THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 20156/2014

In the matter between:

BOOST SPORTS AFRICA (PTY) LIMITED **APPELLANT**

And

THE SOUTH AFRICA BREWERIES (PTY) LIMITED **RESPONDENT**

Neutral citation: *Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd* (20156/2014) [2015] ZASCA 93 (1 June 2015)

Bench: Ponnan, Mhlantla, Mbha JJA and Fourie and Gorven AJJA

Heard: **13 May 2015**

Delivered: **1 June 2015**

Summary: Whether absent a provision similar to the repealed s 13 of the Companies Act 61 of 1973 an *incola* company can be compelled to furnish security for costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hassim AJ sitting as court of first instance): reported *sub nom Boost Sports Africa (Pty) Ltd v South African Breweries Ltd* 2014 (4) SA 343 (GP).

The appeal is dismissed with costs, including those consequent upon the employment of two counsel.

JUDGMENT

Ponnan and Mbha JJA (Mhlantla JA, Fourie and Gorven AJJA concurring):

[1] On 21 October 2011 the appellant, Boost Sports Africa (Pty) Limited (the plaintiff), instituted action in the High Court of South Africa, Gauteng Division, Pretoria against the respondent, the South Africa Breweries (Pty) Limited (the defendant). The plaintiff's cause of action is based on an alleged breach of contract by the defendant. It alleges that it disclosed a particular advertising concept referred to as the 'fans challenge concept' to the defendant under an agreed confidentiality regime between them and that the defendant later used the concept to conduct an event called 'be the coach' in breach of that agreement. In its plea, the defendant raised a number of defences, in particular the defendant denied that there was any confidentiality agreement between the parties in relation to the concept and averred that the information pertaining to the concept was already in the public domain when it was first disclosed to the defendant.

[2] After the plaintiff had made available to the defendant its discovered documents, the latter became concerned that the former would not be able to meet an adverse costs order should it fail in the contemplated action. When the plaintiff refused to furnish evidence of its ability to pay the defendant's costs in the event of its claim being dismissed, the defendant launched an application against the plaintiff on 1 August 2013 for security for its costs. The founding affidavit filed in support of that application stated:

'16. The defendant, therefore, became concerned that, if the plaintiff's claim was dismissed and an adverse costs order was granted against it, it would not be in a position to meet such an order. For that reason, I was instructed to conduct investigations to determine whether or not the plaintiff would be able to meet an adverse costs order against it. The investigations were conducted by conducting various internet searches and also searches of public records. The investigations revealed that:

16.1 the plaintiff's registered address recorded to be at 2 Scherwitz Road, Berea, East London, South Africa is the address of its auditors, Marais & Smith Accountants. . . .

16.2 the plaintiff's principal place of business at 123 Western Avenue, Vincent, East London, (as pleaded at paragraph 1 of its particulars of claim) is the address of Smale & Partners, a firm of architects of which Jed Webber is a director. . . . Mr Webber is a director of the plaintiff as well as a former director of Boost Sports International Limited, the plaintiff's apparent predecessor-in-title in respect of the concept;

16.3 the document titled "Deed of Cession", attached to the plaintiff's particulars of claim as Annex "A", records the plaintiff's registered address and principal place of business at 99 Clovelly Road, Greenside, Johannesburg. This is a residential address. . . .

16.4 the plaintiff does not have any immovable property registered in its name in any of the Deed's Registries in South Africa. . . .

16.5 the plaintiff does not have a telephone number listed in the online company telephone registry known as Brabys. . . .

16.6 the plaintiff does not have a telephone number listed in the yellow pages. A search was conducted under the categories "marketing consultants" and "market research" for both Gauteng and the Eastern Cape. . . .

16.7 the plaintiff does not have a telephone number listed in Telkom's directory enquiry services. This information was gleaned from my telephone conversation with a Telkom directory enquiry operator on 18 June 2013. During that telephone conversation, I asked the operator to

search for the telephone number of Boost Sports Africa (Pty) Limited. The operator was not able to locate a telephone number for the plaintiff in South Africa;

16.8 the plaintiff does not operate a website advertising its business. . . . ; and

16.9 the plaintiff's parent company, Boost Sports International Limited, has been dissolved, according to the United Kingdom's company register. . . .

