Companies – in what circumstances will they be required to furnish security for costs?

Boost Sports Africa (Pty) Ltd v The South African Breweries (Pty) Ltd (SCA) (unreported case no 20156/2014, 1-6-2015) (Ponnan and Mbha JJA)

By Ian Chadwick

Prior to the advent of the Companies Act 71 of 2008, a defendant, confronted with a claim brought by a company of dubious financial standing, was able to invoke the provisions of s 13 of the previous Companies Act 61 of 1973 and bring an application requesting the court to order provision for the security for the costs of the pending action. Section 13 stated: '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 till the security is given'.

There is no similar provision for security for costs in the 2008 Act. The common law position, since 1828 when *Witham v Venables* (1828) 1 Menzies 291 was decided, is that an *incola* plaintiff cannot be compelled to give security, whether rich or poor, solvent or insolvent. The position changed later when it was held that if the court was satisfied that an action was reckless or vexatious, and in order to prevent abuse of process, the court has a discretion to require the plaintiff to provide security for costs. See, *inter alia*, *Ecker v Dean* 1938 AD 102 at 110. In *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) the court summarised the distinction to be drawn between the common law and the law which prevailed in terms of s 13. The court observed that under the common law (the reckless and vexatious requirement) the court would only order security 'sparingly' and 'only in very exceptional circumstances'.

However, the Supreme Court Act (SCA) noted in the recent case of *Boost Sports Africa (Pty) Ltd v The South African Breweries (Pty) Ltd* (SCA) (unreported case no 20156/2014, 1-6-2015) (Ponnan and Mbha JJA) that in the case of *Mears v Pretoria Estate and Market Co Ltd* 1907 TS 951 at 956 Innes CJ had stated with regard to such applications that 'this is a question of practice, which this court is justified in setting for itself'. The SCA further noted that in the case of *Lombard v Lombardy Hotel Co. Ltd (In Liquidation)* 1911 TS 866 the court, when referring to the above statement in *Mears*, stated at 877: 'And if that be so, there can be no doubt as to what the practice should be. Where a company is in liquidation it is sufficient ground for ordering security to be given; and when the company has everything to gain and nothing to lose, as in the present case, it would be putting a premium upon vexatious and speculative actions if such practice were not adopted'.

Prior to the decision in the *South African Breweries* case there were, as the court in this case noted, several decisions of the high court which are 'discordant'. The court referred, *inter alia*, to *Haitas and Others v Port Wild Props 12 (Pty) Ltd* 2011 (5) SA 562 (GSJ) and *Ngwenda Gold (Pty) Ltd and Another v Precious Prospect Trading 80 (Pty) Ltd* (unreported case number 2011/31664, 14-12-2011) (GSJ). The *Haitas* decision adopted what may be regarded as a liberal interpretation of the common law; and the *Ngwenda Gold* case the contrary. In the *South African Breweries* case the SCA appears to have preferred the liberal approach.

In the last mentioned case the court, while noting that absent s 13 there can no longer be any legitimate basis for differentiating between an *incola* company and an *incola* natural person, went on to hold after reviewing various authorities that where the facts of the case indicate that the action is frivolous and vexatious the court should not hesitate to order security for the respondent's costs if satisfied that the shareholders of the company are funding the litigation in a manner that allows them to hide behind the corporate veil of the company. The court remarked further that in deciding whether the action is frivolous and vexatious it is not necessary to undertake a detailed investigation of the merits of the case. The court accordingly upheld the court a *quo*'s finding that the plaintiff be ordered to provide security for the defendant's costs.

The *South African Breweries* case will no doubt be of assistance to practitioners in providing advice to their clients who may be sued by a company as to the prospect or otherwise of obtaining an order for security for costs and serves to clarify the uncertainty which has hitherto prevailed on this question.

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