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FOURIE v. RATEFO.

(ORANGE FREE STATE PROVINCIAL DIVISION.)

1971. *September* 23; *October* 7. KUMLEBEN, A.J.

Practice.—Pauper *suits.*—Peregrinus *entitled to invoke Rule of Court* 40.—*When Court will order security for costs in terms of Rule of Court* 47.

A *peregrinus* is entitled to invoke the provisions of Rule of Court 40 and, if he complies with the provisions thereof, he can institute or proceed with his action *in forma pauperis*; but this circumstance does not mean that security for costs cannot be ordered by the Court, and this circumstance *per se* ought not to have any influence on the Court's exercise of its discretion under Rule of Court 47 with regard to security for costs.
The factors which the Court must take into account in exercising its discretionary powers with regard to security for costs, discussed.

Application by the defendant in an action for an order prohibiting respondent (plaintiff) to proceed with the action. The facts appear from the judgment.

H. C. J. Flemming, for the applicant (defendant.)
H. P. Viljoen, for the respondent (plaintiff).

Cur. adv. vult.

Postea (October 7th).

KUMLEBEN, A.J.: Plaintiff claimed in this Court payment of R10 364 from defendant. In his particulars of the claim he alleges that defendant injured him intentionally or negligently by shooting him in the eye with an airgun. He further alleges that as a result hereof he lost the sight of his right eye and damages are claimed under the usual heads of general damages. It is common cause that at all relevant times the plaintiff was a *peregrinus* and that presently he is residing in Lesotho. On this ground defendant claimed security from plaintiff in terms of Rule of Court 47 (1). He refused to comply with this request. As a reason for this he relied, through his attorney, on the fact that he had already required permission in terms of Rule of Court 40 to proceed with his action *in forma pauperis*. Defendant did not accept this excuse and by way of notice of motion he asked for an order,

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"which prohibits respondent (i.e. plaintiff) from proceeding with his action *in forma pauperis* and/or otherwise, unless he furnishes security beforehand for defendant's costs of the suit in an amount determined in terms of Rule of Court 47 or in such other amount as the Honourable Court may determine".

Although Mr. *Flemming*, who appeared for the defendant, submitted that this prayer also covered an application in terms of Rule of Court 40 (6), it is not necessary to decide on this submission. The application

clearly refers mainly to the remedy mentioned in Rule of Court 47 (3) and the Court will, therefore, approach it on this basis. Accordingly the question for decision is whether an order should be made that security must be furnished by a *peregrinus* in the particular circumstances of this case, or not.

It is an accepted principle of our common law that a *peregrinus*, who institutes an action against an *incola*, may be compelled to furnish security and that the Court's decision in this regard is discretionary. (See *Santam Insurance Co., Ltd.* v. *Korste*, 1962 (4) S.A. 53 (E) at p. 55 and the decisions referred to there). The effect of granting *pauper* privileges to a *peregrinus*, relying on this power, must first be dealt with.

Before referring thereto, it is convenient to consider briefly the position of a *peregrinus*, exclusively with reference to *pauper* privileges. In the case of *Ex parte Kuttenkeuler*, 1911 C.P.D. 8 it was decided that the particular *in forma pauperis* Rule of Court was not meant to cover a *peregrinus*. (See also *Becker* v. *Eastern Province Guardian Co.*, 1923 E.C.D. 502 and *Slocock* v. *Plenderleith*, 1927 C.P.D. 338.) The Transvaal Court adopted a contrary attitude in the case of *Gendre and Cavallera* v. *Pagel*, 1914 W.L.D. 108 at p. 109. The above-mentioned decisions are based on an interpretation of their various Rules of Court and against the background that leave to proceed *in forma pauperis* gives to a litigant farreaching privileges. (Cf. van Zyl, *The Judicial Practice of South Africa*, vol. I, p. 374.) An analysis of these decisions will, therefore, serve no purpose. The relevant question is whether the present Rule of Court 40 is in any way limited to *incolae*. I can find no reason for such a restricted interpretation of the ordinary meaning of the wording of the Rule of Court. The opening words of the Rule refer to "any person who wishes to institute proceedings *in forma pauperis*". "A person" is not defined in the Rules of Court. It must, therefore, be given its ordinary meaning in the context of the Rule of Court, viz., any natural person who may be a party to a suit. Especially in view of the aforesaid contradictory decisions (and the practical considerations taken into account by the Cape decisions) it could be expected that the draughtsman of the Rules would expressly have deprived *peregrinus* of this privilege by a suitable provisio, if that were his intention. I am, therfore, of the opinion, that Rule of Court 40 is also applicable to a *peregrinus* and this approach was accepted by Mr. *Flemming* for the purposes of his argument.

