REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 15794 / 2009

In the matter between:

HEIN HELMUT SCHROEDER N.O. Plaintiff

versus

ABSA BANK LIMITED Respondent

JUDGMENT: 10 MAY 2010

BOZALEK J:

[1] Two issues arose for determination in this matter by virtue of an order made by Breitenbach AJ on 8 December 2009, namely:

(i) the costs in an application for summary judgment which was resolved when the application was refused and the defendant granted leave to defend the action the question of costs being stood over for determination on the semi-urgent roll;

(ii) the defendant's application for security of costs originally set down for hearing on 8 December 2009 but also postponed for hearing on the semi-urgent roll.

[2] The plaintiff is thus the applicant in the summary judgment application and the respondent in the application for security for costs whilst the defendant is the respondent and applicant respectively in the applications. For the sake of clarity, I shall refer throughout to the parties as plaintiff and defendant.

[3] In the main action, plaintiff, in his capacity as the Master's representative in terms of s 18(3) of the Administration of Estates Act, 66 of 1965 (as amended) in the estate of the late Georg Ernst August Schroeder ("the estate and "the deceased" respectively") claims the sum of R1m plus certain unpaid arrear interest and interest *a tempore morae*. Plaintiff makes his claim as the "final holder pro tempore" of a "written original Negotiable Certificate of Deposit no. 478" issued by the defendant in Johannesburg on 29 January 1999 which instrument I shall refer to as "the NCD" or NCD no.478". A copy of the NCD was annexed to the simple summons.

[4] An NCD is described by Cowen, **The Law of Negotiable Instruments in South Africa** 5th Edition Volume 1 page 291 as:

> ***"A receipt issued by a borrower of money, usually a bank, acknowledging the deposit of a sum of money, stating to whom the money is repayable, when the capital sum is repayable, the interest rate and when interest is payable".***

Cowen observes that NCD's are normally issued in respect of large sums of money and are payable to bearer. He notes further that whilst there can be little doubt that in English law the documents issued in that country, described and known as "negotiable certificates of deposit", are in truth negotiable instruments, unfortunately "*the presence of certain conditions of issue which are normally found on the reverse side of the South African version of an ostensibly 'negotiable' certificate of deposit, puts the status of these instruments in doubt*".

[5] The instrument in question, dated 29 January 1999, has a face value of R1m and is recorded as falling due on 28 January 2000. It is payable to bearer and makes provision for interest to be paid monthly on the 29th day of each month of that particular year at a fraction of defendant's prime rate. The reverse side of the NCD records that interest was indeed paid for eleven of the twelve months of the instruments currency. The following conditions of issue and transfer of the instrument are material to this matter:

> "(i) The issue and transfer of the certificate is restricted to resident companies, resident corporate bodies and resident individuals,…" and;

(ii) 'any bona fide transferee for value, being a resident company, resident corporate body or resident individual obtains a good title to (the) certificate."

THE APPLICATION FOR SUMMARY JUDGMENT

[6] The action was instituted in this Court on 5 August 2009. On 3 September plaintiff filed a notice of application for summary judgment. In his verifying affidavit he made the customary allegation that in his opinion defendant did not have a *bona fide* defence to the action and had delivered a notice of intention to defend solely for the purpose of delay.

[7] On 6 August 2009, the day after the institution of the present action, plaintiff launched proceedings against defendant in the Johannesburg High Court seeking provisional sentence in respect of five similar instruments (NCD's) each with a nominal face value of R1m. These five instruments form part of the same batch of instruments, which include NCD 478, and which were lost in mysterious circumstances in late December 2000. Defendant filed a lengthy opposing affidavit in those proceedings on 11 September 2009. On 16 October, i.e. after the service of the defendant's opposing affidavit in the provisional sentence proceedings, defendant's attorneys in this matter despatched a letter to plaintiff's attorneys requesting them to reconsider and withdraw the summary

judgment application in the light, *inter alia*, of the contents of the said opposing affidavit in the Gauteng proceedings. In that letter defendant's attorney asserted that the defences raised in the provisional sentence proceedings applied equally – with the necessary changes appropriate to the specific instrument in question - to the present action and set out various of these defences. The letter warned that unless the application for summary judgment was withdrawn defendant would file its opposing affidavit and seek an order for costs *de bonis propriis* against plaintiff on the attorney/client scale.

