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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

3/5/2021
DATE

SIGNATURE

**Case Number: 838/2013**

**LELOKO HARTBEESPOORT DAM ASSOCIATION** Applicant / Second Defendant

AND

**PHILLIP PEPPERMANS** Respondent / Plaintiff

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**JUDGMENT**

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**H G A SNYMAN AJ**

**INTRODUCTION**

[1] This is an application by the applicant / second defendant ("*Leloko*") against the respondent / plaintiff ("*Mr Peppermans*") in terms of rule 47 of the Uniform Rules of Court ("*the rules*") for security of costs. It is common cause that Mr

Peppermans is a *peregrinus* of this court in that he approximately a month before the action to which this application is incidental was instituted, namely on 25 December 2012, relocated to Australia. Mr Peppermans owns no immovable property in the Republic of South Africa ("*the Republic*").

[2] I am not called upon to fix the amount for any security to be put. According to the parties, in the event of Leloko being successful, this aspect would be referred to the Registrar of this court for a determination.

**BACKGROUND**

[3] On 31 December 2011 Mr Peppermans accompanied by his two minor children, at the time respectively aged 5 and 7 years, attended a New Year's Eve party at Leloko Estate Hartbeespoort dam ("*the estate*"). On that occasion Mr Peppermans fell into a manhole on the property and sustained injuries as a result thereof. Mr Peppermans instituted the action during January 2013 against Project Prop (Pty) Ltd ("*Project Prop*") as first defendant. Project Prop is the developer of the estate. Leloko, the homeowners association of the estate, was cited as the second defendant.

[4] Mr Peppermans' claim is for damages in the amount of R1,235,000. The amount claimed constitutes alleged damages suffered by Mr Peppermans, made up of past hospital and medical expenses, estimated future hospital and medical expenses, past loss of earnings, future loss of earnings and general

damages.

[5] Mr Peppermans' cause of action is based upon a duty of care as, according to Mr Peppermans, Leloko and Project Prop negligently failed to cover the open manhole and to ensure that the manhole was fenced off. They also failed to issue a warning to members of the public of the danger posed by the open manhole.

[6] Pleadings closed prior to 10 October 2014. The issue of liability was separated from the remaining issues and the trial in respect of the liability was heard from 10 to 24 October 2014. On 24 November 2014, the trial court per Janse van Nieuwenhuizen J held that Project Prop and Leloko were liable to compensate Mr Peppermans for 100% of his proven damages. This court was provided with a copy of the Janse van Nieuwenhuizen J judgment.

[7] In terms of prayer 2 of the order, Leloko and Project Prop were ordered to pay the costs of suit, which costs included the costs of a Mr Vallance and Dr Badenhorst as contemplated in paragraph 2 of the "*tariff of allowances payable to witnesses in a civil case*" (GNR397 of April 2008 published in GG30953). Mr Vallance is a friend of Mr Peppermans and he was an eyewitness and assisted Mr Peppermans at the time of the incident by for instance taking him to the consulting rooms of Dr Badenhorst who attended to Mr Peppermans' injuries. On 25 February 2015 Leloko's application for leave to appeal against Janse van Nieuwenhuizen J's judgment and orders was

dismissed with costs.

[8] Mr Peppermans has since been assessed by medical experts who prepared medico-legal reports and an actuary who prepared an actuarial calculation, which reports and actuarial calculation were served on Leloko's attorney of record during November and December 2016. Leloko has not yet delivered any expert reports.

[9] In December 2016 Mr Peppermans' attorney of record made a proposal to Leloko on behalf of Mr Peppermans in an endeavour to settle the quantum of Mr Peppermans' claim. The fact that there was a settlement initiative is disclosed in the papers and also cited by the parties' counsel in their joint practice note. Eventually, Leloko did not make any settlement offer and the initiative failed.

[10] The parties each blame the other for the fact that the quantum trial has not yet been set down for hearing.

