REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: 45241/12

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

22/02/2019 .....

DATE SIGNATURE

In the matter between:-

THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION First Applicant

THE MINISTER OF TRADE AND INDUSTRY Second Applicant

and

CARTE BLANCHE MARKETING CC First Respondent

CLEAR ENTERPRISES (PTY) LTD Second Respondent

In re:-

CARTE BLANCHE MARKETING CC First Applicant

CLEAR ENTERPRISES (PTY) LTD Second Applicant

and

THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION	First Respondent
THE MINISTER OF TRADE AND INDUSTRY	Second Respondent
THE MINISTER OF ECONOMIC DEVELOPMENT	Third Respondent
THE COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE	Fourth Respondent
CLOSE BORDER ROAD TRANSPORT AGENCY	Fifth Respondent
SOUTH AFRICAN CUSTOMS UNION	Sixth Respondent

JUDGMENT

SELEKA AJ:

[1] The parties in this matter have a history of litigation against each other that spans a period described by one of them as longer than a decade[1] and are still involved in multiple court proceedings against each other. The court proceedings were apparently triggered by steps taken by State officials in terms of the Customs and Excise Act, 91 of 1964, to seize and detain certain trucks brought into South Africa, allegedly without a permit, on the arrangement between the first and second respondents in the application before me.

[2] The present application does not concern that issue. It is an application for security for costs in one of the review applications instituted by the first and second respondents under the above case number. That review application was instituted in

---

[1] Second Respondent's AA265/7.

2017 and, shall for convenience, be referred to as the 2017 application or the main application. It is to be distinguished from a review application instituted earlier, in 2013, by the same respondents ('the 2013 application'). However, it is common cause between the parties that an amendment has been introduced, but not formally effected, to the relief sought in the 2013 application, which amendment is similar, if not the same, as the relief sought in the 2017 application.

[3] By reason of the aforesaid amendment, the applicants contend that the 2017 application amounts to a duplication of proceedings and, therefore, an abuse of the Court process. For this and other reasons, that will become apparent below, the applicants became vexed by the institution of the 2017 application and brought the present application for security for costs. They did so against both the first and second respondents. However, on the eve of the hearing date, the applicants withdrew the application against the first respondent. With that withdrawal, fell away some of the grounds relied upon for the present application. The application is now being pursued only against the second respondent ("Clear Enterprises").

[4] The second respondent is a *peregrinus* from Botswana and has confirmed, in its answering affidavit, that it is currently a dormant company and does not own any immovable property in South Africa.[2] It has left unaddressed the allegations that it does not conduct business in Botswana and has not submitted income tax returns since 2004.[3] The second respondent is therefore deemed to admit these allegations as correct.[4]

[5] I have noted that the second respondent's answering affidavit is deficient and unsatisfactory in some material respects. For instance, it also fails to deal with the

---

2 Page 265/6.
3 Page 19/16.2.
4 *United Methodist Church of South Africa v Sokufundamala* 1989 (4) SA 1055 (O) at 1059A.

applicants' allegation that the 2017 application is a duplication of the 2013 application. On this point too, the second respondent must be deemed to admit the allegations as correct.

[6] The aforesaid facts are grounds upon which the applicants rely for the present application. They contend that from these facts it is clear that the second respondent will not be able to meet any cost order against it, if unsuccessful, in the main application.

[7] It is trite that the Court has a discretion whether or not to order security for costs. This applies even in the case of a *peregrinus* applicant or plaintiff who does not own immovable property in South Africa. However, the discretion has to be exercised judicially, taking into account all the relevant facts, as well as considerations of equity and fairness to both parties.[5]

[8] At the end of the exercise of the Court's discretion lies the principle that where the Court has come to the conclusion that the *peregrinus* who initiated the court proceedings should not be absolved from furnishing security for costs, the Court is entitled to protect an *incola* defendant to the fullest extent.[6]

[9] In opposition to the present application, the second respondent relies on another consideration, by reference to a commentary in Erasmus, that if the defendant *incola* is sufficiently safeguarded in other ways, the Court will not order security to be given. The commentary cites two authorities for this proposition.

---

5 *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14E and 15D.
6 *Magida supra* at 14F-G.