[8] In the same letter defendant's representatives called upon plaintiff to furnish security for defendant's costs since, it was stated, defendant did not believe that plaintiff would be in a position to satisfy any costs order which might be obtained against him.

[9] The letter elicited a reply, on 23 October 2009, to the effect that plaintiff would consider whether defendant had a "*bona fide* defence upon receipt of its opposing affidavit" adding that if this appeared to be the case his representatives would advise him to consent to "the normal order", namely, leave to defend, being granted.

[10] In early December 2009 defendant duly filed a 36-page opposing affidavit together with approximately 40 pages of annexures in which it set out at least half a dozen substantive defences to plaintiff's claim as well as pointing out various defects in the plaintiff's application for summary judgment. Many of these defences, *in limine*, technical, procedural and absolute, had been expressly foreshadowed in defendant's opposing affidavit in the Johannesburg provisional sentence proceedings, due allowance being had to the different factual circumstances which apply to NCD 478 as opposed to the other NCD's. Chief amongst these defences were defendant's averments that any claim arising out of the NCD had long since prescribed, that plaintiff enjoyed no *locus standi* and that, for a variety of technical reasons relating to the nature of the instrument, plaintiff's claim was vague and embarrassing and/or excipiable.

[11] Not surprisingly, after receipt of the opposing affidavit plaintiff agreed that the application for summary judgment should fail and defendant should be given leave to defend the action. Plaintiff refused, however, to tender the costs incurred by defendant in opposing the application hence the reservation of the question of costs.

[12] A court hearing an application for summary judgment may make such order as to costs as to it may seem just. It is well established that if, in the opinion of the court, the plaintiff knew that the defendant relied on a contention which entitled him/her to leave to defend it may order the plaintiff to pay the defendant's costs and further order that such costs be taxed as between attorney and client or even order that action be stayed until such time as such costs are paid. Rule of Court 32(9)(a) specifically makes provision for such an order in such circumstances. See for example *ABSA Bank Ltd (Volkskas Bank Division) v SJ Du Toit and Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C). See also SABS v GGS/AU (Pty) Ltd 2003 (6) SA 588 (T) and the authorities quoted at 591 I – 592 E.

[13] In *Floridar Construction Company (SWA) (Pty) Ltd v Kriess* 1975 (1) SA 875 (SWA) at 878 A Vermooten AJ, referring to the provisions of Rule 32(9)(a) states, quoting Nathan, Barnett and Brink, Uniform Rules of Court, at p.156:

> *"The purpose of the subrule is, on the one hand, to discourage unnecessary or unjustified applications for summary judgment, and, on the other hand, to discourage defendants from setting up unreasonable defences. In regard to the first of these it is to be borne in mind that in many instances the object of bringing an application for summary judgment is to force the defendant to put his defence on affidavit. A plaintiff is not entitled to do this unless it is clear that there are good grounds for making the application".*

In the present matter plaintiff was directly and pointedly advised of at least some of the defences upon which defendant would be relying. He had before him, moreover, defendant's deposing

affidavit in a similar matter setting out such defences. Plaintiff was warned in terms that if he persisted with the summary judgment application a special order for costs would be sought against him. Notwithstanding these warnings defendant was put to the trouble and expense of drafting a lengthy opposing affidavit which predictably resulted in plaintiff withdrawing the application for summary judgment. In these circumstances it seems to me that a costs order as contemplated in s 32(9)(a) is entirely justified.

[14] There remains the question of whether the order for costs should be made *de bonis propriis*. It is common cause that the deceased's estate which the plaintiff purports to represent is insolvent. Accordingly any costs order made against the plaintiff in his representative capacity will be a *brutum fulmen*. There must also be a serious question as to whether, in his capacity as a Master's representative in terms of s 18(3) of the Act, plaintiff has the capacity to litigate on behalf of the deceased estate. It is not necessary, however, for me to decide that question.