[11] According to Mr Peppermans his legal representatives have been calling on Leloko's legal representatives since 24 August 2017 to attend a pre-trial conference, but they have refused to do so. Leloko admits that it did not assist Mr Peppermans in attempting to arrange a pre-trial. However, Leloko contends that it is premature to hold a pre-trial conference as it has not yet filed its expert reports.

[12] On 19 September 2019, being in excess of six years after the institution of the action and nearly five years after the Janse van Nieuwenhuizen J judgment, Leloko caused a notice to be served upon Mr Peppermans in terms of rule 47(1) of the rules calling upon him to put up security for costs in the amount of R400,000. This is on the basis that Mr Peppermans is a *peregrinus* of this court. Project Prop did not ask for security of costs. Mr Peppermans refused and Leloko launched the present application for security of costs on 22 November 2019.

[13] The case on behalf of Leloko is that Mr Peppermans will not be able to pay the costs of the quantum trial should it be decided in favour of Leloko and Mr Peppermans be ordered to pay the costs.

[14] The deponent to Leloko's founding and replying affidavits is Mr Clifford Ashley Crutchfield (*"Mr Crutchfield"*). Mr Crutchfield only identifies himself as a director of Leloko and member of Leloko's management. No attempt is made to qualify Mr Crutchfield as an expert. Leloko's case is that when the matter proceeds it will be proceeding for a number of days, as both parties would be calling their experts to testify at the trial. Leloko estimates in this regard that the trial will last approximately four to five days as Leloko intends to call at least two or three experts. Mr Peppermans intends to call at least four experts. It is stated in the founding affidavit on behalf of Leloko that the quantum aspect of the trail will be particularly expensive as various experts will be reserved to testify and will testify in accordance with the contents of their expert reports.

[15] According to Mr Crutchfield having regard to the reports of Mr Peppermans' experts it seems to him that they disagree on the extent of the loss suffered by Mr Peppermans. He states that in view of the fact that Mr Peppermans' actuary based her entire report on what he refers to as assumptions, Mr Peppermans will not succeed in proving the damages allegedly suffered by him. Mr Crutchfield's statements are, however, not supported by any supporting affidavits by experts suitably qualified to express opinions like these. In fact, it is apparent that Leloko has not even at this stage appointed its own experts.

[16] According to Leloko Mr Peppermans' delay in applying for a trial date and in taking steps to bring the matter to finalisation is an indication that Mr Peppermans has no case as regards the damages he claimed and knows it.

[17] It is stated that the amount of R400,000 security claimed is reasonable in that the matter is a trial matter in the High Court, where damages are claimed. Various experts need to prepare supplementary reports and will have to testify at the trial. It is stated that the pre-trial proceedings are also of importance, in particular the fact that the request for further particulars for trial in respect of damages claimed will have to be settled and served and the convening of a pre-trial and possibly more than one pre-trial. It is stated that Mr Peppermans is *dominus litis*, but delayed the finalisation of the claim for a considerable period of time.

[18] Mr Peppermans opposes the application for security for costs and the answering affidavit on his behalf was deposed to by his attorney on 16 January 2020. It was stated in the answering affidavit that a confirmatory affidavit deposed to by Mr Peppermans confirming the content of the answering affidavit in so far as it relates to him, would be served "*in due course*". Such a "*confirmatory affidavit by Mr Peppermans*" was served and filed three weeks later, i.e. on 6 February 2020. The confirmatory affidavit was on the face of it deposed to by Mr Peppermans and signed on 23 January 2020 in Australia before Ernest David Whitehorst, 19 Wexcombe Way, Aveley WA6069, in his capacity as a Commissioner of Oaths.

[19] Mr Peppermans opposes the application on the basis that although he is permanently residing in Australia, he retained his business in South Africa and earns an income from this business. According to the answering affidavit, "*in the unlikely event*" of Mr Peppermans being directed to pay Leloko's costs of suit in the trial pertaining to the quantum of Mr Peppermans' damages, Leloko is sufficiently safeguarded, in that it will be in a position to recover the costs by attaching Mr Peppermans' income stream from his business in South Africa. It is stated that Mr Peppermans returns to South Africa every six months to check on his business. It appears from the answering affidavit that the business is situated in Sandton and that Mr Peppermans employs a manager who conducts the business on his behalf. The manager is paid a percentage of the earnings of the business.

