50/98

REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 364/97

In the matter of:

SHEPSTONE & WYLIE	First Appellant
PETER JAMES ALEXANDER BLANCKENBERG	Second Appellant
SHANE MICHAEL STEVEN DWYER	Third Appellant
ANGELA JOCELYN McGOWAN N.O.	Fourth Appellant
HERMANUS NICOLAAS THEUNISSEN	Fifth Appellant

and

ANDRIES JONATHAN LATEGAN GEYSER N.O.	Respondent

CORAM: Hefer, Howie, Harms, Schutz JJA et Farlam AJA

HEARING: 15 May 1998

DELIVERED: 28 May 1998

J U D G M E N T

HEFER JA

HEFER JA

This is an appeal against the judgment of Hugo J in *Shepstone & Wylie and Others v Geyser NO* 1998(1) SA 354 (N) dismissing an application for security for costs in terms of sec 13 of the Companies Act 61 of 1973, as amended. The section reads as follows:

> "Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

The parties are agreed that the granting of relief is discretionary once the requirements of sec 13 have been satisfied. The main issue is whether Hugo J correctly exercised his discretion in favour of the respondent.

There are three preliminary questions. The first is whether an order dismissing an application for security under sec 13 is appealable. It is not necessary to deal with all the cases on which respondent's

counsel rely for their submission that it is not. Some of the early ones, like *Mears v Nederlandsch Zuid Afrikaansche Hypotheek Bank, Ltd* 1908 TS 1147 and *Lombard v Lombardy Hotel Co Ltd (In liquidation)* 1911 TPD 866, were decided on grounds which, in the light of legislative developments and modern trends, are of little assistance in considering whether an order qualifies as a "judgment or order" under sec 20(1) of the Supreme Court Act 59 of 1959 as amended. More directly in point are *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990(4) SA 196 (C) and *The Catamaran TNT; Dean Catamarans CC v Slupinsky (No2)* 1997(2) SA 577 (C) in which it was held that an order relating to an application for security is not appealable under sec 20(1) for lack of finality and definitiveness and because it does not dispose of any portion of the relief claimed in the main action. In both cases (and also in *Duncan NO v Minister of Law and Order* 1985(4) SA 1 (T) at 2E-3B) this kind of application was regarded as a preparatory or procedural step in the proceedings to which it relates. This, in my view, is not correct. As Van den Heever J said in *Ecker v Dean* 1937 SWA 3 at 4,

> "[t]he usual test, ie whether the order finally disposes of portion of, or a certain phase of the issue between the parties does not really fit circumstances such as these, for the claim for security was a separate and ancillary issue between the parties, collateral to and not directly affecting the main dispute between the litigants ... it is not a procedural step in attack or defence at all but a measure of oblique relief sought by one party against the other on grounds foreign to the main issue, ie the financial situation of one litigant, this relief to be effective, if at all, only after judgment. The order determining this collateral dispute is therefore final and definitive for at no later stage in the proceedings can the applicant obtain the substance of what has been refused to him. If he has been prejudiced by the order his prejudice is irremediable."

(Cf *Ritch and Another* v *Orthopaedic Buildings (Pty) Ltd* 1979(4) SA 19 (T) at 23E-24E; *Bekker NO v Total South Africa (Pty) Ltd* 1990(3) SA 159 (T) at 162I-165B; *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996(4) SA 348 (A) at 356H-357E.)

Viewed in this manner there can be no doubt that an order refusing an application for security is appealable. (Whether an order granting such an application is appealable is not necessary to decide.) Admittedly, as respondent's counsel pointed out, there is provision in

Rule 47 of the Uniform Rules of Court for the variation by the registrar of an order granting security if he is satisfied that the amount originally furnished is no longer sufficient. But this does not affect the position where, as in the present case, the application for security is refused. It may be that the court, having once refused an application, retains the power to entertain a subsequent one. But any subsequent application will obviously require new evidence. Even if such a power does exist, it does not affect the finality of the order in the first application.

The second preliminary question relates to the ambit of sec 13.