[15] The principle underlying costs orders *de bonis propriis* applies where a person acts or litigates in a representative capacity and the basic rationale behind such an award of costs is a material departure from the responsibility of office. *Du Plessis NO v Strauss* 1988 (2) SA 105 (A) 119 G – J. Plaintiff's position in the present matter may be

closely likened to that of an executor and costs *de bonis propriis* may be awarded against an executor who is *mala fide* or has acted negligently or very unreasonably. See *Die Meester v Meyer En Andere* 1975 (2) SA 1 (T).

[16] In the present matter, at the very least, plaintiff acted unreasonably in pursuing the application for summary judgment in the circumstances described above. In doing so he was probably emboldened by the fact that any potential adverse costs order would lie against the insolvent estate and would thus have no material effect. In these circumstances I consider it appropriate that costs *de bonis propriis* be awarded as a mark of the Court's displeasure at plaintiff's conduct. Defendant sought in addition the costs of senior counsel where these had been incurred. However, I am not persuaded that this is justified given that the opposing affidavit in the provisional sentence proceedings existed as a template for the drawing of the opposing affidavit in the present application, a task well within the capabilities of junior counsel.

[17] In the result plaintiff is ordered to pay defendant's costs of opposing the summary judgment application on the attorney and client scale, such costs to be taxable and payable forthwith.

APPLICATION FOR SECURITY FOR COSTS

[18] Defendant brought a substantive interlocutory application requiring that the deceased estate, alternatively plaintiff in his personal capacity, in the further alternative, both, were liable to furnish security to defendant for its costs in the sum of R100 000.00. That application was supported by an extensive supporting affidavit plus annexures. In due course it was met with plaintiff's answering affidavit which in turn elicited a replying affidavit from the defendant.

[19] In its notice in terms of Rule 47(1) defendant cited the following factors as the basis for its demand for security; that plaintiff purported to litigate in a representative capacity notwithstanding that he was statutorily not permitted to do so with the result that the action was a nullity; secondly, the deceased estate which the plaintiff purported to represent was insolvent and there was therefore reason to believe that it would not be able to pay defendant's costs should it be successful in its defence. Further grounds relied on were that plaintiff's claim or claims had no merits and, in any event, had prescribed.

[20] In order to deal with the application it is necessary to set out a brief history of the events which gave rise to the litigation. According to defendant, Standard Bank of South Africa Ltd acquired eight NCD's, including NCD 478, on 29 January 1999 for a total purchase consideration of R8m. The monthly interest payments due on each

NCD were paid upon regular presentation thereof until the date of their loss, 28 January 2000 the day before they matured. On that day the eight NCD's were handed to a Standard Bank employee for hand delivery to defendant. Sometime before they reached the relevant employee of defendant the eight NCD's disappeared. The matter was reported to the police and investigated internally by Standard Bank but ultimately nobody was found responsible for the disappearance of the instruments.

[21] In due course, against an indemnity furnished by Standard Bank to defendant, the remaining interest payable plus the capital sums on the NCD's were paid by defendant to Standard Bank. On 9 February 2000 and at defendant's Table View branch, one of the deceased's sons presented NCD 478 to an official of defendant with a query as to whether payment of the interest and the capital could be made there rather than in Johannesburg. Defendant's official took possession of the certificate and issued the deceased's son with a receipt therefor.

[22] On 26 May 2003 the deceased launched a vindicatory action against defendant and Standard Bank in the High Court in Johannesburg seeking a declaration that he was the owner of NCD no. 478 and requiring defendant to return the original of such certificate to him. In the aforesaid application the deceased

claimed to have purchased six of the missing batch of NCD's in question in return for payment of R5m from a certain Dambar. The action was opposed and on 4 December 2003 was dismissed with costs.

