IDC") and NPGH in terms of which the IDC was to advance to NPGH the funds to enable it to acquire the business of the fourth respondent as a going concern. On 5 March 2004, an amount of approximately R69 million was transferred by the IDC into a bank account of NPGH. On 8 March 2004, an amount of approximately R63 million was transferred into the fourth respondent's bank

account. On 10 March 2004, the same amount was transferred from the fourth respondent's account to a bank account held in Namibia by Fehrsen Harms & Associates ("FHA"). On 10 March 2004, FHA was instructed to transfer an amount of R50 million to ENF, an amount of approximately R9 million to an account held by H Seelenbinder, and an amount of approximately R4 million to the account of PGMC. On 22 June 2004, ENF paid the amount of R50 million to the second applicant. It is alleged by the respondents that the first applicant or the second applicant eventually received payment of the R50 million out of the funds transferred into the fourth respondent's banking account.

[11] The respondents' action is essentially based thereon that it sold its business to NPGH and that third parties, including the first and second applicants, had received the proceeds of such sale. At the core of the respondents' action is a transfer of funds from an account allegedly held by the fourth respondent to another account and the assertion that a substantial part of those funds found their way into the hands of the first and second applicants. The applicants' defence in essence is that the first applicant sold its shares in the fourth respondent to the third defendant and the payment received by it was in discharge of the purchase price. The applicants assert that they had no knowledge of the flow of funds or of the source of funds received by ENF on behalf of the first applicant, save that the applicants were aware that funding was to be provided by the IDC, and they had no knowledge of the alleged actions of the sixth and seventh defendants.

[12] I assume the *bona fides* of the company's claims, at least against the first and the second applicants. Another factor which favours the respondents is that by its nature their action is for the recovery of a payment allegedly made by the fourth respondent. The alleged mischief of the sixth and seventh defendants, who were allegedly the individuals who controlled the sequence of events, cannot, on the papers before me, be attributed to the applicants, and the interests of the applicants can also not be conflated with those of the third, sixth and seventh defendants. I am not persuaded that the actions of the applicants could be said to have caused the financial difficulties of the fourth respondent. But even if I am wrong in this assessment, then it remains no more than a factor to be taken into account in favour of the respondents, and, on the somewhat extraordinary facts of this matter, is by itself not decisive.

[13] I agree with the submission of Adv AO Cook SC, who appeared for the applicants, that it has not been established as a probability that the ordering of security will effectively terminate the litigation or prevent the respondents from pursuing their action. The respondents merely alleged that an order that security be furnished *"… may prevent the Plaintiffs from pursuing proper claims against the Defendants."* Such allegation is merely speculative and at best a conclusion with the primary facts on which it depends omitted [see: Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A), at p 793D; Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279 (TPD),

at p 234F]. The attempts the respondents have made to find financial assistance from the fourth respondent's creditors who will, if the action is successful, benefit from the action, have not been addressed. In MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd (*supra*), Brand JA, held:

"[20] One of the very mischiefs s13 is intended to curb, is that those who stand to benefit from successful litigation by plaintiff company will be prepared to finance the company's own litigation, but will shield behind its corporate identity when it is ordered to pay the successful defendant's costs. A plaintiff company that seeks to rely on the probability that a security order would exclude it from the court, must therefore adduce evidence that it will be unable to furnish security; not only from its own resources, but also from outside sources such as shareholders or creditors (see eg Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1) 1997 (4) SA 908 (W) 920G-J; Keary Developments at 540f-j; Shepstone & Wylie at 1047A – B; Giddey NO at paras 30, 33 and 34)."

[14] The factors favouring the respondents, in my view, do not provide sufficient reason for refusing an order of security and do not outweigh the considerable prejudice to the applicants should they succeed and be unable to recover their costs.

[15] In the result the following order is made:

1. The respondents are directed to furnish security for the applicants' costs in an amount to be determined by the Registrar, such security to be furnished in the form and manner directed by the Registrar;

2. The action by the respondents against the applicants is stayed until paragraph 1 of this order is complied with;

3. The applicants are granted leave to apply on the same papers, supplemented where necessary, for a dismissal of the action should the respondents fail to furnish security within fourteen days of the date of the determination by the Registrar;

4. The respondents are ordered to pay the costs of this application.

_____

PA MEYER
JUDGE OF THE HIGH COURT