THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 11/07

In the matter between :

DAVID WALLACE ZIETSMAN Appellant

and

ELECTRONIC MEDIA NETWORK LIMITED First Respondent
MULTICHOICE AFRICA (PTY) LIMITED Second Respondent
VODACOM (PTY) LIMITED Third Respondent

Before:	**STREICHER, NUGENT, HEHER JJA, HURT & SNYDERS AJJA**
Heard:	**18 FEBRUARY 2008**
Delivered:	**7 MARCH 2008**
Summary:	**Security for costs – s 17(2) of Patents Act 57 of 1978 – 'any party' includes *incola* plaintiff – agreement to provide security – relevant factors.**
Neutral citation:	**Zietsman v Electronic Media Network (11/07) [2008] ZASCA 4 (7 March 2008)**

STREICHER JA

STREICHER JA:

[1] The appellant instituted action in the court of the Commissioner of Patents against the respondents for damages for the alleged infringement of his South African patent no 92/9925. The respondents gave notice of their intention to defend the action but when they failed to deliver their pleas they were in terms of the rules barred from doing so. As a result the first and second respondents (the second and third defendants in the court a quo) brought an application for the bar to be removed and for an extension of time to file their pleas. In the same application they applied for an order directing the appellant to provide security for any costs which might be awarded to them. The third respondent (the fourth defendant in the court a quo) in two separate applications applied for similar relief. The Commissioner of Patents (De Vos J) directed the appellant to provide security for the costs of the respondents, removed the bar to the filing of their pleas, granted the respondents an extension of time to deliver their pleas and ordered the appellant to pay the costs of the applications, including the costs of two counsel. With the necessary leave the appellant now appeals against the order directing him to provide security for the respondents' costs and against the costs orders.

[2] Section 17(2) of the Patents Act 57 of 1978 provides as follows:

'17(2)(a) The commissioner may also order that any party to proceedings before him shall furnish security to the satisfaction of the commissioner in respect of any costs which may be awarded against such party in those proceedings, and may refuse, until such security has been furnished, to permit such proceedings to be continued.

(b) The commissioner may have regard to the prospects of success or the *bona fides* of any such party in considering whether such security should be furnished.'

[3] In the court a quo the appellant submitted that the phrase 'any party' in s 17(2)(a) should not be interpreted so as to include an *incola* plaintiff. The court a quo dismissed this argument as also the argument by the respondents

that the appellant had admitted his liability to provide security. It erroneously assumed that the parties were agreed that the furnishing of security should be ordered in the event of it being found that a plaintiff *incola*, such as the appellant, could in terms of s 17 be ordered to furnish security and proceeded to determine the quantum of the security to be furnished.

The interpretation of s 17(2)(a)

[4] Although the appellant in his heads of argument in this court attacked the court a quo's interpretation of s 17(2)(a) he expressly abandoned the argument before us. The concession was correctly made. There is no reason not to give the phrase 'any party' its ordinary literal meaning. The general rule of our law is that a plaintiff *incola* cannot be compelled to furnish security for costs[1] but the common law recognises exceptions to this general rule. A High Court has inherent jurisdiction to prevent abuse of its process by ordering security in certain circumstances. One such circumstance would be if the action is vexatious.[2] In the case of companies there is a statutory exception to the general rule.[3] In the light of the position at common law and the aforesaid statutory exception it is unlikely that the phrase 'any party' in s 17(2)(a) was intended not to include *incola* plaintiffs. Moreover, the same phrase, 'any party', appeared in s 76(1) of the Patents Act 37 of 1952[4], the predecessor of s 17(2) and in *Selero (Pty) Ltd and Another v Chauvier and Another* 1982 (3) SA 519 (T) at 521D-F a full bench of the Transvaal Provincial Division held that the phrase should be interpreted literally. In the