[23] On 19 February 2004 the deceased committed suicide and on 16 March 2004 plaintiff, one of the deceased's sons, received letters of authority from the Master in terms of s 18(3) of the Act authorising him "to take control of the assets of the estate … to pay the debts, and to transfer the residue of the estate to the heir/s entitled thereto by law".

[24] In September 2008 the estate became subject to a final order of sequestration. This order was rescinded however in March 2009 at the instance of plaintiff on the basis that the service upon him of the application, in his capacity as a s 18(3) representative, was incompetent.

[25] As previously mentioned the present action, in respect of NCD no. 478, was instituted in this Court on 5 August 2009 and was followed, the next day, by the institution of provisional sentence proceedings in respect of the remaining five NCD's in the Johannesburg High Court, again at the instance of plaintiff.

[26] Defendant filed its opposing affidavit in those proceedings 30 minutes late. This led to an opposed condonation application which was eventually granted with costs being awarded against plaintiff *de bonis propriis*. The Court found that plaintiff's actions in opposing the condonation application could only be seen as vexatious. It was further ordered that plaintiff could not charge the costs awarded against him as a cost in the estate. A bill of costs in a substantial amount was taxed but, as at the date of the present hearing, remained unpaid by plaintiff.

GENERAL PRINCIPLES

[27] The general rule of our law with regard to the giving of security for the costs of an action by a litigant was laid down in *Witham v Venables* (1828)1 Menz 291 as follows:

> "*(No) person, who is either civic municeps or incola of this colony can, as plaintiff, be compelled to give security for costs, whether he be rich or poor, solvent or insolvent; and on the other hand, … every person, who is neither civic municeps, nec incola, may, as plaintiff, be called on to give security for costs, unless he prove that he is possessed of immovable property, situated within the colony.*"

One of the exceptions to the general rule is that the Court may, in its inherent jurisdiction, order a litigant to give security for the costs of the other side.[1] The power of the court to order security for costs on this basis is, however, exercised sparingly and only in exceptional cases.

[1] See *Western Assurance Company v Caldwell"s Trustee* 1918 AD 262 and *Ecker v Dean* 1937 AD 254 at 259.

[28] In *Crest Enterprises (Pty) (Ltd) and Another v Barnett and Schlosberg* NNO 1986 (4) SA 19 (CPD)

Berman J held that:

> ***"The mere fact that a party suing is an insolvent is no ground for obliging him to provide security for his opponent's costs – each case must be considered in the light of its own particular facts, and only where the insolvent's action is vexatious or reckless or where it amounts to an abuse of the Court's process should he be called on to give security for costs".***

This approach were reaffirmed in *Ramsamy N.O. and Others v Maarman N.O. and Another* 2002 (6) SA 159 (CPD) where Thring J held that, in general terms, an abuse of process took place when the procedures permitted by the Rules of Court to facilitate the pursuit of truth were used for a purpose extraneous to that objective. An improper purpose could be a factor where an abuse of process was at issue.

[29] In *Fitchet v Fitchet* 1987 (1) 450 (SA) (ECD) the Court was similarly concerned with an application for the plaintiff to furnish security for the defendant's costs, inter alia, on the basis that the action was vexatious. It was held that, outside the parameters of the Vexatious Proceedings Act, 3 of 1956, a vexatious action, for the purposes of *dismissing* an action, had to be equated to one standing outside the region of probability altogether, and which becomes vexatious because it cannot succeed. This onus is a stringent one in that the Court must be satisfied not as on a balance of probabilities but as a

certainty. Because the Court could not find in that case that the plaintiff would not be able to satisfy an adverse order of costs, it approached the application on the basis that security had only to be furnished by the plaintiff if his claim was incapable of succeeding.

