REPUBLIC OF SOUTH AFRICA

INTHE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

JUDGMENT

31/7/15

~~Reportable~~/Not reportable

Case No: 60356/2012

In the matter between:

LEONA VAN EYK	1st Applicant/1st Defendant
PIETER NAUDE VAN EYK	2nd Applicant/2nd Defendant

and

HALTON BOERDERY BELANGE CC	1st Respondent/1st Plaintiff
LOUISA MADALINA PETRONELLA JOHANNA WESSELS	2nd Respondent/2nd Plaintiff

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J U D G M E N T

MNGQIBISA-THUSI, J:

[1] The applicants (defendants in the main action) seek an order in terms of Rule 47(1)[1] of the Uniform Rules of Court, for the respondents (plaintiffs in the main action) to provide security of costs for R 350 000.00.

[2] The second respondent is the sole member of the first respondent, a close corporation.

[3] The applicants delivered a Rule 47(1) notice (the notice) the respondents, demanding that respondents comply with it within 10 days, failing which they would have no alternative but to launch this application. The respondents did not respond to the notice leading to the applicants filing this application. Even though the respondents delivered a notice of intention to defend, they did not file an opposing affidavit to the Rule 47(1) application.

[4] Despite the fact that the respondents had not filed an opposing affidavit, at the hearing of this application they were represented by Mr van Rensburg. Mr Van Rensburg submitted that it was unnecessary for the respondents to file opposing papers, as the applicants on their papers have not provided any credible evidence in support of its application.

[5] It is trite that an *incola* cannot be called on to give security for costs unless the court is satisfied that the main application is vexatious or reckless or amounts to an abuse of the process of court. In *Vanda v Mbuqe and Mbuqe; Nomoyi v Mbuqe*[2] the court stated that:

> "[2] There are certain exceptions, arising from both common and statutory law, to the principle that *incolae* will not be called upon to furnish security for costs. As the exceptions are limited

[1] Rule 47(1) provides that "A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded."
[2] 1993 (4) SA 93 (Tk GD).

in number and only refer to a few specific cases, they make virtually no inroads on the general rule. An *incola* who embarks on reckless or vexatious litigation, or an insolvent who embarks on litigation, other than that which he is empowered to embark on by the Insolvency Act 24 of 1936, may be called upon to furnish security – *Ecker v Dean* 1938 AD 102 at 110. If an *incola* who is a man of straw litigates in a nominal capacity, or as a front of another, he may be ordered to furnish security – *Mears v Brook's Executor and Mear's Trustee* 1906 TS 546 at 550. A limited company which litigates as a plaintiff will be ordered to furnish security for costs if there is reason to believe that it, or the liquidator of the company, will not be in a position to pay the defendant's costs ... Lastly, ... security for costs can be claimed in respect of certain applications pertaining to prescribed claims."

[6] Section 8 of the Close Corporation Act 69 of 1984 provides that:

> "When a corporation in any legal proceedings is a plaintiff or applicant or brings a counterclaim or counter application, the Court concerned may at any time during the proceedings if it appears that there is reason to believe that the corporation or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent, or the defendant or respondent in reconvention, if he is successful in his defence, require security to be given for those costs, and may stay all proceedings till the security is given."

[7] In exercising its discretion whether or not to order a respondent to furnish security for costs there is no need for the court to necessarily inquire into the merits of the case. The court needs to weigh the injustice to the applicant if no security is ordered and the respondent is not successful, at trial against the injustice to the respondent if it is prevented from pursuing a valid claim. The onus to prove that the respondent will be unable to pay the applicant's costs if the respondent is not successful in its claim, lies with the applicant.

[8] With regard to the requirement that there is reasonable belief that the respondent will be unable to satisfy a cost order against it in *Vumba Intertrade CC v Geometric Intertrade CC*[3] the court stated that;

> "[8] ... Although the phrase 'there is reason to believe' places a much lighter burden of proof on an applicant than, for instance, 'the court is satisfied, (*Trust Bank van Afrika Bpk v Lief and Another* 1963 (4) SA 752 (T); *Agri Drip (Pty) Ltd v Fedgen Insurance Co Ltd* 1998 (1) SA 182 (W) at 186E), the 'reason to believe' must be constituted by facts giving rise to such belief (cf *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D) at 592F), and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice (cf *Native Commissioner and Union Government v Nthako* 1931 TPD 234 at 242).
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> In short, there must be facts before the court on which the court can conclude that there is reason to believe that a plaintiff close corporation will be unable to satisfy an adverse cost order; and the onus of adducing such facts rests on the applicant."