[20] It is also stated that since September 2013, Mr Peppermans has been the co-owner of a business in Australia, which manufactures cleaning products. It is pointed out in the answering affidavit that according to the actuary, Ms Mary Cartwright, Mary Cartwright Consult CC, Mr Peppermans' future loss of earnings is R5,621,800. The costs of assistive devices required by Mr Peppermans is R16,300. It is stated that Leloko has no prospects of obtaining a cost order against Mr Peppermans as part of the quantum trial.

[21] Reliance is also made on the fact that Leloko did not seek any security for costs prior to the trial on the merits despite the fact that Mr Peppermans had by then relocated to Australia. Moreover that in view of the lengthy delay of more than seven years, and Leloko's failure to provide any explanation for its failure to apply for security for costs as soon as possible after Mr Peppermans relocated to Australia, the application should be dismissed with costs for this reason alone.

[22] In Leloko's replying affidavit, which was served and filed on 22 June 2020, the point was raised that the deponent to Mr Peppermans' answering affidavit, i.e. his attorney, cannot be seen to be a person who is in a position to furnish anything but hearsay evidence. The evidence tendered by her is according to the replying affidavit not common cause, but remains in dispute between the parties. The content of the supplementary affidavit was also criticised. It was stated that only Mr Peppermans can depose to an affidavit, regarding his damages, in addition to the reports by his experts. Mr Peppermans'

confirmatory affidavit is criticised since it only refers to him confirming "*same*".

[23] In the replying affidavit it is further stated that Leloko only at a later stage, i.e. subsequent to 25 December 2012, ascertained that Mr Peppermans immigrated to Australia. However, no detail is given of exactly when this was found out. The lapse of time is left entirely unexplained.

[24] On 22 February 2021, a day before this application was heard, Mr Peppermans' attorney of record filed a supplementary affidavit. Attached to this affidavit was a special power of attorney. Mr Peppermans' attorney stated that Mr Peppermans signed the power of attorney and that the signature as appears from this power of attorney is the same signature as on his confirmatory affidavit. It was not explained why the supplementary affidavit was only filed now.

## STATUS OF THE ANSWERING AFFIDAVIT

[25] In terms of rule 63 of the rules, read with the Justices of Peace and Commissioners of Oath Act, Act 16 of 1963, certain procedures have to be followed for the authentication of documentation executed outside the Republic for use within the Republic. This for instance includes that rule 63(2)(a) of the rules provides that any document executed in any place outside the Republic shall be deemed to be sufficiently authenticated for the purpose of use in the Republic, if it is duly authenticated at such foreign place by the

signature and seal of office of the head of the South African diplomatic or consular mission, or a person in the administration or professional division of the public service serving at a South African diplomatic consulate or trade office abroad. It is common cause that these procedures were not followed in this matter in so far as Mr Peppermans' confirmatory affidavit is concerned.

[26] It was argued by counsel for Leloko at the commencement of the hearing that Mr Peppermans' confirmatory affidavit should therefore not be admitted into evidence and that what is stated in the answering affidavit, to the extent that it relies on Mr Peppermans' supplementary affidavit, should be regarded as hearsay evidence.

[27] It was argued by counsel on behalf of Mr Peppermans, however, that in terms of rule 63(4) this Court may accept as sufficiently authenticated any document which is shown to the satisfaction of this Court to have actually been signed by the person purporting to have signed the document. Reliance was in this regard made on the supplementary affidavit by the attorney for Mr Peppermans confirming that the signature of Mr Peppermans on his confirmatory affidavit was indeed that of Mr Peppermans. It was also pointed out by counsel for Mr Peppermans that Leloko relied as part of its application on the medico-legal reports filed by Mr Peppermans, and has annexed those to the founding affidavit and has not disputed the contents of those reports, and has not filed any opposing reports and any expert report of its own. The expert reports confirm that Mr Peppermans has a business in the Republic

and that he still conducts business in South Africa.