[30] However Olivier J qualified the general stringent test for vexatiousness in the following terms (at page 454 E – G):

> *"It may well be that, in applications for security of costs, the test should be somewhat different. Where, in an application for dismissal of an action, the Court without hearing evidence on the merits will require moral certainty alone that the action is unsustainable, in an application for security for costs the merits test should be somewhat less stringent, and other factors which are irrelevant in a dismissal application should be taken into account. I am therefore in respectful agreement with the statement of Klopper J in Davidson's Bakery (Pty) Ltd v Burger 1961 (1) SA 589 (O) at 593 E, viz:*
> *'Myns insiens is die meriete van eiser se aksie nie altyd deurslaggewend nie, maar slegs 'n faktor wat in oorweging geneem moet word. Daar kan gevalle wees waar die hof sekuriteitstelling sal verleen al word dit slegs bevind dat die kanse van welslae op die aksie alleen twyfelagtig is sonder dat dit gesê kan word dat dit geen vooruitsigte van sukses inhou nie.'*
> *The financial ability of the plaintiff to comply with an order to pay the defendant's costs of action should it prove to be unsuccessful is an obvious factor which should be taken into account … There may also be other considerations relevant to the exercise of the court's discretion."*

[31] In *Davidson's Bakery (supra)* the Court was likewise seized with an application that the plaintiff provide security for the defendant's costs. Klopper J noted that the discretion to order security in such circumstances arose from the court's inherent power to prevent abuse of its process and that such discretion could be exercised where the action was reckless or vexatious. In concluding that a court was not precluded from making such an order unless it could

find that the action was doomed to failure, the learned Judge placed reliance on a dictum from *Ecker v Dean 1938 AD 102*, one of a line of cases dealing with the circumstances in which an insolvent plaintiff could be required to furnish security for the defendant's costs. There De Wet JA stated as follows at page 110 *"Notwithstanding dicta to the contrary, it seems to me that the correct principle underlying these decisions is that every application for security must be decided on the merits of the particular case before the court, bearing in mind that the basis for granting an order for security is that the action is reckless and vexatious. In determining this the facts that the plaintiff is an insolvent, that the action could have been brought by the trustee or the creditors and, if such be the case, that there has been previous litigation on the same subject are matters to be taken into account by the Court in exercising its discretion."*

I find myself in respectful agreement with the less stringent test for the vexatious of the action in applications for the furnishing of security for defendants' costs expressly approved of in *Davidson's Bakery* and *Fitchet*. It stands to reason that there will be those actions which, although highly questionable, cannot, without the advantage of hearing evidence or full argument, be held to be incapable of succeeding. In such circumstances it is entirely appropriate that the Court should have a discretion, after

considering all the relevant circumstances, to order that a plaintiff provide security for any adverse costs order which may follow.

[32] The question which arises then is whether the present action is vexatious, reckless or amounts to an abuse of the process of court. In answering this question regard must be had, *inter alia*, to the defences which defendant proposes to raise. The terms of NCD no. 478 provide that:

> ***"The nominal amount of the deposit will be repaid upon presentation of the certificate*** *(at certain offices of Defendant in Johannesburg)".*

On the basis hereof defendant avers that this court lacks jurisdiction. Plaintiff responds by contending that defendant has consented to the jurisdiction of this court, relying on a letter from an official of defendant agreeing to accept service of process in Cape Town.

[33] A further defence the defendant indicates it will raise is that the plaintiff lacks *locus standi* in that, inasmuch as he derives his representative capacity from an appointment in terms of s 18(3) of the Act, plaintiff lacks the capacity to sue on behalf of the deceased's estate. In this regard defendant relies upon the statement in *Jacobs v Baumann* N.O.[2] to the effect that:

> ***"The rule in our law is that the only proper person to litigate on behalf of a deceased's estate, in the vindication of its assets, is its executor even to the exclusion of the beneficiaries in the estate."***

[2] 2009 (5) SA 432 (SCA) at 437 para 13.

[34] S 18(3) of the Act reads as follows:

> ***"If the value of any estate does not exceed the amount determined by the Minister by notice in the Gazette, the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed."***

Having regard to the terms of section 18(3) and the letters of authority issued by the Master, quoted above, there must be serious doubt whether plaintiff had the authority to institute the present action in a representative capacity for and on behalf of the estate.