[9] In this matter, the court is required to embark on a two-stage inquiry. Firstly, whether the applicants have adduced credible evidence that, if unsuccessful, the respondents will be unable to satisfy an order for costs made against it. If the applicants do not succeed in doing so, that is the end of the matter. If the court is satisfied that the applicants have made a case that the respondents will not be able to pay an adverse cost order if unsuccessful, the court has to exercise its discretion whether or not it should order the respondent entity to furnish security.

[10] In brief, the following facts are common cause:

10.1 during September 2008, the respondents and the first applicant concluded a contract of sale of land (the property). The property was transferred to the first applicant on 17 September 2008.

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[3] 2001 (2) SA 1068 (WLD).

10.2 on 19 October 2012 the respondents issued summons against the applicants in which they sought the setting aside of the contract of sale and the re-transfer of the property into the name of the first respondent.

10.3 the respondents signed as sureties and mortgaged the property in favour of the applicants.

[11] In the notice demanding security, the applicants allege that the respondents will not be in a position to pay an adverse cost order if made against because:

11.1 according to a search done through CIPRO, the first respondent was de-registered and therefore does not have *locus standi* to institute the claim. The Applicants further called on the respondents to provide a power of attorney, which was duly provided on 4 August 2014;

11.2 the first respondent is dormant and has not traded for the past 5 years;

11.3 the first respondent's sole asset is the disputed property;

11.4 the respondents' action is not sustainable in that the claim has prescribed.

11.5 the second respondent is a pensioner and does not have any other means;

11.6 the respondents' action is reckless and/or vexatious and amounts to an abuse of the court process.

[12] In their founding affidavit in support of their demand for the respondents to furnish security for costs, the applicants refer to the

grounds as set out in the Rule 47(1) notice in support of their application and also contend that the Respondents' claim is vexatious and that the Respondents will be unable to satisfy an order of costs if the Applicants are successful.

[13] Despite the fact that the respondents had not filed an opposing affidavit, at the hearing of this application they were represented by Mr van Rensburg. Mr Van Rensburg submitted that it was unnecessary for the respondents to file opposing papers, as the applicants on their papers have not provided any credible evidence in support of its application.

[14] As indicated above, the onus is on the applicants to show that there is reason to believe that the Respondents will not be able to satisfy an adverse cost order against them. The founding affidavit does not contain any credible evidence showing that the respondents will not be able to satisfy an adverse cost order except to rely on what is contained in their Rule 47(1) notice. In order to make-up for the founding affidavit which lacks detail as to the respondents' potential inability to meet an adverse cost order, the applicants filed, over and above their heads of argument, two additional supplementary heads of argument in which an attempt is made to provide evidence that the Respondents will not be able to pay security. It cannot be gainsaid that heads of argument are not evidence and counsel cannot in his submissions give evidence from the bar. The applicants' founding affidavit lacks any credible evidence showing that the respondents will be unable to meet an adverse cost order if unsuccessful at trial. Nothing turns on the fact that the respondents have not produced their financial statements showing that they will be in a position to satisfy an adverse cost order. The applicants have not shown sufficient cause to enable the court to exercise its discretion whether or not to compel the respondents to furnish security nor that the respondents' claim is reckless and/or vexatious.

[15] In the premises, I am satisfied that the applicants have not shown that there is reason to believe that the respondents will not be able to meet an adverse costs order.

[16] Accordingly, the following order is made:

'The application is dismissed with costs.'

MNGQIBISA-THUSI
Judge of the High Court

Appearances:
For Applicant: Adv Visser
Instructed by: van Rensburg Jordaan & Olivier
For Respondent: Adv Van Rensburg
Instructed by: LGR Inc.