[28] It was also argued by counsel on behalf of Mr Peppermans that should I be inclined not to accept Mr Peppermans' confirmatory affidavit as sufficiently authenticated, this would lead to an application for postponement in order to have the said "*affidavit authenticated in terms of the rules and that this will take some time*". It was submitted in this regard that due to the worldwide lockdown it takes in excess of three months to obtain an appointment at the South African consulate in Australia. It was also submitted that the South African consulate is quite far from where Mr Peppermans resides. Counsel for Mr Peppermans therefore asked me, in the exercise of my discretion in terms of rule 63(4), to accept that Mr Peppermans' confirmatory affidavit is compliant and adequate.

[29] Counsel on behalf of Leloko cautioned me in reply that should I exercise my discretion to admit the confirmatory affidavit of Mr Peppermans at this stage, I must nevertheless bear in mind the probative value of such evidence during the course of any argument submitted on the evidence thus confirmed.

[30] I proceeded at the hearing to provisionally allow the confirmatory affidavit of Mr Peppermans as duly authenticated. As I see it, based on the supplementary affidavit filed by Mr Peppermans' attorney, a case was made out that the confirmatory affidavit was indeed signed by Mr Peppermans.

[31] In view of the caution I was called upon to exercise by counsel on behalf of Leloko, I requested him to refer me during the course of his argument to the specific facts I ought to regard as hearsay. Eventually, counsel for Mr Peppermans conceded that the only *"fact"* which qualified for this was the amount of income that Mr Peppermans' business is earning in the Republic. The fact that he had such a business is common cause.

**THE DELAY IN BRINGING THE APPLICATION**

[32] Rule 47(1) of the rules provides than an application for security of costs have to be brought *"as soon as practicable after the commencement of proceedings"*. There is no indication in the rule exactly what this means. It is also not clear from the rule what fate awaits an applicant who does not bring such an application as soon as practicable after the commencement of proceedings.

[33] I have not been referred to any authority, neither am I aware of any, where an applicant for security like Leloko was the losing party in the merits part of the action, subsequently seeks security for cost for the quantum part of the action. As I see it, however, the mere fact that Leloko was the losing party in the merits part of the action, does not preclude it from bringing this application for security.

[34] In **Holfeld, HR, (Africa) Ltd v Karl Walter & Co GmbH (2) 1987 (4) SA 861**

**(W) at 867F** the court held that security of costs may only be sought and granted by the Court under its inherent jurisdiction while a *lis* is pending or after judgment while an appeal is pending, but not after final judgment.

[35] In the present matter there is clearly still a *lis* pending between Leloko and Mr Peppermans and Leloko and the application for security of costs is therefore competent. Moreover, it follows in my view based on the above authority that an applicant is not barred to institute such an application merely because it did not do so when the action was instituted. It can even do so at the appeal stage and be successful, if a case for that is made out.

[36] In the matter of **ICC Car Importers (Pty) Ltd v A Hartrodt SA (Pty) Ltd 2004 (4) SA 607 (W)**, a judgment of Marais J a case relied upon by both parties, it was held that a failure to demand or apply for security at the early stages is not fatal, but merely a factor to be taken into account in the exercise of the Court's discretion. Counsel for Mr Peppermans pointed out that in the **ICC Car Importers** matter the court went on to hold that because the delay in that matter was considerable, substantial trial costs had been run up and the application was heard on the day of the trial, the delay was so substantial that security should not be ordered and the application was dismissed. She also invited my attention to the fact that the judgment was then followed by the full bench decision in the matter of **B & W Industrial Technology (Pty) Ltd v Baroutsos 2006 (5) SA 135 (W)**, also a Witwatersrand decision where Marais J was one of the judges of the full bench. In this matter the delay had been 25

months and His Lordship Mr Justice Goldblatt in the Court *a quo* held that that was a substantial delay and took that fact into account in determining to exercise his discretion against the ordering of security. On appeal the full bench refused to overturn the court a quo's judgment.