[1] See *Witham v Venables* (1828) 1 Menz 291.
[2] See *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 274; *Ecker v Dean* 1937 AD 254 at 259; and *Ecker v Dean* 1938 AD 102 at 111.
[3] Section 13 of the Companies Act 61 of 1973 provides: '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.'
[4] Section 76(1) read as follows: '(1) The commissioner may, for the purpose of this Act . . .(j) if any party to proceedings before him is resident outside the Union, or has no fixed property therein, on the application of any other party to the proceedings, order that security to the satisfaction of the commissioner be lodged or given by the first-mentioned party in respect of any costs which may be awarded against him in those proceedings, and refuse until such security has been lodged or given to permit such proceedings to be continued, …'

light of this authoritative interpretation of the phrase it is unlikely that it was intended to have a different meaning in s 17(2)(a).[5]

Was the appellant liable to furnish security to the third respondent?

[5] Before us only the third respondent persisted with the submission that the appellant agreed to provide security to it. The following constitutes the factual basis for the submission.

5.1 In a letter by the appellant's attorneys, Galgut & Galgut, to the first and second respondents' attorneys, Adams & Adams, the appellant tendered to furnish security for the costs of the first and second respondents in an amount of R40 000 each. Thereafter the attorneys for the third respondent, Leslie Cohen & Associates, wrote to the appellant that they had been advised by Adams & Adams that the appellant was willing to furnish security for costs in relation to each of their clients. They stated that they were of the view that the appellant would not be able to meet an adverse order for costs, that they required to know whether the appellant would be prepared to furnish the third respondent with the necessary security for costs, that R40 000 security would be inadequate and that, on the assumption that the appellant would consent thereto, they had communicated with Adams & Adams and requested that a time and date be arranged whereby all parties approach the Registrar to determine the amount of the security that the appellant would be obliged to pay.

5.2 The appellant, through his attorneys, in a letter dated 7 March 2005 responded as follows:

'You have not stated the quantum of security required by your client. Your letter therefore cannot be considered to be a demand in terms of Rule 47.

Our client agrees to provide security for costs in this matter. Our client tenders security in an amount of R40 000 (forty thousand Rands). If you do not accept this amount then doubtless you will make requisite demand and the matter will go to the Registrar for settlement of the quantum.'

---

[5] See *Ex parte Minister of Justice: In re Rex v Bolon* 1941 AD 345 at 359.

5.3 The third respondent's attorneys responded:

'By virtue of the fact that your client has agreed to furnish our client with security for the costs we hereby as a consequence request that your client furnish security to our client in the sum of R250 000.00 . . . failing which the Registrar of the High Court be approached for the purpose of determining the amount of security to be paid by your client . . ..'

5.4 The appellant's attorneys replied that the appellant was willing to provide security for costs but that he contested the amount of security required.

[6] From the aforegoing it is clear that the appellant accepted that rule 47 of the Uniform Rules of the High Court applied. Subsections (1) and (2) of the rule provides as follows:

'47(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

(2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.'

[7] Section 17(2) provides that the commissioner may order a party to furnish security to his satisfaction in respect of costs that may be awarded against that party in the proceedings before him and it is to the commissioner that the third respondent applied for such security. Reference to Rule 47 nevertheless assists in the interpretation of the letter of 7 March 2005. Read with the rule the statement in the letter that should the tender of security in the amount of R40 000 not be accepted, the quantum of the security to be provided would be determined by the registrar, serves to confirm that the appellant's agreement to provide security was not limited to a specific amount or specific costs or subject to acceptance of the tender. In terms of the letter the appellant's liability to furnish security was no longer in issue, only the quantum to be provided still had to be determined. Had there not been provision for the determination of the quantum of the security to be provided

where a party merely agreed to provide security, the agreement to provide security, without stipulating the amount of such security, would of course have served no purpose. That is however not the case. A commissioner faced with an application in terms of s 17(2) of the Act has to determine whether a party from whom security is demanded is liable to furnish security and if he is he may order him to furnish security to his satisfaction ie he may then determine the amount of such security. Where such party agrees to provide security for costs, as was done by the appellant, the commissioner is relieved of the duty to determine whether the party is liable to provide security and may proceed to determine the amount of the security to be furnished.