17. It therefore appears clear that the plaintiff is not trading currently and has not done so in the past. It has no assets registered in its name. Furthermore, in an effort to avoid this application, the defendant wrote to the plaintiff asking it to disclose its financial statements to the defendant and to show that it has sufficient income or assets to cover any adverse costs order against it. . . . The plaintiff refused to provide evidence of its ability to pay any such order in a letter dated 11 July 2013 . . . The defendant, therefore, served a formal notice in terms of Rule 47(1) on the plaintiff. . . .

18. The only inference one can draw from the evidence above and the plaintiff's refusal to provide evidence of its ability to pay any adverse costs order against it is that the plaintiff does not have any means with which to do so. If the plaintiff is to contend otherwise, it is required to adduce evidence of its ability to pay any adverse costs order against it. Should the plaintiff now adduce evidence of its ability to pay any adverse costs order against it, having been given an opportunity to do so earlier, an adverse costs order will be sought against it in this application.'

[3] The response to those allegations on behalf of the plaintiff was:

'16.1 Save to repeat paragraph 14 above, I admit these allegations.

16.2 The plaintiff has four shareholders whose shareholding is as follows:

16.2.1 Jed Webber (Myself) – 45%;

16.2.2 Mkhuseli Mnguni – 25%;

16.2.3 Justin Price – 20%;

16.2.4 Andrew Stylianou – 10%.

16.3 I am an architect, Mr Mnguni is an entrepreneur, Mr Price is an estate agent and Mr Stylianou is a legal adviser.

16.4 The plaintiff's shareholders are funding the plaintiff's costs. However, none of its shareholders have sufficient assets to fund the plaintiff's costs and to put up the quantum of security for costs demanded by the defendant.

16.5 This demand by the defendant will, effectively, destroy the plaintiff's ability to prosecute its claim.

17.1 I admit that the plaintiff has never traded. I deny that it has no assets. The concept constitutes a valuable asset. This much is clear from the manner in which the concept has been exploited by the defendant.

17.2 It is extremely difficult to place a firm value on an intangible asset such as the concept. However, if this Court is *prima facie* of the view that the concept constitutes confidential information worthy of protection, then the concept must have significant commercial value given that the defendant has exploited it so successfully.

17.3 Save as aforesaid I admit these allegations.

18.1 I repeat paragraph 17 above.

18.2 Save as aforesaid I deny these allegations.'

[4] The defendant's application succeeded before Hassim AJ[1] who, on 17 March 2014, issued the following order:

'(i) The plaintiff is ordered to furnish security for the defendant's legal costs in the action.

(ii) The form, amount and manner of security to be provided by the plaintiff shall be determined by the Registrar on application by the defendant to that office.

(iii) In the event that the plaintiff fails to provide security as determined by the Registrar within 20 days of the Registrar's order or determination, the action shall be stayed forthwith and the defendant is granted leave to apply on the same papers, amplified as necessary, for the dismissal of the action.

(iv) The plaintiff is to pay the costs of the application, including the costs occasioned by the employment of two counsel.'

The appeal is with the leave of the learned Judge.

[5] The procedure whereby an application for security for costs is made is governed by Uniform rule 47. It provides:

'(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.

. . .

[1] The judgment of Hassim AJ is reported *sub nom Boost Sports Africa (Pty) Ltd v South African Breweries Ltd* 2014 (4) SA 343 (GP).

(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.'

The rule, which deals with the procedure to be followed, applies to all cases where security is sought in the high court. It deals with procedure and not with substantive law.[2] For the substantive right, it is to the common law and the relevant statutory provisions that one must look.[3] The general rule of our law as laid down in *Witham v Venables* (1828) 1 *Menz* 291 is that an *incola* plaintiff cannot be compelled to furnish security for costs. As explained in *Lumsden v Kaffrarian Bank* (1884 – 1885) 3 S.C. 366 no inhabitant of the Colony can be compelled to give security for costs whether he be rich or poor, solvent or insolvent, but a *peregrinus* may be called upon to do so, unless he can prove that he is possessed of immovable property within the Colony of adequate value (*Lombard v Lombardy Hotel Co Ltd (In Liquidation)* 1911 TPD 866).

[6] In the case of a company, until recently, there existed a statutory exception to the general rule that an *incola* plaintiff cannot be compelled to furnish security.[4] Our company law derives from English law. Prior to Union each of the Provinces had its own Act. The first general Act providing for incorporation of companies in South Africa was the Cape Joint Stock Companies Limited Liability Act 23 of 1861, which was based on English legislation. This Act served as the model for the Acts subsequently enacted in Natal, the South African Republic and the Republic of the Orange Free State. Only in 1892 was a fully-fledged Companies Act (Act 25 of 1892) passed in the Cape. Section 128 of that Act provided:

'Where a limited company is plaintiff in any action, suit, or other legal proceeding, any Judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until security is given.'