The next question is whether the granting of *pauper* privileges has any effect on the discretion of the Court to order the furnishing of security in terms of Rule 47.

In reply to a question by the Court Mr. *Viljoen* conceded that the

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granting of such *pauper* privileges is not an absolute legal impediment to an order in terms of Rule 47 (3). This question was put as a result of the view that, by requiring security the privilege already granted to

proceed *in forma pauperis*, is nullified. (Cf. *Achimaly* v. *Ritch*, 1918 T.P.D. 387 at p. 389). In my opinion, this concession was justified, because these two remedies differ completely in terms of the law of procedure and as regards legal content and object.

Rule of Court 40 refers to the duties of a pauper litigant to his legal representatives and the *fiscus*. If the requirements of sub-rule (2) are complied with, the attorney and advocate act free of charge and the Registrar must receive all process without collecting any fees. (See sub-rule (2) (*b*) and (*c*)). Before granting these privileges the opposing party is not notified, because he has no interest therein. The present rule (Rule of Court 40) also provides that this legal assistance is granted on a certificate of *probabilis causa* by the appointed advocate and a declaration of indigence, without the approval of the Court. Consequently it is presently not necessary to approach the Court in order to proceed *in forma pauperis*. In this respect there is an important divergence from the common law position and previous Rules of Court in regard to *pauper* proceedings. On the other hand it is the object of the common law rule with regard to security to insure that the *incola* is protected by the litigating *peregrinus*. In this connection the Courts possess an age-old right to order the furnishing of security in the exercise of their discretion. In these circumstances it could hardly be submitted that the power to grant these privileges to an indigent person, which according to the Rule of Court is vested in two legal practitioners, deprives the Court of the vested right to order security in certain circumstances.

Indeed it is, in my opinion wrong to approach the two concepts on the assumption that there exists any material relationship or reciprocal effect between them (as submitted by plaintiff's attorney). This approach may lead to the incorrect conclusion that because someone is a *pauper* security should not be required from him, or, conversely, that because security may be required, *pauper* privileges should not be granted. The reason for this approach is perhaps the "frustration argument" relied on to a certain extent by Mr. *Viljoen*. According to this, so it is submitted, by requiring the furnishing of security, the *pauper* privileges already granted, necessarily fall away. This argument would possibly have carried more weight when both remedies vested in our Courts. It could possibly have been said then that a privilege which had already been granted by a Court should not be frustrated or taken away. But as indicated already, it is not the Court which grants the privileges in terms of Rule 40. I have also already indicated that the two concepts are independent and unrelated. For the following further reasons, I am of the opinion, that this "frustration argument" is not acceptable:

(*a*) The present Rule of Court 40 does not confer general authority

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to proceed with a suit regardless of other circumstances which is legally applicable to a litigating party—in this case the *pere-*

grinus. The said *pauper* privileges are implicitly subject to such other requirements. (Cf. *Chermont* v. *Lorton*, 1929 A.D. 84 at pp. 88 to 91). At the latter page the learned CURLEWIS, J.A., says: "....."

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(*b*) It does also not follow that these privileges are necessarily or permanently frustrated, e.g. as soon as a *pauper* becomes an *incola* or finds a satisfactory surety to satisfy his duty to furnish security, the *pauper* may utilise these privileges in proceeding with his suit.

(*c*) It must be borne in mind that the requirement to furnish security is in the first place and exclusively intended as a protection for the *incola* defendant. In the case of *Rosenblum* v. *Marcus*, 5 N.L.R. 82 at p. 85 CONNOR, C.J. said: "....."

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Taking this principle into consideration exemption from security because the *peregrinus* plaintiff is a pauper would lead to serious absurdities. It would mean that an *incola* defendant receives protection against a wealthy plaintiff, but not in cases where the latter is indigent.

