REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

13/01/25
DATE SIGNATURE [redacted]

Case Number: 030796/2022

In the matter between:

MOTSWAKO OFFICE SOLUTIONS (PTY) LTD	**Applicant**
and	
LUANELLE-YVONNE VOIGT (PREVIOUSLY VAN NIEKERK)	**Respondent**
in re: -	
LUANELLE-YVONNE VOIGT (PREVIOUSLY VAN NIEKERK)	**Plaintiff**
and	
ALAN AUSTIN	**1st Defendant**
MOTSWAKO OFFICE SOLUTIONS (PTY) LTD	**2nd Defendant**

JUDGMENT

Joyini J

INTRODUCTION

[1] This is an opposed interlocutory application for security for costs in terms of Rule 47(3) of the Uniform Rules of Court ("Rule 47"). The applicant served a Rule 47(1) notice to provide security for costs in the amount of R150 000.00 to the respondent on or about 9 November 2022.[1]

[2] The respondent failed to provide security as required in Rule 47(1) notice or to respond thereto within the 10 days allowed for her to do so in terms of Rule 47(3). Consequent to the respondent's failure to comply, the applicant launched an application to the court for relief in terms of Rule 47(3).

[3] I am indebted to the parties' counsel for their contribution to this judgment through their submissions, oral arguments, heads of argument, and affidavits In crafting this judgment, I have relied a lot on this contribution.

RULE 47(1) REQUIREMENT

[4] Rule 47(1) reads: *"A party is entitled and desiring to demand security for costs from another shall, as soon as practicable, after the commencements of proceedings, deliver a notice setting forth the grounds upon which the security is claimed and the amount demanded."*

ISSUE FOR DETERMINATION

[5] The only dispute which the court is called upon to adjudicate is whether the applicant should be awarded security for costs.[2]

BACKGROUND FACTS

[6] The respondent (plaintiff in the main action) was employed as an executive personal assistant by the applicant (second defendant). First defendant was

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[1] Caselines 06-16, para 6 (Affidavit in support of the Rule 47 application ("FA")).
[2] Caselines 08-7, para 8.

employed as chief operations officer by the applicant. The respondent is an *incola* who resides in South Africa and has a South African identity document.

[7] The respondent (plaintiff) instituted action against the first defendant and the applicant for damages allegedly suffered as a result of the first defendant's alleged sexual harassment of the respondent from March to July 2021.[3]

[8] The respondent alleges that the applicant is vicariously liable to her for the alleged damages she suffered, alternatively, she alleges that the applicant is directly liable to her for damages suffered due to a breach of its statutory duty of care.[4]

[9] Against this background, I now turn to the basis upon which the applicant seeks the payment of security for costs by the applicant.

APPLICANT'S EVIDENCE AND ARGUMENT

[10] The applicant argues that the respondent has failed to demonstrate that she will be in a position to pay the costs of the applicant, if she ultimately ordered to pay same.

[11] The applicant submits that the court, in deciding whether or not to order security for costs to be provided, should consider various factors including whether (i) the action is vexatious, reckless or an abuse of process; and (ii) the financial ability of the respondent to pay the costs that a defendant incurred in defending an action.[5]

[12] The applicant further submits that the court has an inherent jurisdiction to regulate its process, including to order an *incola* to provide security for costs to stop or limit a vexatious action as being an abuse of process.[6]

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[3] Caselines 07-37, para 6; 07-39, para 10; and 07-40, para 13.
[4] Caselines 07-38, paras 7-8; 07-39, paras 11-12; 07-41, paras 14-15.
[5] *Fitchet v Fitchet* 1987 (1) SA 450 (E) at 454.

[6] *Fitchet v Fitchet* 1987 (1) SA 450 (E) at 453 [J] to 454 [A]. See also *Ecker Appellant v Dean, Respondent,* 1938 A.D. 102. The aforesaid case dealt with the issue of security in the case of an insolvent. See also *Ramsamy NO and Others v Maarman NO and Another* 2002 (6) SA 159 (C) at 174 [F].

[13] The applicant is of the view that an action is vexatious if it is obviously unsustainable.[7] A finding of vexatiousness need not be made "as a matter of certainty" but must be made on a preponderance of probability.[8]

[14] The applicant is also of the view that the term *'abuse of process'* connotes that the legal machinery is employed for some ulterior purpose.[9]

[15] The applicant reiterates that the respondent's claim against the applicant is unsustainable and it has been brought for purposes other than to facilitate the pursuit of the truth.