(See *Brink v Liquidator United Farming Corporation of South Africa Ltd* 1913 CPD 371).

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[2] *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) para 9.
[3] *ICC Car Importers (Pty) Ltd v A Hartrodt SA (Pty) Ltd* 2004 (4) SA 607 (W) at 615 G.
[4] *Zietsman v Electronic Media Network Ltd & others* 2008 (4) SA 1 (SCA) para 4.

[7] In the absence of such a provision in the Transvaal Act of 1909, the issue as to whether or not that power existed at common law arose in two cases in that Province. In the first, *Liquidator, Salisbury Meat Market Ltd v Perelson* 1924 WLD 104 at 106-7 De Waal J stated:

'Apart from the English authorities to which I have referred, I can find no principle of our law upon which the application for security for costs can be supported. The general rule of our law is that nobody but a *peregrinus* can be called upon under any circumstances to give security for costs, and that the Court has no jurisdiction to make an ordinary litigant, or one who sues under a power conferred upon him expressly by Act of Parliament, give security for costs.'

And, in the second, *Lombard v Lombardy Hotel Co Ltd (In Liquidation)* 1911 TPD 866, Bristowe J stated:

'In England cases of this kind are provided for by section 278 of the Companies Consolidation Act, 1908, which (following section 69 of the Companies Act, 1862), empowers the Court to order security for costs in every case where a limited company is plaintiff and will be unable to pay the costs of the defendant if the action fails. And it has been held that the fact that a company is in liquidation is in itself sufficient ground for ordering security to be given (*Pure Spirit Company v Fowler*, 25 Q.B.D. 235). In our own Statute (the Companies Act, 1909), although it is taken almost *verbatim* from the English Act, this section is omitted. Why this should have been done it is hard to say, for the power to order security for costs is a most reasonable one, having regard to the enormous protection which shareholders of a company derive from the principle of limited liability. But the omission is not a reason for straining the Common Law. On the contrary, it rather indicates an intention on the part of the Legislature that litigants with joint stock companies in this country shall not enjoy the protection which is afforded to them in England.'

On appeal from the judgment of Bristowe J to the full court, neither Wessels J, nor Smith J, entered into the issue, both having concluded that the matter was not appealable. De Villiers JP considered that the court could order security against an *incola* company. He expressed himself thus (at 876):

'Now it was admitted that under similar circumstances in England a company could be compelled to give security for costs under sec. 278 of the Companies Cons. Act, 1908. In fact, as Bristowe J, points out, it has been held in the *Pure Spirit Co. v Fowler* (25 Q.B.D. 235), that the fact that a company is in liquidation is, in itself, sufficient ground for ordering security to be given. But it was contended that this Court has no such power as the corresponding section was

left out in our Company's Act, 1909, which, it was urged, follows the English Act so closely. This conclusion is, to my mind, unwarranted. The mere fact of the absence of a corresponding section in our law does not justify such a conclusion. It may be that the Legislature considered that the matter was covered by the principles of our Common Law, or it may even be a pure oversight.'

[8] After Union and before the issue could be settled by our courts, the first South African Companies Act was enacted in 1926.[5] It provided in s 216:

'Where a limited company is plaintiff . . . in any legal proceedings, the Court having jurisdiction in the matter may at any stage, if it appears by credible testimony that there is reason to believe that the company . . . will be unable to pay the costs of the defendant . . . if successful in his defence require sufficient security to be given for those costs and may stay all proceedings till the security is given.'

A similar provision was to be found in s 13 of the Companies Act 61 of 1973, which read:

'Where a company or other body corporate is plaintiff 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.'

[9] Section 216 (and its successor, s 13, which mirrors provisions in certain other Commonwealth jurisdictions),[6] meant that the issue under the common law whether an impecunious *incola* company can be required to give security for the costs of proceedings instituted by it, was left unresolved. The object of s 13 was to protect

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[5] M S Blackman 'Company Law' in *Lawsa* Vol 4(1) (first re-issue) para 5.

[6] See eg s 726(1) of the United Kingdom Companies Act, which provides:

'(1) Where in England and Wales a limited company is plaintiff in an action or other legal proceedings, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.'