[35] It should be said that plaintiff now appears to be relying for his *locus standi* on his appointment as executor of the estate by the Master with effect from 6 January 2010 and, to this end, has sought to amend the description of himself in the summons. A procedural dispute now looms between the parties, since defendant opposes the amendment contending that what is being sought is the substitution of one plaintiff for another thereby avoiding the fact that the summons, as initially issued, was a nullity.

[36] A further defence which defendant proposes to raise is that of prescription. NCD no. 478 fell due on 29 January 1999 and the present action was instituted some 9 years and 8 months later. Defendant contends that the operative prescriptive period is 3 years since, on a proper analysis, the NCD is not a negotiable instrument as defined in the Bills of Exchange Act 34 of 1964 with

the result that the 6 years prescriptive period provided for therein does not apply. Defendant points out further that, assuming always that the prescriptive period commenced when the instrument fell due, even if the 6 year prescriptive period is applied the action was instituted more than 2½ years after such period expired. For his part plaintiff appears to reckon the prescriptive period as being six years and commencing in August 2003 when the receipt which defendant apparently gave to plaintiff's brother upon confiscation of the original NCD 487 was unsuccessfully presented for payment.

[37] Defendant intends also to except to plaintiff's claim as being bad in law and/or vague and embarrassing. In this regard it points out that the basis upon which plaintiff's sues, as the "final holder *pro tempore*" of the "written original" is contradictory in that plaintiff cannot be the "final holder" and seek to sue on the instrument "for the time being, temporary or provisionally", being the meaning of "*pro tempore*". It relies also on the fact that plaintiff has never been the holder of the instrument, the original being held by defendant which successfully saw off a vindicatory application by the deceased, seeking the return of the instrument and a declaration that he was the owner.

[38] In addition to the above, defendant contends that plaintiff neither alleges in his particulars of claim nor will be able to prove

compliance with each of the necessary conditions required for the obtaining of good title to the instrument, namely, that the transferee must be "*bona fide*, that value must have been given for the instrument and that the transferee must be a South African resident. In regard to the requirement of value given, notwithstanding the voluminous documentation in the litigation initiated by plaintiff and the deceased in relation to the NCD's, there is a dearth of concrete proof of such value having been given for the instruments, including NCD 478. Dambar appears to be a shadowy figure and, as far as can be seen, has never filed any affidavit while the principal party involved in the original acquisition of the NCD's, the deceased, can no longer testify.

[39] It is both undesirable and unnecessary for this Court to express a view on the validity of the various defences which the defendant proposes to raise either *in limine*, technical, procedural or substantive. What can safely be said is that there are many formidable obstacles in the path of plaintiff proving his claim, not least the defences of prescription and the lack of value given.

[40] As far as plaintiff's ability to meet any order for costs it is common cause between the parties that the deceased estate is insolvent. According to defendant the liabilities in the estate are in the order of R17.7million whilst its only assets, presumably, are the claims it has

in respect of the NCD's. According to plaintiff the estate's liabilities are less than half a million rand but no explanation is furnished for a longstanding debt in the sum of US$2.2 million.

[41] The litigation involving the NCD's has produced at least two costs orders, the first arising out of the 2003 application and the latest arising out of the successful condonation application in Johannesburg late last year. The first such order was not met and no doubt is a liability in the deceased estate. It remains to be seen whether plaintiff will meet the second costs order made herein relating to the summary judgment application.

[42] Any costs orders made in these proceedings can, in the nature of things, not be satisfied by the insolvent estate and liability therefor will be disavowed by the plaintiff personally since he sues in a representative capacity, either as the s 18(3) representative, or if his amendment is successful, as the estate's executor. Although plaintiff is legally represented it is apparent that much of the work involved in the presentation of his case and preparation of his papers is done by a lay person, presumably himself. In this matter alone plaintiff has filed two declarations running to hundreds of pages including annexures.

[43] It is likely that the litigation, irrespective of the merits of plaintiff's claim will be prolonged and strenuously contested at every level. The signs, in the form of the opposed condonation application in the provincial sentence proceedings and the summary judgment application in this action, are already clear. Plaintiff's counsel was unable to explain why, after a hiatus of six years between 2003 and 2009, plaintiff has seen fit to launch actions on two fronts seeking to enforce the estate's claims in respect of the NCD's.