[10] During argument, I asked both counsel whether they knew what is meant by the expression above, viz. "sufficiently safeguarded in other ways", and how it has been applied in case law. As none of them could provide an immediate answer, I gave them the opportunity to submit further heads on the point. I will return to this point later below.

[11] The *Magida* case was relied upon by counsel for the second respondent to impress upon me to refuse the application for security for costs, as was done by the Appellate Division in *Magida*.

[12] However, *Magida* is materially distinguishable from the facts in the present case. In that case, Mr Magida, who was an *incola* of the Republic of South Africa at the time when he instituted an action against the Minister of Police, for assault on him by the police, suddenly and without his volition, lost that status when Ciskei was separated from South Africa on 4 December 1981, to become an independent and sovereign state. Mr Magida was a resident in a town in Ciskei, but employed in East London, before and after Ciskei was separated. His court action had been instituted and pursued in the Eastern Cape Division with legal aid from the Legal Aid Board. Due to the change of his status, the Minister brought an application for security for costs on the ground that Mr Magida had become a *peregrinus*. The High Court granted the application, only for its decision to be reversed on appeal.

[13] In reversing the High Court's decision and dismissing the application for security for costs, the Appellate Division took into account a number of factors, including-

13.1 that the action had been instituted when Mr Magida was citizen and *incola* of South Africa;

13.2 that his loss of status was not due to his own doing;

13.3 that Mr Magida was still employed in East London, South Africa, and was therefore economically active within the Court *a quo*'s jurisdiction;

13.4 that Mr Magida was reliant on legal aid from the Legal Aid Board and, in his affidavit, had stated that he was impecunious and not in a position to furnish security;

13.5 that Mr Magida further stated in his affidavit that an order for security would effectively destroy his chance to prosecute the action against the State;

13.6 that Mr Magida was not a vagabond or dishonourable person;

13.7 that it was possible to execute the Court's judgment where Mr Magida was resident in Ciskei.

[14] Unlike in *Magida*, the second respondent in the present case is not economically active in South Africa, and not even in Botswana. It has not disclosed its financial position, nor given an indication as to how its litigation is funded. The second respondent has no connection whatever with any Court's jurisdiction in South Africa.

[15] The second respondent is embroiled in a multitude of court proceedings against the applicants and other State organs. Some of those court proceedings are instituted by the second respondent itself. Although it is a dormant entity, it does not claim to be impecunious and unable to provide security for costs. Its contention is that the mere fact that it is a *peregrinus* does not entitle the applicants to an order for security for

costs. I am therefore unable to perceive of any reason why security for costs in respect of the 2017 application will, as in *Magida*, effectively destroy the second respondent's chance of pursuing its rights in Court. Mr Magida had only one action to pursue. That is not the case with the second respondent.

[16] The present application does not relate to the 2013 application in which the same relief sought in the 2017 application has been introduced.

[17] Considerations of fairness and equity do not, on the facts of the present case, tilt the scales in favour of the second respondent. If anything, those considerations cry out for protection of the applicants' rights against a clearly litigious *peregrinus*, who is dormant, economically inactive and with unknown financial means. The chances of the applicants recovering their costs against the second respondent, should they be successful in the main application, are, in my judgment, rather slim.

[18] The second respondent alleges that it has immovable property in Botswana.[7] However, the details of the property have not been disclosed and the allegation is wholly unsubstantiated. As regards its contention that the value of its trucks detained in South Africa far exceed the amount of security sought by the applicants, the contention is untenable for at least two reasons. Firstly, the value of the trucks is unknown and, secondly, the applicants say that it is not possible to execute against trucks that are in detention for contravention of the Customs and Excise Act.

---

[7] Page 267/9.4.

[19] Further on the allegation of immovable property in Botswana, it is instructive what was said by the Supreme Court of Appeal in *Exploitatie-en Beleggingsmaatschappij v Honig*:[8]

> "The fact that the respondent will have to proceed against the appellants abroad if he obtains a costs order in his favour, with the associated uncertainty and inconvenience that would entail – and it is his undisputed allegation that it would be substantially more expensive to do so than litigating in this country – is one of the fundamental reasons why a *peregrinus* should provide security."[9]

[20] I am persuaded by considerations in this passage that the mere mention of immovable property abroad is in itself not an answer to an application for security for costs.