And s 1335 of the Australian Corporations Act 2001, which provides:

'(1) Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

(2) The costs of any proceeding before a court under this Act are to be borne by such party to the proceedings as the court, in its discretion, directs.'

persons against liability for costs in regard to any action instituted by bankrupt companies.[7] Its main purpose was to ensure that companies, who were unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, did not institute litigation in circumstances where they had no prospects of success thus causing their opponents unnecessary and irrecoverable expenses. As is apparent from s 13, if a company ordered to provide security for costs was unable to do so, it could have been prevented from proceeding with its action. The section, like its predecessor s 216 of the 1926 Act, vested a court with a discretion to order a company that had instituted action to furnish security for costs if there was reason to believe that it would be unable to pay the costs of its opponent.

[10] The phrase 'if it appears that there is reason to believe' in s 13 placed a much lighter burden of proof on an applicant for security.[8] In terms of s 13, a two stage enquiry was required. At the initial stage, and in order to discharge the onus, the applicant for security had to adduce facts on which the court could conclude that there was reason to believe that the plaintiff would be unable to satisfy an adverse costs order. If the court could not come to such a conclusion that was the end of the matter and the application was bound to be refused. However, if the court was satisfied that a case had been made out, it had, at the second stage, to decide, in the exercise of its discretion, whether or not to order the company to furnish security. (See *MTN Service Provider (Pty) Ltd* v *Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 622H.)

[11] Until *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1037 (SCA), the approach adopted had been that although the court was not bound to order security to be furnished, it should nevertheless do so unless special circumstances exist. Hefer JA rejected that approach. He stated (at 1045I–1046A):

'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

[7] *Hudson & Son v London Trading Company Ltd* 1930 WLD 288 at 291; D R Harms *Civil Procedure in the Superior Courts* (2014) para B47.16.
[8] D R Harms op cit.

case upon a consideration of the relevant features, without adopting a predisposition either in favour of or against granting security.'

[12] The 1973 Companies Act has been repealed and replaced by the Companies Act 71 of 2008. Our most recent Companies Act, which 'is a complete reinvention of our corporate law',[9] does not contain an equivalent provision to s 13. There have been several decisions in which our high courts have recently had occasion to consider whether, absent a counterpart to section 13 in our new Act, an *incola* company can be ordered to furnish security for costs.[10] Those decisions – or more accurately some – have been discordant. Valuable as those decisions are, a discussion of each of them would likely contribute to a judgment that is indigestible. We thus approach the problem as if the matter is *res nova*. In doing so, we obviously draw on the benefits and insights that a reading of those judgments has given.

[13] However, in the light of some of the views expressed in those decisions it may be prudent to pass certain general observations. First, our courts now derive their power from the Constitution itself,[11] which in section 173 provides:

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

As it was put by the Constitutional Court in *SABC Ltd v National Director of Public Prosecutions and others*:[12]

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[9] Per Brand JA in *Newlands Surgical Clinic v Peninsula Eye Clinic* [2015] ZASCA 25 (20 March 2015) para 24.

[10] *Hiatas & Others v Port Wild Props 12 (Pty) Ltd* 2011 (5) SA 562 (GSJ); *Ngwenda Gold (Pty) Ltd & Another v Precious Prospect Trading 80 (Pty) Ltd* unreported case number 2011/31664 (GSJ); *Genesis on Fairmount Joint Venture v KNS Construction (Pty) Ltd & Others* unreported judgment, 28 November 2012, case number 2012/36204, SGJ; *Siemens Telecommunications (Pty) Ltd v Datagenics (Pty) Ltd* 2013 (1) SA 65 (GNP); *Hennie Lambrechts Architects v Bombenero Investments (Pty) Ltd* 2013 (2) SA 477 (FB); *Maigret (Pty) Ltd (in liquidation) v Command Holdings Ltd & Another* 2013 (2) SA 481 (WCC) *Biochlor (Pty) Ltd v G E Betz South Africa (Pty) Ltd* (A 710/2013) [2014] ZAGPPHC 1030 (12 December 2014). See also D E van Loggerenberg and J Malan 'Security for costs by local companies: Back to 1909 in the Transvaal, or not?' (2012) 75 THRHR 609; Van Loggerenberg & Farlam 'Erasmus Superior Court Practice' – Rule 47 Security for Costs.

[11] *Phillips and others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 47.