[44] Various arguments were raised on behalf of plaintiffs why he should not be required to furnish security for costs and these fall to be dealt with. Apart from a reliance on the common law rule that *incolae* plaintiffs can not be compelled to furnish security for costs, these arguments are the estate's constitutional rights in terms of s 34(1) of the Bill of Rights, that the estate will be unable to proceed with its action if it is ordered to provide security for costs, that there will be no prejudice to defendant if it succeeds in its defences and cannot recover its costs in as much as it is indemnified against all costs orders by Standard Bank and, finally, that the estate finds itself in its current predicament due to the action of defendant in refusing to honour the NCD's.

[45] As far as the indemnity defence is concerned defendant readily admits that it holds an indemnity from Standard Bank against any

judgment which may be taken against it in the respect of NCD 478. That indemnity was furnished by Standard Bank when defendant paid it the nominal value, presumably plus interest, in respect of the "lost" NCD's including no. 478.

[46] As Mr. Robinson, who appeared for defendant, pointed out however, the existence of the indemnity constitutes *res inter alios acta*. Moreover, defendant cannot sit back armed with such an indemnity and adopt a supine attitude towards the litigation. There will always be an implied term in such an indemnity that defendant put up a "virilis defensio", a powerful or proper defence, to the action. [3] This would include defendant's obligation to seek security for its costs in the face of the prospect that plaintiff will be unable to meet any costs award made against him. It was suggested on behalf of plaintiff, albeit not pursued by counsel with any vigour, that the estate's impecunious position was principally due to defendant's actions in not honouring the NCD's. Apart from the fact that this begs the question as to whether defendant was obliged in law to honour these instruments, there is considerable evidence that the prime liability of the estate was a longstanding debt of US$ 2.2 million and thus, even had the deceased received full payment on the NCD's, the estate would still have been in an insolvent position.

[3] See *York and Company (PVT) Ltd v Jones N.O. Co.* 1962 (1) SA 72 (SR).

[47] It was also contended that requiring plaintiff to furnish security for defendant's costs would infringe his rights of access to court constitutionally enshrined in s 34(1)(a) of the Bill of Rights which provides that:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court …".*

[48] In *Giddey No. v J.C. Barnard and Partners* 2007(5) SA 525 (CC) The Constitutional Court recently considered the import of this basic right in the context of the provisions of section 13 of the Company's Act, 61 of 1973, ("The Act") which permit a litigant to require a company to furnish security for costs.

[49] The Court held that the main purpose of the relevant provision of the Act is to ensure that companies, who are unlikely to be able to pay costs and are therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense.[4] The court held further that in applying s 13, a court needed 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*

[4] At page 530 C – D.

*claim and 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, the court will need to balance the interests of the plaintiff in pursuing the litigation against the risk that the defendant of an unrealisable costs order***.**"

[50] After reviewing the authorities the Court held that s 13 could not be read, in the light of the Constitution or otherwise, to mean that "a court has no discretion to order security to be furnished where the effect of that order will be to terminate the litigation". It quoted with approval from the judgment of Hefer JA in *Shepstone and Wylie and Others v Geyser N.O.*[5] where he stated:

> ***"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 s 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."***

[5] 1998 (3) SA 1036 (SCA) at 1046 G.

[51] The Constitutional Court's judgment in *Giddey* is in my view a strong indication that the court's inherent power to order an *incola* plaintiff to provide security for costs in exceptional circumstances, and in particular where the action instituted is vexatious, reckless or an abuse of process, will survive constitutional scrutiny and, furthermore, that the fact that the effect of such an order might be to put and end to the litigation is in itself not the decisive factor in deciding whether security for cost should be furnished or not.