[16] The applicant, in support of its argument, cited *Beinash v Wixley*[10] where the court held: *"What does constitute an abuse of the process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process". It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the rules of the court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective."*

RESPONDENT'S EVIDENCE AND ARGUMENT

[17] The respondent has indicated that she is employed and she is earning R25 000.00 per month. She also co-owns an immovable property worth R1 600 000.00. She is an *incola* who resides in South Africa and has a South African identity document.

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[7] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D). The aforesaid matter dealt with "vexatiousness" in the context of string out. In *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at para 18, the court supported that the test for "vexatiousness" in the context of security for costs is not a matter of "certainty" but of "preponderance of probabilities".

[8] *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C) at para 26.

[9] Hudson Applellant v Hudson and Another Respondents 1927 AD 259 at 268.

[18] The respondent is claiming compensation from the applicant in respect of the damages which she has suffered as a result of the alleged sexual harassment incident referred to above.

[19] The respondent is of the view that the applicant has gone out of its way to make the process as difficult and cumbersome for the respondent as possible, before she can proceed with her claim.

[20] The respondent argues that the Rule 47 application is without merit and must fail for either or both of the following reasons:

[20.1] Firstly, the applicant has failed to establish that the respondent will be unable to satisfy a potential cost order; and/or

[20.2] Secondly, the applicant has failed to establish that the action instituted by the respondent is vexatious or reckless or otherwise amounts to an abuse of this court's process.

[21] The respondent submits that the respondent, who is the plaintiff in the main action, is an *incola* of this country and the general rule is that an *incola* plaintiff cannot be compelled to furnish security.[11]

[22] It is trite that the court has a discretion as to whether or not a plaintiff *incola* ought to be compelled to provide security for costs. The principle in *Boost Sports Africa v South African Breweries Ltd*,[12] paragraph 16, is cited with approval herein. Ultimately the court must be satisfied that the main action is vexatious, reckless or amounts to an abuse.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[23] As you may recall, the applicant wants the court, in deciding whether or not to order security for costs to be provided, to consider various factors including whether (i) the action is vexatious, reckless or an abuse of process; and (ii) the financial ability of the respondent to pay the costs that a defendant incurred in

[11] *Di Meo v Capri Restaurant* [1961] 1 All SA 64 (N), 1961 (4) SA 614 (N), quoting *Witham v Venables* (1828) 1M 291, *Rosenblum v Marcus* (1884) 5 NLR 82, *Mears v Pretoria Estate and Market Co Ltd* 1907 TS 951.
[12] *2015 (5) SA 38 SCA.*

defending an action.[13] I am mindful that the standard exercised by this court differs from that which is to be exercised when hearing the main application. In *Fitchet v Fitchet*[14] the court stated: *"The test is applied in a different manner as to that in an application for a dismissal of the action. In an application for security for costs the test should be somewhat less stringent and other factors which are irrelevant in a dismissal application should be taken into account. Hence the detailed investigation in terms of the merits is not necessary, nor is it contemplated that there should be a close investigation of the fact in issue in the action."*

[24] Rule 47 provides only the procedural framework for a party to demand security for costs from the other. Whether the applicant is entitled to receive security from the respondent who is an *incola* of South Africa is a question of law.

[25] Some of the guidelines that a court will take into account when exercising its discretion are whether the plaintiff's claim is made in good faith or whether it is mala fide, whether it can be concluded that a plaintiff has a reasonable prospect of success and whether the application for security was used to stifle a genuine claim.[15] In *Shepstone and Wyle and Others vs. Geyser N.O*[16] it was said that a court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon consideration of all the relevant features, without adopting a pre-disposition either in favour of or against granting security.

[26] In *Giddey No v JC Barnard and Partners*[17], it was stated that: "*The Courts have accordingly recognised that in applying s 13, 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*

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[13] *Fitchet v Fitchet* 1987 (1) SA 450 (E) at 454.
[14] 1987 (1) SA 450 at 45 E-G.
[15] Barker v Bishops Diocesan College and Others 2019 (4) SA 1 (WCC).
[16] 1998 (3) SA 1036 (SCA).
[17] 1998 (3) SA 1036 (SCA).

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."