[37] I will proceed to adjudicate this matter on this basis, i.e. that delay does not present a bar against an application for security of costs being brought, but that I may take it into account in exercising my discretion.

**TEST TO BE APPLIED**

[38] In the matter of **Magida v Minister of Police 1987 (1) SA 1 (A)**, also a judgment referred to and relied upon by both parties in their respective heads of argument and in argument, it was held at **14C to G** that:

> "Notwithstanding the obsolescence of the *cautio juratoria* as security on oath we must bear in mind that our common law principles which underlie its granting are still applicable in our modern practice when a *peregrinus* in his answering affidavit deposes to his inability to furnish security for costs owing to his impecuniosity, since it must be left to the judicial discretion of the Court by having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both the *incola* and the *peregrinus* to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs. Nor is there any justification for requiring the Court to exercise its discretion in favour of a *peregrinus* only sparingly. It follows that the following *dictum* in *Saker & Co Ltd v Grainger* 1937 AD 223 *per* De Wet JA at 227, viz: 'The principle underlying this practice is that in proceedings initiated by a *peregrinus* the Court is entitled to protect an *incola* to the fullest extent,' should be read subject to the qualification that it is only applicable *after* the Court, in the exercise of its judicial discretion in accordance with the principles hereinbefore

stated, had come to the conclusion that the *peregrinus* should not be absolved from furnishing security for costs."

[39] This court is accordingly afforded a wide judicial discretion in considering whether or not an application for security of costs ought to be granted.

[40] It is stated in this regard by the author in **Van Loggerenberg, Erasmus: Superior Court Practice Revision Service 11, 2020 at D1-635** that:

> "The factors which the court will consider in the exercise of its discretion to determine an application for security for costs are case-specific. No list of factors to be rigidly followed exists indicating which factors weigh more heavily than others. Some guidelines exist that may influence the court in the exercise of its discretion. These include whether the plaintiff's claim is made in good faith or whether it is *mala fide*, whether it can be concluded that plaintiff has a reasonable prospect of success and whether the application for security was used to stifle a genuine claim. A respondent resisting an application for security for costs has to provide documentation to support allegations of impecuniosity, and a failure to do so might lead to the inference that the allegations are unfounded and that undisclosed documentation might contradict them."

## THE EXERCISE OF THIS COURT'S DISCRETION

[41] It is common cause that Mr Peppermans does have a business in South Africa and that he has means to pay. The application is therefore not opposed on the basis that Mr Peppermans cannot afford to pay the security sought. What is not common cause is what amount of income Mr Peppermans earns from this business in the Republic.

[42] Counsel on behalf of Mr Peppermans also submitted, with reference to the papers that I should take into account that Mr Peppermans owns an aircraft in the Republic and that he owns immovable property in Perth. He is therefore not a man whose address one does not know, who one will not be able to locate. She submitted that even if it may be more expensive to execute against him in Australia, one could execute against him in Australia at the end of the day if necessary. I agree with this submission.

[43] The fact that the Minister of Police was able in the **Magida** matter to execute any costs order in the former Ciskei, was *inter alia* taken into account by that Court in not ordering Mr Magida to put up security for costs. Counsel for Mr Peppermans argued that the present situation can be distinguished in that it is much more difficult to execute in Australia than it was in those years to execute in the Ciskei. In my view this is not a valid argument. The fact remains that in the unlikely event of Leloko obtaining a cost order against Mr Peppermans, to use the words of Mr Peppermans' deponent, such an order is capable of being executed in Australia if needs be. That is if Leloko is not cable of executing against the income stream of Mr Peppermans' business in the Republic.

[44] In my view it is not decisive that detailed information regarding the profitability of that business is not before court. This is according to me at best, something that the Registrar ought to take into account if it is called upon to fix an amount for any security to be put up.