[8] The appellant, relying on *Cooper v Mutual & Federal Versekeringsmaatskappy Bpk*[6], submitted that an agreement to provide security did not bind a party to provide security in an amount subsequently determined. The case is no authority for the proposition. The plaintiff in that case agreed to provide security in a certain amount and the court held that that was not an agreement or an admission of liability to provide security in respect of a subsequent increase in the amount of security required.

[9] Although acting on the basis of the erroneous assumption that subject to s 17(2)(a) being interpreted as aforesaid, liability to furnish security was not in issue, the court a quo did determine the amount of the security to be furnished. It said in this regard:

'At the hearing of this application, however, counsel for the defendants submitted that an amount of R250 000,00 would be reasonable under the circumstances. I find no facts before me to differ from that suggestion'.

The court a quo then made the following order:

'The plaintiff is directed to furnish security for costs for the second, third and fourth defendants in the amount of R250 000,00.'

[6] 2002 (2) SA 863 (O) 869F-J.

[10] In his heads of argument appellant's counsel made it clear that the appellant was not appealing against the court a quo's determination of the quantum of the security to be provided. However, in reply before us he stated that if, upon a correct interpretation of the order, the appellant was ordered to furnish security in an amount of R250 000 to the third respondent and not, as he interpreted the order, to furnish security in an amount of R250 000 to the three respondents together the appellant did not accept such determination. For the reasons that follow I do not think that there can be any doubt that in so far as the third respondent is concerned, the court a quo intended to order that security in an amount of R250 000 be furnished. First, the first and second respondents on the one hand and the third respondent on the other brought separate applications and were represented by different attorneys and counsel making it highly unlikely that the court a quo could have intended that the amount of R250 000 should serve as security for the costs of all three respondents leaving it to the respondents to determine how to divide the amount amongst themselves. Second, the appellant in his heads of argument stated that the respondents had in fact submitted in the court a quo that R250 000 per respondent would be reasonable in the circumstances. Third the court a quo stated in its judgment that it could find no facts before it to differ from the suggestion by counsel.

[11] Apart from stating that the appellant did not accept the determination of the amount of security to be furnished the appellant did not advance any basis for interfering therewith.

Was the appellant liable to furnish security to the first and second respondents?

[12] In terms of s 17(2) 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. The section

provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or tribunal. In terms of s 36 of the Constitution[7] 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. The right is limited by the provisions of s 17(2), the constitutionality of which is not challenged by the appellant. It follows that it is accepted by the appellant that the conferral of a discretion on a commissioner in terms of s 17 to order a party to furnish security for costs is reasonable and justifiable. 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. The court a quo in fact never applied its mind to the question whether it should exercise its discretion in favour of the respondents. As stated above it proceeded on the basis of an erroneous assumption that the parties were agreed that it should order the appellant to provide security in the event of it finding that it could in terms of the section order a plaintiff *incola* to provide security. It is therefore for this court, having regard to all relevant factors, to decide whether the court a quo should have ordered the appellant to provide security for the costs of the first and the second respondents.

---

[7] Section 36 reads as follows: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.'

[14] The first and second respondents alleged that they, in another pending matter, experienced considerable difficulty in extracting payment from the appellant in respect of various costs orders against him and that their holding company experienced similar problems in a matter between it and the appellant. Writs of execution had to be issued against the appellant and *nulla bona* returns were received in respect of them. Although the costs awarded against the appellant were eventually paid, in one instance only after the appellant's patent which gave rise to these proceedings was attached, these allegations cast doubt on the ability of the appellant to meet adverse costs orders. Such doubt is reinforced by the fact that the appellant did not state that he would be able to meet adverse costs orders and made no disclosure concerning his financial affairs but stated that his financial state was irrelevant. In the circumstances I am satisfied that there is reason to believe that the appellant may not be able to meet adverse costs orders.