[12] SABC Ltd v NDPP 2007 (1) SA 523 (CC) para 35 and 36.

'This is an important provision which recognises both the power of Courts to protect and regulate their own process as well as their power to develop the common law. . . . The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that Courts in exercising this power *must take into account* the interests of justice.'

That our courts were endowed with such power even in our pre-constitutional era is evident from the following dictum of Corbett JA:

'There is no doubt the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice ....'[13]

According to the Constitutional Court:[14]

'The task of a . . . Court in determining its own proceedings is an important one. Its primary constitutional responsibility is to ensure that the proceedings before it are fair and it must give content to that obligation. This obligation has always been part of our law and is now constitutionally enshrined as a fundamental right in s 35(3) of the Constitution. The task of ensuring that the proceedings are fair will often require consideration of a range of principled and practical factors, some of which may pull in different directions.'

Second, it is a well-established principle of statutory construction that the legislature must be taken to be aware of the nature and state of the law existing at the time when legislation is passed.[15] The omission of a similar provision to s 13 from the 2008 Act, must therefore be taken (*prima facie* at least) to import a change of intention on the part of the legislature. It must therefore follow that it is not open to a court to approach an enquiry such as this as if the position is unaltered and that s 13 is still part of our law. For, to do so may well result in a court impermissibly intruding into the domain of the legislature. Third, it has been suggested that such a provision has been excluded because its inclusion would limit the fundamental right of access to the courts as enshrined in s 34 of the Constitution and would thereby be unconstitutional. But that may be to ignore the fact that a court was vested with a discretion in terms s 13 and that

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[13] *Universal City Studios Inc and others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G.
[14] *SABC Ltd* para 21.
[15] *Road Accident Fund v Monjane* 2010 (3) SA 641 (SCA) para 12; *Marine & Trade Insurance Co Ltd v Workmen's Compensation Commissioner* 1972 (1) SA 535 (N) at 538D.

in exercising its discretion a court performs a balancing act. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security and against that it must weigh the injustice to the defendant if no security is ordered and the plaintiff's claim fails and the defendant finds himself unable to recover costs.[16] Significantly, on that score, the European Court of Human Rights[17] appears to have inclined to the view that security for costs pursued a legitimate aim, namely to protect a litigant from being faced with an irrecoverable bill for legal costs and since regard was had to prospects of success the requirement could be said to have been imposed in the interests of the fair administration of justice. It is also noteworthy that back home, as long ago as *Lombard* it was stated by Bristowe J that the power to order security for costs is a most reasonable one.[18] Why the legislature saw fit to exclude it (or a provision that mirrors it) is fortunately a debate that is not necessary for us to enter. Fourth, s 39(2) of the Constitution makes plain that, when a court embarks upon a course of developing the common law, it is obliged to 'promote the spirit, purport and objects of the Bill of Rights.' This ensures that the common law will evolve, within the framework of the Constitution, consistently with the basic norms of the legal order that it establishes. Faced with such a task, a court is obliged to undertake a two-stage enquiry. It should ask itself whether, given the objectives of s 39(2), the existing common law should be developed beyond existing precedent—if the answer to that question is in the negative that should be the end of the enquiry. If not, the next enquiry should be how the development should occur and which court should embark on that exercise.[19] Fifth, the omission of a provision akin to s 13 from the new Act is strange particularly since s 8 of the Close Corporations Act 69 of 1984, which has been interpreted in accordance

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[16] See *Shepstone & Wylie* at 1046A-C citing with approval the dictum of Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 (CA) at 540a-b; see also *Lappeman Diamond Cutting Works v MIB Group (No 1)* 1997 (4) SA 908 at 919G.

[17] *Tolstoy Miloslavsky v United Kingdom* [1995] ECHR 18139/91.

[18] More recently in *Shepstone & Wylie* (at 1046G–I), Hefer JA 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. 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.'

[19] *City of Cape Town v SANRAL* [2015] ZASCA 58 (30 March 2015) para 29.

with the principles that have evolved in relation to the corresponding provisions in the previous Companies Act,[20] has been retained. It follows that the principles pertaining to the furnishing of security by a close corporation will henceforth differ from that applicable to a company. Such incongruity as may arise from that dichotomy is no invitation to a court to continue to approach an enquiry such as this in relation to a company as if s 13 is still in force.