In conclusion, and still with reference to the fact that the plaintiff already has *pauper* privileges, Mr. *Viljoen* submitted that this fact is indeed a relevant and important factor which the Court must take into consideration when exercising its discretion to order the furnishing of security.

I must stress again that the concessions or privileges, granted in terms of Rule of Court 40, do not require the imprimatur or approval of the Court. Accordingly, the fact that the plaintiff received *pauper* privileges in terms of Rule of Court 40, cannot carry more weight than the factual circumstances on which it is based, viz. that the plaintiff is indigent and that he has a reasonable prospect of success on the merits—a *probabilis causa*. (Whether these two factors are relevant in determining whether security should we ordered or not, is a question with which I shall deal later).

In the result and as a summary of the conclusions thus far reached, the Court is of the opinion:

(*a*) That a *peregrinus* may invoke the provisions of Rule of Court 40 and, if he complies with the provisions thereof he may institute or proceed with his action *in forma pauperis*;

(*b*) but this circumstance does not mean that security for costs cannot be ordered by the Court;

(*c*) and that this circumstance *per se* ought not to have any influence on the Court's exercise of its discretion with regard to security.

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I further deal with the Court's discretionary power to order security in the present case. In this connection there are certain general doctrines which must be kept in mind. Firstly, as it is stated in the case of *Saker & Co. Ltd.* v. *Grainger*, 1937 A.D. 223 at p. 227: "....."

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Consequently the discretion must only be exercised in exceptional cases in favour of exemption, when special or extraordinary circumstances justify it. (See *Setecki* v. *Setecki*, 1917 T.P.D. 165 at p. 169; *Rapanos, N.O.* v. *Rapanos, N.O.*, 1958 (2) S.A. 705 (T) at p. 706B).

A series of decisions by our Courts laid down that the merits of the main issue is not a relevant factor. (See e.g. *Arkell & Douglas* v. *Berold*, 1922 C.P.D. 198; *Santam Insurance Co. Ltd.* v. *Korste, supra* at p. 56C; *Alexander* v. *Jokl and Others*, 1948 (3) S.A. 269 (W) at p. 281). This doctrine, with which I respectfully agree, is clearly subject to the proviso that the defence must be *bona fide* and not unfounded and vexatious. (Cf. *Cohn* v. *Weston Email Industrie Handels A.G. of Vienna*, 1926 W.L.D. 20 at p. 22). In the present case particulars of the merits have been furnished. These indicate that the plaintiff is entitled to a *probabilis causa* certificate, but also that defendant's defence is not unfounded.

The indigence of the plaintiff is obvious. Mr. *Viljoen* did, however, not submit that this is a factor which must be considered. Apart from the *pauper* privileges, with which I have already dealt, Mr. *Viljoen* in fact advanced only one further consideration, which, according to him, should count in favour of exemption from security. It is the nature of the cause of action in the main issue. He directed attention to the fact that according to the particulars of the claim, the plaintiff sustained a serious injury. The nature of the cause of action can most certainly be a relevant factor (see *Santam Insurance Co. Ltd.* v. *Korste, supra* at p. 56A). But in the present case only an amount of money is claimed. The fact that it arose *ex delicto* as a result of personal injuries is, in my opinion, not of particular importance. It is certainly not a consideration which reduces defendant's need for protection. I am, therefore, of the opinion that this factor is insufficient to justify the exercise of the Court's discretion in favour of plaintiff.

Mr. *Flemming* informed the Court that should the application succeed the defendant will not insist on an order for costs. The question whether defendant unnecessarily burdened the record with particulars on the merits is, therefore, not relevant. It is therefore, unnecessary to decide whether, on the wording of the notice of motion, he could also have based his application on Rule 40 (6) in which event the comprehensive reference to the merits would probably have been in order.

In the result the Court orders that applicant is entitled to security. The plaintiff (respondent) is prohibited from proceeding with his suit against the defendant (applicant) before having furnished security in the amount and in the manner stipulated by the Registrar of this Court.

Applicant's Attorneys: *Naudé & Naudé*; Respondent's Attorneys: *S. V. A. Rosendorff & Venter.*