[15] The object of s 17(2) in so far as defendants are concerned is clearly to protect them in appropriate circumstances against actions instituted by plaintiffs who may eventually be unable to meet costs orders made against them. [8] The fact that there is reason to believe that the appellant may not be able to meet such orders is therefore a relevant factor to be taken into account in exercising a discretion in terms of the section. [9]

[16] The appellant stated in his answering affidavit that the effect of the security sought would be to deny him his right to assert his rights in his property and to deprive him of his right to access to a court for that purpose. He would, he said, simply not be in a position to finance the assertion of his rights in court and put up security in the extraordinary amounts claimed by the respondents. It is self-evident that the extent to which the right of access

[8] Cf *Hudson &Son v London Trading Co Ltd* 1930 WLD 288 at 291; *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1044E-F.
[9] *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at 530B-E.

to a court would be curtailed by an order that security be furnished is a relevant consideration in determining whether such curtailment would be reasonable and justifiable. However, the appellant who is relying on this factor, failed to adduce any evidence in support of the conclusion that he would be unable to enforce his patent rights should he be ordered to furnish security.

[17] It does not follow from the fact that there is reason to believe that the appellant may not be able to meet adverse costs orders that there is also reason to believe that the appellant would not be able to furnish security. Funds may be available to the appellant for as long as there is a prospect of success but not after the case had been lost. That the appellant has access to funds appears from the fact that he is conducting these proceedings and that he was able to offer security in an amount of R120 000. The appellant did, however, not disclose the source and extent of these funds. In the result there is no basis upon which it can be found that the appellant would be unable to raise security for costs and thus be unable to exercise his right to have his action decided by a court.

[18] There are, however, other factors militating against an order that security be furnished by the appellant.

18.1 The fact that a commissioner may in terms of s 17(2) order a plaintiff *incola* to furnish security does not have the result that the residential status of the plaintiff is no longer relevant especially not if the plaintiff is a natural person. Generally the chances of extracting payment from a presently impecunious plaintiff are much better in the case of a natural person who is also an *incola* than from a presently impecunious plaintiff who is a company or a *peregrinus*.

18.2 It is stated in the founding affidavit to the first and the second respondents' application that they intend making application to set aside certain amendments to the relevant patent on the basis that the amendments do not comply with the provisions of s 51(6) of the Act. However, they do not state what the effect of the setting aside of the amendments would be on the appellant's claim. They demand that security be furnished without even alleging that they have a defence to the appellant's claim, let alone stating what the nature of their defence is. They are doing so notwithstanding the fact that s 17(2)(b) specifically provides that the Commissioner may have regard to the prospects of success or the bona fides of the party from whom security is required.

[19] In my view it would be quite unreasonable to order the appellant, an *incola* natural person, to provide security for an action instituted by him, at the behest of a defendant who may not even have a defence worthy of consideration. The first and second respondents submitted that, in the light of the fact that the appellant made no allegation in regard to his prospects of success either, it should be accepted that they do have a defence which is not devoid of any merit. There are two answers to this submission. First, the onus is on the first and second respondents as applicants for security to persuade a court that security should be ordered. Second, not only is a defence not disclosed in the application, it is not alleged that a defence has at any stage been disclosed to the appellant. Therefore, assuming the first and second respondents have a defence to the appellant's action, it does not appear from the papers filed that the appellant is in a position to deal with the merits of the defence.

[20] The appellant's counsel conceded that there is reason to fear that the appellant may eventually not be able to meet an adverse costs order but then no reason has been advanced to fear that an adverse costs order may

eventually be made against the appellant. To require the appellant to furnish security in these circumstances would place an unjust impediment on his constitutional right in terms of s 36 of the Constitution.

[21] I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party's prospects of success would depend on the nature of the dispute in each case.

[22] It follows that the first and second respondents' application for security should have been dismissed by the court a quo.