[52] In the present case plaintiff states in his affidavit opposing security for costs that making such an order would put an end to the estate's claims. He gives little detail, however, as to what efforts, if any, has been made to secure finance to assist the estate in its prosecution of its claims which totals some R6m. Plaintiff does, however, state that he is funding the litigation from his personal monthly salary income and that after various deductions and monthly obligations which he had are met he is left with approximately R10 000.00 which is used to assist in the litigation against defendant. Plaintiff adds he has no other income or liquid investments from which he can fund the litigation and that his twin brother, being the other beneficiary in the estate, assists in the aforementioned funding. The position appears to be that although the plaintiff performs much of the legal work himself, he engages attorneys and counsel to present his case and presumably meets

their fees through finances mentioned. In these circumstances I can see no reason why the plaintiff and his brother cannot set aside a sum of money to satisfy an order providing for security for costs. They are also free to approach any person to finance their claim as well. Plaintiff is, therefor, not an impecunious litigant who cannot afford even his own legal representation. He is, rather, a litigant able to fund his own legal expenses but largely immune to any adverse costs order. The provision by plaintiff of security for the defendant's costs in the circumstances of this matter will, at the very least, have the salutary effect of discouraging ill-considered interlocutory applications or procedural steps on the part of plaintiff.

[53] On behalf of plaintiff Mr. Heyns argued that defendant's interest were protected since the Court retained the power to order costs award against plaintiff *de bonis propriis* and it was thus unnecessary to order plaintiff to provide security for costs. This argument ignores the fact that special circumstances must exist before a court will order costs *de bonis propriis* and they are not ordered against a party simply because he is acting in a representative capacity for an insolvent entity. Nor, in the absence of any information concerning plaintiff's financial solvency, would such costs orders provide the certainty to defendant which an order for the provision of security for costs will.

[54] Taking all these circumstances into account I consider that the defendant has not established that the present action is doomed to failure or amounts to an abuse of the process of court. Having regard to all the surrounding circumstances, however, I am satisfied that the present action is reckless or vexatious, within the meaning discussed above. These circumstances include earlier unsuccessful litigation to establish ownership and re-claim possession of NCD 478, the long and unexplained delay in the institution of the present action, the several procedural, technical and substantive defences which defendant proposes to raise and the manner in which the plaintiff has conducted this and related litigation, most notably the filing and withdrawal of lengthy declarations and his persisting in the application for summary judgment and in opposing an application for condonation in the Johannesburg proceedings.

[55] Having made this finding it is open to this court, in exercising its discretion, to order the furnishing of security. I see no reason why defendant, notwithstanding that it is a large commercial concern, should be exposed to expensive and time consuming litigation over NCD no. 478 at the instance of a plaintiff who, if unsuccessful, can merely shrug off any adverse costs award because he sues in a representative capacity on behalf of an insolvent estate. There are strong indications that Plaintiff is one of the two beneficiaries (the

other being his brother) in the estate and thus the litigation on its behalf directly furthers his interests.

[56] Ultimately, and by way of amendment, the order sought by defendant was that security for its costs be furnished by plaintiff, that the amount and the form thereof be determined by the Registrar and that the action be stayed until such time as the security was furnished. I regard such an order as appropriate in the circumstances. Defendant also sought an order that plaintiff pay the costs of this application on the attorney and client scale, *de bonis propriis*. I do not think costs on this scale are appropriate since, in the ordinary course, an *incola* plaintiff is not required to furnish security for costs and therefore it was reasonable on the part of plaintiff to oppose the application. For the same reasons I do not consider that the costs of this application should be awarded against plaintiff in his personal capacity.

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

1. Plaintiff shall pay defendant's costs in the application for summary judgement on the attorney and client scale, de bonis propriis, such costs to be payable immediately;
2. Plaintiff is directed to furnish security for the costs of defendant in an amount and form to be determined by the Registrar.

3. The action is stayed until such security is furnished;
4. Plaintiff shall pay defendant's costs in the application for security for costs, such costs to include the costs of two counsel, where employed.

[58] For the guidance of the Taxing Master it is recorded that no less than two thirds of the argument heard on 17 March 2010 was devoted to the question of security for costs.

L. J. BOZALEK, J
JUDGE OF THE HIGH COURT