[21] Returning to the argument that the Court will not order security for costs where an *incola* defendant is sufficiently safeguarded in other ways, the second respondent's counsel submitted that security for costs was being sought jointly and severally against the two respondents and that that is the manner in which costs will be sought in the main application if the applicants are successful. The submission is that the applicants should be able to recover their costs in full against one of the respondents, in particular against the first respondent ("Carte Blanche").

[22] A number of factors militate against this argument. Firstly, the first respondent's financial position is unknown and has not been disclosed, despite requests from the applicants.

---

8 2012 (1) SA 247 (SCA).
9 *Honig* at para 19.

[23] Secondly, the applicants in the present application are the respondents in the main application and have not indicated the manner in which they will seek costs to be awarded if the application is dismissed, i.e. whether only jointly or jointly and severally the one party paying the other to be absolved.

[24] Thirdly, the issue of costs falls within the Court's discretion and it alone will finally decide how costs are to be awarded. This being a matter of discretion, it does not follow that the Court hearing the main application will award costs jointly and severally the one party paying the other to be absolved, even where the unsuccessful parties have made common cause in the same application.

[25] I am aware of what was said by the Appellate Division in *Minister of Labour v Port Elizabeth Municipality* that:

> "A party is compelled to join all other parties who have a direct interest in the proceedings and, if one of those other parties is not in a financial position to pay *aliquot* share of the cost awarded, an order simply for costs would result in the successful party not being able to recover all his taxed costs. This would be inequitable in cases where the parties condemned to pay costs made common cause with one another."[10]

[26] The Court hearing the main application may be guided by what was said in this passage. And I emphasise, "guided", as I do not think that the Appellate Division was seeking to lay down a rule of law that would erode the Court's discretion (on costs) which is so firmly entrenched in Rule 10(4) of the Uniform Rules of Court. The issue is still to be decided based on considerations of fairness and equity.

---

[10] *Minister of Labour v Port Elizabeth Municipality* 1952 (2) SA 522 (A) at 537H.

[27] As regards the two authorities referred to in the commentary in Erasmus, viz. *Hulbert & Co v Caporu & Marriot* (1890) 7 CLJ 261 and *Bovenzer v Bovenzer* (1898) 15 CLJ 203, I was provided (by the second respondent's counsel) with copies of the Cape Law Journal (vol. VII of 1890 and vol. XV of 1898) in which the authorities are referred. The journal only provides summaries under Digest of Cases. Copies of the judgments are not provided.

[28] The summary on the *Hulbert* case reads:

> "An application made by the defendants to compel the plaintiffs, who resided in England, to give security for costs for an action instituted by them, refused, it appearing that the defendants admitted their liability for and had tendered part of the amounts sued for, which amount was sufficient to cover the costs."

[29] Regarding *Bovenzer*, the summary reads:

> "Action to have a judgment of the Supreme Court of the South African Republic for divorce and payment of monthly maintenance monies declared an order of this Court. The plea admitting the judgment in the Transvaal, security for costs was refused the defendant, although plaintiff was a foreigner, the Court holding that the liability for future monthly payments afforded the defendant sufficient security."

[30] There seems to be no hard-and-fast rule about the consideration of "sufficient safeguards in other ways". Each matter turns on its own facts. Factors that motivated the courts in the two mentioned cases to decide as they did, do not feature in the present application.

[31] In the premises, and for all of the reasons above, I am unable to find other ways by means of which it can be said that the applicants' rights to costs in the main application, if they are successful, are safeguarded, let alone sufficiently safeguarded.

[32] In view of the manner in which the provisions of Rule 47 are worded, it is in my view unnecessary for the applicants to seek a formal amendment to their notice of motion. Whereas the Court may make an order for security for costs to be given, it is the Registrar who determines the amount and the form in which security should be given. On the facts, I am persuaded that the second respondent should not be absolved from furnishing security for costs.

[33] In the result, I make the following order:

33.1 The second respondent is ordered to provide security for the applicants' costs in the main application in the form and amount to be determined by the Registrar of this Court.

33.2 The second respondent is ordered to pay the applicants' costs of this application, including costs occasioned by the employment of two counsel.