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

CASE NO: A34/2022

DOH: 24 August 2023

1. REPORTABLE: **NO/YES**

2. OF INTEREST TO OTHER JUDGES: **NO/YES**

3. REVISED

SIGNATURE:

DATE: 16 October 2023

In the matter of:

MAJORIES TRADING ENTERPRISES CC

APPLICANT

**(Respondent in the appeal and
Defendant in the Court *a quo*)**

And

KLEINBOOI MONARENG

RESPONDENT

**(Appellant in the appeal and
Plaintiff in the Court *a quo*)**

In re:

KLEINBOOI MONARENG

APPELLANT

And

MAJORIES TRADING ENTERPRISE CC

RESPONDENT

JUDGMENT

**THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADED ON CASELINES,
ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 16 OCTOBER 2023**

Bam J (Collis J concurring)

A. Introduction

1. This is an application for additional security by the respondent on appeal, Majorie Trading Enterprises CC. Prior to dealing with the citation of the parties I indicate that we deemed it prudent to adjudicate the application to file additional security prior to the hearing of the appeal itself. I refer to the parties as they are in the underlying appeal. That means, for the appellant, even though he is the respondent in this application, I refer to him as the appellant. The application for additional security is premised on the provisions of the Magistrate's Court Rules, rule 54 (4), which deals with appeals in civil cases. The rule provides:

‘An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the

amount of R1000: Provided that no security shall be required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established legal aid board.'

2. The appellant, is an adult male and a taxi driver. He is based in Pretoria, Gauteng. The respondent is a close corporation duly incorporated in terms of South African laws, with its principal place of business situated on 1st Floor, Relimed Building, 2[...] B[...] Street, Pretoria, Gauteng.
3. Briefly by way of background, the appeal arises from the decision of the Magistrates Court in which the appellant's claim for delictual damages against the respondent was dismissed with costs. The appellant was shot in the leg by an employee of the respondent. Arising from that shooting, the appellant unsuccessfully claimed damages against the respondent. He is now before this court appealing the decision of the Magistrate.
4. The respondent contends that the appellant is a man of straw. He will not be able to satisfy an award of costs in the event the respondent succeeds in its defence. It further says that appellant's case is speculative and the amount of R1000 he provided as security is wholly insufficient to cover its costs of appeal. It asks the court for additional security in the amount of R 131 167.66.

B. Legal principles

5. The application will be considered against the legal principles as set out in the cases discussed here-below:

6. In *Zietsman v Electronic Media Network Ltd. and Others*, the court, entertaining an appeal against the order of the Commissioner of Patents, that the appellant provide security in the amount of R 250 000.00 in respect of each of the two respondents had the following to say:

‘In terms of section 17 (2) [of the Patents Act 57 of 1978] the court a quo had a discretion to order the appellant to furnish security. Such an order places a limitation on the right conferred on litigants in terms of s 34 of the Constitution... In terms of s 36 of the Constitution the right may be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. ... As the validity of the section itself depends on the reasonableness and justifiability thereof it must follow that an order that a plaintiff should furnish security, thereby limiting his right to have his dispute resolved in a court, may only be made if it is reasonable and justifiable to do so.

[13] In exercising his discretion in terms of s 17(2) a commissioner must consider all relevant factors and balance them against one another. It is clear that the court a quo never did so...’¹

7. The question whether to grant security requires that the court balance competing interests. In *Giddey NO v JC Barnard and Partners* the Constitutional Court had to consider a claim for security against a huge claim brought by the liquidator of an insolvent company against a firm of accountants. Aggrieved by the order that he

¹ *Zietsman v Electronic Media Network Ltd. and Others* (11/07) [2008] ZASCA 4; [2008] 2 All SA 523 (SCA); 2008 (4) SA 1 (SCA); 2008 BIP 1 (SCA) (7 March 2008)

provide security for costs in favour of the firm, the liquidator appealed to the Constitutional Court. In reasoning the issue, the Court remarked:

‘[4]...Accordingly, in determining whether an order for security should be made, a court needs to take into consideration the provisions of the Constitution and in particular, section 34. In deciding whether it is appropriate to require security for costs to be paid, therefore, a court makes a decision on a constitutional matter. The respondent’s argument to the contrary must therefore be rejected....