The respondent is the liquidator of Shepway Management Company (Proprietary) Limited. As appears from 362A-363E of the Court *a quo*'s judgment some of his claims in the action in connection with which the application for security has been brought, are for the recovery of amounts which the company itself could, but for its liquidation, allegedly have recovered. A liquidator may institute proceedings for the recovery of claims like these under his general powers under sec 386(4)(a) of the Companies Act. The respondent's other claims are ones which a liquidator is empowered to bring under

other provisions of the Companies Act read, where necessary, with certain provisions of the Insolvency Act (henceforth referred to as "statutory claims"). On the authority of *Trakman NO v Livschitz and Others: In Re Livschitz and Another v Trakman NO* 1996(2) SA 384 (W) at 391 *et seq* and *Henochsberg on the Companies Act*, 5th ed 27 Hugo J found (at 361E-F) that sec 13 does not apply to statutory claims.

I do not think Hugo J was correct in saying (referring at 360C-D to the judgment in *Trakman)* that "Wunsh J found that s 13 does not and cannot apply" where a liquidator institutes a statutory claim. After referring, first, to the practice in England and Wales, then to the same passage in *Henochsberg* on which Hugo J relied, and finally to the decision in *Waisbrod v Potgieter and Others* 1953(4) SA 502(W), Wunsh J continued as follows at 392I-392B:

> "To sum up so far, a liquidator who seeks to set aside dispositions under the Insolvency Act should not be required to furnish security either because s 13 applies where *a company* is the plaintiff or applicant in any legal proceedings (even though the liquidator acts for it), but not to a case where the liquidator is exercising a power to recover for the benefit of the company an amount which was paid out by it, or because the Court should, generally,

> exercise its discretion not to order security for costs to be given in favour of the party alleged to have been the beneficiary of the disposition."

It is obvious that the two alternatives mentioned cannot both be applied in the same case. Where it is found that sec 13 does not apply, an application for security falls to be dismissed for that very reason, and the need for the exercise of the court's discretion does not arise. On which basis Wunsh J did not make an order in respect of the costs of the first respondent in that matter does not emerge from the judgment, which is in any event so ambivalent that it is difficult to fathom its real import.

However, the passage in *Henochsberg* does support Hugo J's view and remains to be dealt with. As mentioned earlier it is to the effect that on the ordinary meaning of its language sec 13 is not applicable to statutory claims. Before I deal with the language of the section a few brief remarks about the judgment in *Turkstra v Goldberg NO* 1946 TPD 535 are required because the case is mentioned in respondent's counsel's heads of argument and because *Henochsberg*,

whilst acknowledging that the reasons may be flawed, supports the conclusion that a liquidator who sues to set aside an impeachable disposition cannot be ordered to give security for costs. That the reasons are indeed flawed, is beyond question. Price J misread some of the English cases on the topic (as demonstrated in *Fraser v Lampert NO* 1951(4) SA 110 (T) at 113-115). He relied moreover on *Liquidator, Salisbury Meat Market Ltd v Perelson* 1924 WLD 104, not realizing that a provision like the present sec 13 did not appear in the legislation when that case was decided. And his remark that "the relevant sections of the English Companies Acts are the same as the sections of our Acts", was simply not correct at the time. Whenever the ambit of sec 13 comes up for consideration again, *Turkstra*'s case may safely be ignored.

Which brings me to the language of the section. According to the opening words it applies "where a company or other body corporate is plaintiff or applicant in any legal proceedings." But it is well to be reminded of Schreiner JA's observation in *Jaga v Dönges NO and Another* 1950(4) SA 653 (A) at 664H that

> "[t]he legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene."

The express reference in sec 13 to a company which is being wound up and to its liquidator indicates that the legislature envisaged cases where the plaintiff or applicant is a company in liquidation. It could not have been unaware of the fact that in such cases the company is always represented by the liquidator, whether the latter sues *nomine officii* or not. There can be no doubt that the reference in the opening words to a company must be interpreted to include a liquidator suing on behalf of a company in liquidation. The enquiry is thus reduced to the question whether cases are excluded where a liquidator exercises a power specially entrusted to him by the Companies Act read with the relevant provisions of the Insolvency Act.