[14] The onus is on the party seeking security to persuade a court that security should be ordered. As was the situation under s 13 in the past, a court in the exercise of its discretion will have regard to: the nature of the claim; the financial position of the company at the stage of the application for security; and its probable financial position should it lose the action. The distinction to be drawn between the common law and that which prevailed in terms of s 13 is described thus by Brand JA in *MTN Service Provider (Pty) Ltd* v *Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) paras 15–16:

'Against an insolvent natural person, who is an *incola*, so it has been held, security will only be granted if his or her action can be found to be reckless and vexatious (see *Ecker* v *Dean* 1938 AD 102 at 110). The reason for this limitation, so it was explained in *Ecker* (at 111), is that the court's power to order security against an *incola* is derived from its inherent jurisdiction to prevent abuse of its own process in certain circumstances. And this jurisdiction, said Solomon JA in *Western Assurance Co* v *Caldwell's Trustee* 1918 AD 262 at 274, 'is a power which . . . ought to be sparingly exercised and only in very exceptional circumstances. (See also eg *Ramsamy NO* v *Maarman NO* 2002 (6) SA 159 (C) 173F–I). In the exercise of its discretion under s 13 of the Companies Act, on the other hand, there is no reason why the court should order security only in the exceptional case. On the contrary, as was stated in *Shepstone & Wylie* v *Geyser NO* 1998 (3) SA 1037 (SCA) at 1045I–J, since the section presents the court with an unfettered discretion, there is no reason to lean towards either granting or refusing a security order.'

[15] Accordingly, in terms of the common law mere inability by an *incola* to satisfy a potential costs order is insufficient to justify an order for security, something more is required (*Ramsamy NO* v *Maarman NO* 2002 (6) SA 159 (C) 172I-J). As Thring J put it

[20] *Henry v R E Design* 1998 (2) SA 502 (CPD).

(*Ramsamy NO* at 172J-173A): '[w]hat this something is has been variously described in a number of decisions. Thus in *Ecker v Dean* . . . it was said that the basis of granting an order for security was that the action was 'reckless and vexatious'.' In *Ecker v Dean* 1937 AD 254 at 259, Curlewis CJ stated:

'In *Western Assurance Co. v Caldwell's Trustee* (1918, A.D. 262) this Court laid down that a Court of law had inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the process of the Court; one of the ways of doing so is by ordering the vexatious litigant to give security for the costs of the other side, and I know of no reason why the Court below should not have [exercised] such an inherent jurisdiction.'

To once again borrow from De Villiers JP (*Lombard* at 877):

'But, however, this may be the case of *Mears v The Pretoria Estate and Market Co.* is an authority for the proposition that this Court has the power to settle a question of practice like the present for itself. Innes, C.J., on page 956, is reported as follows: "But after all, this is a question of practice which this Court is justified in settling for itself; and I think that we should lay down the rule that an insolvent ought to give security for costs in a case like the present." 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.'

[16] Absent s 13, there can no longer be any legitimate basis for differentiating between an *incola* company and an *incola* natural person. And as our superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings, it must follow that the former can at common law be compelled to furnish security for costs. Accordingly, even though there may be poor prospects of recovering costs, a court, in its discretion should only order the furnishing of security for such costs by an *incola* company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse.

[17] According to Nicholas J in *Fisheries Development Corp v Jorgensen* 1979 (3) SA 1331 (W) at 1339E-F:

'In its legal sense "vexatious" means

"frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant"[21] (Shorter Oxford English Dictionary). Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; "abuse" connotes a mis-use, an improper use, a use *mala fide*, a use for an ulterior motive.'

In *African Farms & Townships v C.T. Municipality* 1963 (2) SA 555 (A) at 565D-E, Holmes JA observed:

'An action is vexatious and an abuse of the process of Court *inter alia* if it is obviously unsustainable. This must appear as a certainty, and not merely on a preponderance of probability. *Ravden v Beeten*, 1935 C.P.D. 269 at p. 276; *Burnham v Fakheer*, 1938 N.P.D. 63.'

[18] *African Farms & Townships* was concerned with an application to strike out a claim. Since the common law is reluctant to limit access to court, an application for security for costs would seem to require a less stringent test than one for the stay of vexatious proceedings; the latter ends unsustainable litigation whereas the former contemplates the continuance of the proceedings with the safeguard of security for costs.[22] Thus in *Fitchet v Fitchet* 1987 (1) SA 450 (ECD) at 454E-G, Olivier J pointed out that:

'It may well be that, in applications for security for 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 593E, 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."'