[8] The courts have accordingly recognised that in applying section 13 [of the Companies Act 61 of 1973] , they need to balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against the potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its own costs in the litigation. To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An applicant for security will therefore need to show that there is a probability that the plaintiff company will be unable to pay costs. The respondent company, on the other hand, must establish that the order for costs might well result in its being unable to pursue the litigation and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospects of success, Equipped with this information, a court will need to balance the interests of the plaintiff in pursuing the litigation against the risks to the defendant of an unrealisable costs order.’²

C. Analysis and conclusion

² (CCT65/05) [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) (1 September 2006), paragraph 4, 8

8. Although Giddey had to do with a claim by a liquidator of a company in liquidation instituting proceedings against a firm of accountants, the remarks of the court are not confined to instances involving section 13. As has already been seen in *Zietsman*, which involved individuals, in making the decision whether or not to order security, the court exercises a discretion which requires it to consider all the relevant information.
9. In the present case the respondent says that the appellant has already testified before the magistrate's court and his case was rejected with costs in favour of the respondent. Following the case the respondent wrote through its attorneys to the appellant's, requesting some undertaking that the appellant was capable of paying not only the costs arising from the magistrate's court case but including the costs envisaged in the respondent's opposition of the appeal³. The appellant's attorneys wrote back advising that the appellant is the owner of taxi, allegedly being an asset of value⁴. They added that following the injury, the appellant no longer regularly drives. In response to this letter, the respondents sought proof that the appellant was indeed the owner of the taxi. In their reply, the appellant's attorney's advised that the earlier statement was made in error and that the appellant is not the owner of the taxi.⁵
10. The appellant on the other hand submits that the entire pursuit of additional security is aimed at stifling his claim. He says he has no duty to prove against speculative

³ Caselines 10-17 paragraph 20.6

⁴ Caselines 10-17 paragraph 20.7

⁵ Caselines 10-17 paragraph 20.9

statements that he is a man of straw and he is capable of paying the respondent's costs. In argument counsel for the appellant, with references to the authority in *Zietsman* and *Giddey* decried the amount of R131 167.00 sought by the respondent stating that even if the court were to consider granting the respondent security, the amount should not be exorbitant as it will effectively close the doors of the court to the appellant in his quest for justice. Counsel emphasised the need for the court to carefully consider the individual parties' positions and their respective interests in the matter.

11. We have considered the parties' written and oral submissions. It is clear from authorities that the court is called upon to exercise a discretion in the strict sense. In coming to the decision, this court takes into account, *inter alia*, the appellant's prospects of success based on what is in the record, the respondent's prospects and the parties' individual interests in the matter. There is little by way of information supporting the appellant's means other than that he drives a taxi and draws income from that activity. I am confident that the court can take judicial notice of the fact that a taxi driver who does not drive for his own cause is a person of relatively limited means. The court must thus take that information into account along with the implications in the event an order were to be made for an amount of security beyond his means but this must be balanced against the risk that the respondent may ultimately fund the litigation even in the event he were to succeed in his defence. Ultimately, the decision made must uphold the interests of the parties and the interests of justice.

12. The amount sought by the respondent of R 131 167 00 is based on a pro forma bill of costs drawn by a costs consultant. The estimation however, is not binding to the court. Nor is it one of the considerations that the court must take into account in order to serve the interests of justice. The Constitutional Court's *ratio* in *Giddey* is clear; a court must be minded that it is making a decision on a Constitutional matter when deciding the question of security for costs.

13. Accordingly, it is in the interests of justice that the appellant provide security in the amount of R10 000.

D. Order

14. The application for additional security succeeds.

14.1 The appellant is ordered to provide security in the amount of R10 000 within six weeks from date of this order. Until such time that the security in the aforementioned amount has been provided, the appellant may not set down his appeal.

14.2 The costs of this application shall be held over for final determination of the appeal.

N.N BAM

JUDGE OF THE HIGH COURT, PRETORIA

I agree:

C COLLIS

JUDGE OF THE HIGH COURT, PRETORIA

For the applicant:

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Instructed by:

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Nieuw Muckleneuk

Pretoria

For the Respondents:

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Date of Hearing:

24 August 2023

Date of Judgement:

16 October 2023