Bearing in mind that sec 13 clearly applies to liquidators exercising the general power to institute proceedings under sec 386(4)(a), it is difficult to conceive of any reason why the legislature would exempt those who exercise a power specially entrusted to them

elsewhere in the Act. The object of a provision like sec 13 is "to protect persons against liability for costs in regard to any action instituted by bankrupt companies" (per Greenberg J in *Hudson & Son v London Trading Company Ltd* 1930 WLD 288 at 291); and, as far as the achievement of the object is concerned, it makes no difference whether the liquidator is exercising his general power or not. Nor does it make any difference in regard to the purpose for which the power is exercised, because every action brought by a liquidator, whether it be under his general power or not, is for the eventual benefit of creditors. It may be that the exercise of certain special powers are also in the public interest and therefore require different treatment. But this is not always the case. To expose fraudulent dealings on the part of the directors or officers of the company and to recover whatever may be recoverable on that score, for example, may well be in the public interest. But the public does not always have an interest in the recovery of dispositions without value or some of the other impeachable transactions. General statements about the public interest cannot solve the problem of the interpretation of sec 13. It is at the level of the

court's discretion to grant relief that this consideration can best receive attention in appropriate cases.

I am unable to support the view expressed in *Henochsberg* and in Hugo J's judgment. I should say that respondent's counsel did not support it either. They argued the appeal on the basis that liquidators exercising special powers have not been exempted from the provisions of sec 13. This judgment will proceed along the same lines.

The last preliminary matter relates to the discretion which a court has to grant or refuse relief under sec 13. Numerous judgments of this Court are to the effect that the power to interfere on appeal with the exercise of a discretion is limited to cases in which it is found that the trial court has exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons. (See eg *Benson v SA Mutual Life Assurance Society* 1986(1) SA 776 (A) at 781I-782B and the cases cited there.) The judgment in *Knox D'Arcy Ltd and Others v Jamieson and Others (supra)* reveals, however, that this is not the correct approach in cases where the word "discretion" is not used

in the strict sense. To say, for example, that the court has a discretion to grant or refuse an interim interdict means no more than that "the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a conclusion" (per EM Grosskopf JA at 361H-I). In such cases the court of appeal is at liberty to decide the matter according to its own views of the merits. (See also *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997(1) SA 391 (A) at 401G-402C.) Accordingly, whenever such a court is asked to interfere, the nature of the discretion must first be ascertained. This will not be a simple exercise where a discretion is conferred in a statute by the use of the word "may" which, standing on its own, is not particularly informative. Although the present is precisely such a case, a quest for the sense in which the word was used in the section is not necessary because the parties are agreed that we are at liberty to interfere even on the restricted grounds listed in the *Benson* line of cases. Their agreement stems from the fact that Hugo J exercised his discretion and refused the application on an incorrect understanding of the ambit of sec 13. .In effect he wrongly excluded the

statutory claims from consideration. Since we are thus entitled to interfere I will proceed to consider the merits of the application without deciding whether the restricted approach is indeed the correct one in an appeal against an order under sec 13. It is common cause at this stage that the requirements of the section have been satisfied and the only question is whether the discretion to grant relief was correctly exercised in favour of the respondent.

The reasons why Hugo J refused to grant an order appear at 364B-E of his judgment. A convenient starting point for discussion is the reference towards the end of the passage to "special circumstances that justify a decision not to order security". The learned judge probably had in mind a line of cases commencing with *Fraser v Lampert NO (supra)* in which a Full Court of the Transvaal held that

> "a defendant or respondent should not be deprived of this benefit unless special circumstances exist" (per Malan J at 115B).

(See eg also *Trust Bank van Afrika Bpk v Lief and Another* 1963(4) SA 752 (T) at 754H *ad fin; Cometal-Mometal Sarl v Corliana Enterprises*

(Pty) Ltd 1981(4) SA 662 (W) at 663F-G).

In my judgment this is not how an application for security should be approached. Because 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 a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security. (Cf *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)* 1997(4) SA 908 (W) at 919G-H; *Wallace NO v Rooibos Tea Control Board* 1989(1) SA 137 (C) at 144B-D.) I prefer the approach in *Keary Developments Ltd v Tarmac Construction Ltd and another* [1995] 3 All ER 534 (CA) at 540a-b where Peter Gibson LJ said:

> "The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim."

These are probably the "considerations of equity and fairness" mentioned in *Magida v Minister of Police* 1987(1) SA 1 (A) at 14D-F in regard to the consideration of an application for security for costs against a *peregrinus,* and which should, in my judgment, also prevail in an application under sec 13.