[45] It was agued on behalf of Leloko that it is not a foregone conclusion that Mr Peppermans would eventually be successful in proving his damages. In my view, however, it cannot be said on the papers that Mr Peppermans' claim is anything but made in good faith and that he has no reasonable prospect of success. Mr Peppermans may eventually not be able to prove all of his claims, but no case is made out that he will not be able to prove any damages. On a mere reading of the expert reports, it is clear that Mr Peppermans suffered considerable damages. In any event, Leloko make out no case that Mr Peppermans' claims are mala fide and that it will under the circumstances eventually be able to obtain a costs order against Mr Peppermans. The opinions of Mr Crutchfield do not suffice to cast doubt on Mr Peppermans' claims. No attempt is even made on the papers to qualify Mr Crutchfield as an expert capable to express opinions such as these.

[46] I also take the unexplained considerable delay in excess of six years in bringing the application into account in exercising my discretion against Leloko. Leloko does not even disclose when it became aware that Mr Peppermans relocated to Australia. On the papers before court, further alluded to on behalf of Leloko in the heads of argument and in argument before this Court, the main reason for Leloko only bringing the application at this late stage, appears to be Leloko's frustration with Mr Peppermans that he is not taking steps to further the quantum trial. It was in this regard submitted on behalf of Leloko at the hearing of this matter that an order for security of costs

will *"light a proverbial fire under Mr Peppermans as dominus litis to proceed with the matter to finality"*.

[47] Further to this is the stated reason in the founding affidavit that Leloko is under the impression that Mr Peppermans has no case and knows it. (I pause to mention in this regard that the submission made in the heads of argument on behalf of Leloko that in view of Mr Peppermans' conduct it is clear that he cannot afford the litigation and that he presumably abandoned his action against the applicant and has no intention of proceeding with the trial, was correctly in my view not persisted with in argument before me). As I see it, the application is obviously brought at this late stage in an attempt by Leloko to bring this matter to a head.

[48] The above are no valid reasons in bringing an application for security of costs. These are in my view akin to bringing an application for security of costs in order to stifle a genuine claim.

[49] As I see the matter having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both Leloko and Mr Peppermans, Mr Peppermans ought to be absolved from furnishing security for costs.

**COSTS**

[50] Counsel for Leloko requested that if I in the exercise of my discretion

determine that Leloko should pay the costs of this application, I should nevertheless disallow the costs occasioned by the late filing of the supplementary affidavit, filed a day before the hearing. In my view the request is validly made.

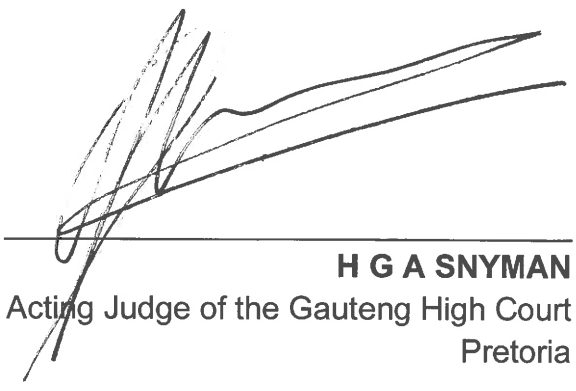
[51] For the remainder, there is in my view no reason for costs not to follow the event.

[52] In the result, I make the following orders.

**ORDER**

1. The application for security for costs is dismissed.

2. The applicant is ordered to pay the respondent's costs, excluding the costs occasions be the late filing of the supplementary affidavit.



**H G A SNYMAN**
Acting Judge of the Gauteng High Court
Pretoria

Virtually heard: 23 February 2021

Electronically delivered: 3 May 2021

Appearances:

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|---|---|
| For the applicant / second defendant: | Adv JL Verwey instructed by AJ van Rensburg Inc. |
| For the respondent: | Adv S Georgiou instructed by Malcom Lyons & Brivik Inc. |