[27] The financial considerations are not dispositive of the right to security, particularly where the respondent is an *incola*. Courts are anxious not to close their doors to *incola* of South Africa merely on the grounds of impecuniosity, for this would be to limit access to justice based on wealth. Accordingly, it has been held that mere inability by an *incola* to satisfy a potential costs order is insufficient to justify an order for security: "*something more is required*" (Ramsamy NO v Maarman NO 2002 (6) SA 159 (C) at 172J-173A). That "*something more*" is found in the nature of the main proceedings.

[28] The authoritative statement of the law in this regard is as follows (Boost Sports (*supra*) in para [16]: "*[E]ven though there may be poor prospects of recovering costs, a court, in its discretion, should only order the furnishing of security for such costs by an incola company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse.*"

[29] This reflects the underlying rationale for a court's power to order security, namely the prevention of abuse of its own process (Ecker v Dean 1938 AD 102 at 111, MTN Service Provider (Pty) Ltd v Afro Call (Pty) Limited 2007 (6) SA 620 (SCA) in para [15]).

[30] The security power is therefore not meant to be available in response to what may be viewed as merely misguided, careless or ill-advised procedural steps in litigation. It is more fundamental than that. This is reflected in the admonition in Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 274 that the

power "*ought to be sparingly exercised and only in very exceptional circumstances*".

[31] The authorities provide guidance as to what is meant by proceedings that are "*vexatious*" or "*an abuse*".

[32] In Boost Sports (*supra*) in paras [17] and [18], the following *dicta* were endorsed in relation to what is meant by "*vexatious*" or "*abusive*" proceedings: "*In its legal sense 'vexatious' means 'frivolous, improper; instituted without sufficient ground, to serve solely as an annoyance to the defendant' … Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; 'abuse' constitutes a mis-use, an improper use, a use mala fide, a use for an ulterior motive*" (Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Limited 1979 (3) SA 1331 (W) at 1339E-F).

[33] In African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 565D, the court held: "*An action is vexatious and an abuse of the process of court inter alia if it is obviously unsustainable*".

[34] In Phillips v Botha [1998] ZASCA 105; 1999 (2) SA 555 (SCA), the question arose whether a private prosecution was an abuse of the court's process. The court had regard to what is meant by abuse of civil process. It found the following definition (drawn from the Australian case of Varawa v Howard Smith Co Ltd [1911] HCA 46; (1911) 13 CLR 35 at 91) "*terse but useful*": "*…[T]he term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim … they are regarded as an abuse for this purpose…*"

[35] The Court in Phillips went on to say this (at 565H): "*Where the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the Court's duty to prevent such abuse. This power, however, is to be exercised with great caution and only in a clear case.*"

[36] The dictionary meaning of the word "*reckless*" is "*without thought or care for the consequences of an action*" (Concise Oxford English Dictionary). In Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Limited 1980 (4) SA 156 (W) at 169A to 170D, the Court considered the meaning of the word in the context of section 424 of the Companies Act 61 of 1973 (i.e. where "*any business of the company was or is being carried on recklessly or with intent to defraud the creditors of the company*"). Margo J pointed out that in S v Van Zyl 1969 (1) SA 553 (A) Fagan J held that gross negligence met the requirement, while Steyn CJ said that the ordinary meaning of the term incorporates "*growwe nalatigheid met of sonder risiko bewustheid*" (i.e. gross negligence with or without awareness of the risks). Margo J concluded that it connotes at least *culpa lata*.

[37] It appears to me that the term when used in relation to security for costs must be read in the context of the other circumstances with which it is associated, namely vexatious proceedings or an abuse of process. So read, it would connote, at least, a very high degree of negligence; or a wanton disregard for the legitimate interests of the other party; or an obviously inappropriate or extraordinary harnessing of the process of litigation.

[38] I therefore am of the view that mere incorrect, ill-advised or even negligent procedural steps in pursuit of litigation relief will not be treated as vexatious, reckless or an abuse of process, such as to warrant an order to furnish security for costs.

CONCLUSION

[39] In determining this matter, I must be guided by the well-established principles applicable to Rule 47 applications. In this regard, I need to draw certain inferences and weigh probabilities as they emerge from the parties' respective submissions, affidavits, heads of arguments and oral arguments by their counsel.