The "special circumstances" which persuaded Hugo J to refuse an order in the present case are (1) the nature of the claims, (2) the relationship between the appellants and the company and (3) the public interest (364D-E). The nature of the respondent's claims as such is not particularly significant; nor is the relationship between the appellants and the company. It is clear that the learned judge referred to these factors in the context of the third one - the public interest - and the passage at 364B-D where, after remarking that an order granting security in anything but a nominal amount would probably put an end to the litigation, he expressed the belief that it is not in the public interest that liquidators be prevented from litigating against the very people that are alleged to have caused the "bankrupt demise" of the company. It is this belief that eventually led him to refuse relief, but, before I deal

with it, it is necessary to canvass the remark to the effect that an order of security would probably put an end to the respondent's case.

Let me say at the outset that the fact that an order of security will put an end to the litigation does not by itself provide sufficient reason for refusing it. It is a possibility inherent in the very concept of a provision like sec 13 which comes into operation whenever it appears to the court that the plaintiff or applicant will not be able to pay the defendant or respondent's costs in the event of the latter being successful in his defence. If there is no evidence either way, the mere possibility that the order will effectively terminate the litigation, can plainly not affect the court's decision. It only becomes a factor once it is established as a probability by the plaintiff or applicant. And, even if it is established, it remains no more than a factor to be taken into account; by itself it does not provide sufficient reason for refusing an order. (*Keary*'s case *supra* at 539j-540a).

In the present case the evidence does not justify Hugo J's remark. The respondent's opposing affidavit does contain a suggestion that the respondent will not be able to pursue the action if he is required

to give security for the appellants' costs, but some of his allegations lead one to believe that he is confident of receiving the financial support of at least some of the major creditors. I am in full agreement with the statement in *Keary*'s case (at 540j) that

> "[t]he court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons."

Turning to the remarks about the public interest and litigation against the very persons who are alleged to have caused the company's financial ruin, I have already indicated that the public interest may indeed come into play in appropriate cases. I also accept that a liquidator should not be discouraged from pursuing a claim based on the conduct which has impoverished the company (*Henochsberg* 28; *Beaton v SA Mining Supplies (Pty) Ltd* 1957(2) SA 436 (W) at 439G-440C). In order to see how this affects the present case a brief reference to the respondent's particulars of claim is necessary. In the discussion I will refer to the company as "Shepway."

At various stages second, third and fifth appellants and one McGowan were directors of Shepway and partners in first appellant - a firm of attorneys which managed Shepway's affairs. (McGowan has since died. Fourth appellant is the executrix in his estate.) Shepway in turn managed the timber farming operations of several other concerns. Most of the respondent's claims relate in one way or the other to the alleged improper way in which first appellant, through its partners, managed Shepway. The causes of action pleaded range from simple breach of contract and negligence to breach of fiduciary duty and contravention of the Companies Act. The central theme of the respondent's case, as far as the alleged mismanagement is concerned, is that the appellants failed to exercise proper control over persons whom they had engaged to oversee the farming operations. This enabled the latter to defraud Shepway. It is not alleged that the appellants were parties to the fraud, but only (in one of the alternative causes of action) that they were parties to the reckless carrying on of Shepway's business as envisaged in sec 424(1) of the Companies Act.

This being the respondent's case I find it difficult to see the

interest of the public in the matter. But even if it is correct to say, as the learned judge's remarks suggest, that it is a matter of public interest because the respondent is seeking to pursue a claim against the persons who have caused Shepway's financial ruin, it is not a consideration which can tip the scale in the respondent's favour. We must bear in mind that the appellants are not the persons immediately responsible for Shepway's financial problems and that they are not alleged to have reaped any benefit other than the professional fees which first appellant charged for its services in managing Shepway's affairs. That they allegedly neglected or breached their duties as directors and managers and thus contributed to the collapse of the company is certainly something to be taken into account. But I do not regard it as decisive. Weighed against factors such as the admitted difficulty which the respondent will have to prove his allegations and the enormity of the costs which the appellants will not be able to recover should the action fail (see 363G-I of Hugo J's judgment), it pales into insignificance. In all the circumstances of the case an order for security should, in my judgment, have been granted.

The appeal is accordingly upheld with costs including the costs of two counsel. Substituted for the Court *a quo*'s order refusing the application with costs is an order in terms of paragraphs (a), (b), (c), (d), (e) and (f) of the notice of motion save that the period in paragraph (c) will be three months.

JJF HEFER

JUDGE OF APPEAL

Howie JA)
Harms JA)
Schutz JA) Concur
Farlam AJA)