Costs

[23] The appellant also appealed against the order that he should pay the costs of the respondents' applications for the removal of bar and the extension of the time for the filing of their pleas. The application of the first and second respondents formed an insignificant part of their application for security and their counsel conceded that the costs thereof should follow the result of their application for security. It follows that the appellant's appeal against the costs order in respect of the first and second respondents' application should succeed.

[24] The third respondent brought an application for removal of bar and an extension of time and subsequently, when the appellant disputed that he had agreed to provide security, a separate application for security. The two applications and the application by the first and second respondents were heard together. The appellant submitted that he had not opposed the application for an extension but only opposed the third respondent's prayer

for costs, that the third respondent was asking for an indulgence and that it should have tendered the costs of the application.

[25] The appellant did say in the last paragraph of a twelve page answering affidavit that he did not take issue with third respondent's 'application for the indulgences sought' and that he abided the decision of the court a quo but in the preceding part of the affidavit he disputed the basis upon which the third respondent claimed to be entitled to an extension of time and concluded: 'The applicant has not, I am advised, shown good cause for the indulgences sought and has made no attempt to explain its remissness in not pleading timeously'. He even filed a duplication to the third respondent's replying affidavit. As in the case of the application for security the main dispute in the application for an extension was whether the appellant was liable to furnish security for the costs of the third respondent. This dispute was decided against the appellant. In these circumstances the court a quo in the exercise of its discretion awarded the third respondent the costs of the application. It cannot be said that the court a quo did not exercise its discretion judicially. In the circumstances this court cannot interfere with the order by the court a quo. However, the court a quo went further and ordered that the costs of the application for extension as well as the application for security should include the costs of two counsel. The court a quo did so on the basis of a practice in that court 'that where the main action justifies the retention of two counsel, both counsel may appear in interlocutory proceedings to the action and the cost for both counsel are justified'. We were informed from the bar that the practice referred to is not an invariable practice. The court a quo had a discretion and by simply following a practice in that court it failed to exercise that discretion. This court is therefore free to interfere with the costs order insofar as it relates to the costs of two counsel. In my view the applications did not justify the employment of two counsel.

[26] In the result the following order is made:

(1) The appellant's appeal against the order directing him to furnish security to the first and second respondents (the second and third defendants in the court a quo) and to pay the costs of the first and second respondents in respect of their applications for security, removal of bar and extension of time to plead, is upheld with costs.

(2) The appellant's appeal against the order directing him to provide security in an amount of R250 000 to the third respondent (the fourth defendant in the court a quo) is dismissed.

(3) The appellant's appeal against the order that the costs of the third respondent in respect of the applications for removal of bar and extension of time to plead should include the costs of two counsel, is upheld.

(4) The appellant is ordered to pay the third respondent's costs of the appeal.

(5) The order of the court a quo is replaced with the following order:

'(a) (i) The second and third defendants' application for security for costs is dismissed.

(ii) The second and third defendants' application for the removal of the bar to the filing of their pleas and for an extension of time is granted.

(iii) The second and third defendants are ordered to pay the costs of these applications.

(iv) The second and third defendants are granted leave to plead to the plaintiffs particulars of claim within a period of 20 days after their application in terms of s 51(10) has been determined.

(b) (i) The plaintiff is ordered to furnish security for the costs of the fourth defendant in an amount of R250 000.

(ii) The fourth defendant's application for the removal of the bar to the filing of its plea and for an extension of time to plead is granted.

(iii) The plaintiff is ordered to pay the costs of these applications.

(iv) The fourth defendant is granted leave to plead to the plaintiffs particulars of claim within a period of 20 days after the application in terms of s 51(10) has been determined or after the plaintiff has furnished security for its costs, whichever occurs later.

_____

P E STREICHER
JUDGE OF APPEAL

CONCUR:

NUGENT JA)

HEHER JA)

HURT AJA)

SNYDERS AJA)