[40] It is common cause that the respondent is employed and she is earning R25 000.00 per month. She also co-owns an immovable property worth R1 600

000.00. She is an *incola* who resides in South Africa and has a South African identity document. She (as plaintiff) instituted action against the first defendant and the applicant for damages allegedly suffered as a result of the first defendant's alleged sexual harassment of the respondent from March to July 2021.[18] She alleges that the applicant is vicariously liable to her for the alleged damages she suffered, alternatively, she alleges that the applicant is directly liable to her for damages suffered due to a breach of its statutory duty of care.[19] She is claiming compensation (in the main action) from the applicant in respect of the damages which she has suffered as a result of the alleged sexual harassment issue.

[41] The respondent is of the view that the applicant has gone out of its way to make the process as difficult and cumbersome for the respondent as possible, before she can proceed with her main claim.

[42] The respondent argues that the Rule 47 application is without merit and must fail for either or both of the following reasons:

[42.1] Firstly, the applicant has failed to establish that the respondent will be unable to satisfy a potential cost order; and/or

[42.2] Secondly, the applicant has failed to establish that the action instituted by the respondent is vexatious or reckless or otherwise amounts to an abuse of this court's process.

[43] Having considered the circumstances of this case and in an endeavour to strike a balance between the interests of the parties, I am not persuaded that the applicant has made out a case against the respondent for the furnishing of security for costs.

[44] Upon having considered all the relevant factors, namely: the nature of the claim, the financial position of the respondent, and weighing both parties' versions

[18] Caselines 07-37, para 6; 07-39, para 10; and 07-40, para 13.
[19] Caselines 07-38, paras 7-8; 07-39, paras 11-12; 07-41, paras 14-15.

against the principles of equity and fairness, I am of the view, that the respondent should not furnish security.

[45] The test for requiring an *incola* respondent to provide security for an applicant's costs is a difficult one to overcome. Such orders are only made in rare cases where the conduct of the respondent meets the high threshold of vexatiousness, recklessness or an abuse of process.

[46] On an overview of the matter, and having regard to the various basis upon which the applicant relies, I am of the view that this is not one of those cases where it would be appropriate to order payment of security for costs.

[47] I am therefore of the view that the applicant is not entitled to the exercise of this court's power to direct that the respondent should pay security for the applicant's costs.

[48] On a conspectus of all the evidence placed before court, I am satisfied on a holistic evaluation of the evidence presented that the applicants have not made out a case for the relief they seek.

[49] I am persuaded by the respondent's argument that this Rule 47 application is without merit and must fail. The applicant has failed to establish that the respondent will be unable to satisfy a potential cost order. The applicant has also failed to establish that the action instituted by the respondent is vexatious or reckless or otherwise amounts to an abuse of this court's process. In view of these considerations, it follows that the applicant's interlocutory application in terms of Rule 47 of the Uniform Rules of the Court must fail.

COSTS

[50] One of the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.[20] The last thing that our already

[20] Union Government v Gass 1959 4 SA 401 (A) 413.

congested court rolls require is further congestion by an unwarranted proliferation of litigation.[21]

[51] It is so that when awarding costs, a court has a discretion, which it must exercise after a due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides. The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such order as to costs as would be fair in the discretion of the court.

[52] No hard and fast rules have been set for compliance and conformity by the court unless there are special circumstances.[22] Costs follow the event in that the successful party should be awarded costs.[23] This rule should be departed from only where good grounds for doing so exist.[24] The respondent submits that the current application has no merit and amounts to an abuse of the court process. This, submits the respondent, calls for a punitive cost order. On this I agree, albeit to a limited extent.

[53] It is common cause that the ordinary rule in this court is that costs should follow the results. However, I have a wide discretion in making costs orders, and I am entitled to depart from the general rule in appropriate circumstances.

[54] I have considered both parties' argument relating to the costs of this application. I am accordingly inclined to grant costs in respondent's favour on a party and party scale.

ORDER

[55] In the circumstances, I make the following order:

[55.1] The applicant's interlocutory application in terms of Rule 47 of the Uniform Rules of the Court is dismissed with costs on a party and party scale.

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[21] Socratous v Grindstone Investments (149/10) [2011] ZASCA 8 (10 March 2011) at [16].
[22] Fripp v Gibbon & Co 1913 AD 354 at 364.
[23] Union Government v Gass 1959 4 SA 401 (A) 413.
[24] Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd 1996 3 SA 692 (C).

T E JOYINI

JUDGE OF THE HIGH COURT, PRETORIA

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Date of Hearing: 14 November 2024

Date of Judgment: 13 January 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 13 January 2025 at 10h00.