[21] *Bisset v Boland Bank Ltd* 1991 (4) SA 603 at 608D-E.
[22] D R Harms *Civil Procedure in the Superior Courts* – Uniform Rule 47 – Instances where security can be demanded B-339.

[19] In *Golden International Navigation SA v Zeba Maritime* 2008 (3) SA 10 (CPD) para 18, Griesel J posited that the ordinary yardstick – a preponderance of probability – should find application in an enquiry such as the present. In *Ravden v Beeten* 1935 CPD 269 at 276, Sutton J cited with approval the following dictum of Fletcher Moulton J (*Goodson v Grierson* 1908 1 KB 761 at 764): 'In my opinion that is limited to the case where on the face of the pleadings it is shown that the action cannot be maintained and is frivolous and vexatious'.[23] It is not envisaged, it seems to us, that a detailed investigation of the merits of the case should be undertaken. Nor, is it contemplated that there should be a close investigation of the facts in issue in the action. As it was put by Streicher JA in *Zietsman v Electronic Media Network Ltd* 2008 (4) SA 1 (SCA) para 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.'

[20] Against that backdrop we turn to a consideration of the claim sought to be advanced by the plaintiff against the defendant. In its particulars of claim the plaintiff alleges:

'3. During or about July and August 2006 the plaintiff, represented by Jed Webber ("*Webber*") introduced the defendant, represented by Rob Fleming ("*Fleming*") to the plaintiff's *Fans' Challenge Sport* concept ("*the concept*").

. . .

8. Annexure "B" [a document that purported to introduce the concept] was provided to Fleming during July 2006 and annexure "C" [an executive summary] was provided to Ireland during September 2006.

. . .

11. The concept is unique and constitutes confidential information.

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[23] Under consideration there was Order 25, rule 4, which provided: 'The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, or in any such case or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered according as may be just.'

12. The concept was disclosed to Fleming, Ireland and Minnaar in confidence and with the intention that the plaintiff and the defendant would enter into a commercial relationship to utilise the concept to their mutual financial benefit.

13. Fleming, [. . .] orally accepted that the concept was disclosed to them in confidence, constituted, confidential information and could not be used without the consent of the plaintiff.

14. Fleming gave Webber an express undertaking that the defendant was a company with high ethical standards and one that the plaintiff could trust. Webber accepted the undertaking which, in the context of the disclosure of the concept, meant that:

14.1 the defendant agreed that the concept constituted confidential information; and

14.2 the defendant would not use the concept, directly or indirectly, without the consent of the plaintiff.

15. In the premises, the plaintiff and the defendant concluded an agreement on the terms recorded in paragraphs 14.1 and 14.2 above ("*the agreement*").'

[21] The plaintiff's pleaded case was thus that there was: (a) an oral acceptance on behalf of the defendant that the concept was disclosed in confidence and constituted confidential information (para 13); and, (b) a tacit undertaking that the concept constituted confidential information (para 14). In both instances, so it is alleged, the concept would not be used by the defendant without the consent of the plaintiff. Facially, paragraphs 13 and 14 of the plaintiff's pleaded case appear incompatible. But assuming in the plaintiff's favour that it is not or that in due course such incompatibility can be overcome, the plaintiff alleges in paragraph 16 of its particulars of claim that '[t]he defendant has breached the agreement in that . . . on or about 1 June 2011, unlawfully using the concept without the consent of the plaintiff, it launched an event called *"BE THE COACH"* under its **Carling Black Label** trade mark'.

[22] The defendant's plea in answer to those allegations is:

'3.1 The plaintiff, represented by Jed Webber ("Webber"), and Rob Fleming ("Fleming"), an employee of the defendant, engaged in email correspondence during the course of July and August 2006, a copy of which is attached marked "P1".

3.2 During the course of that exchange, the plaintiff provided an "executive summary" relating to the *Fan's Challenge Sport* concept (the "concept") to the defendant in the absence of

any undertaking by the defendant to maintain the alleged confidentiality of the concept. The executive summary is an attachment to the email exchange attached as P1.'

The exchange of emails relied on by the defendant makes interesting reading. On 12 July 2006 Jed Webber on behalf of the plaintiff wrote to Rob Fleming, the sponsorship manager of the defendant:

'Further to our conversation earlier today I have attached an NDA [non disclosure agreement] for you to consider. It is a standard NDA to protect both parties which should enable us to enter into candid discussion.

. . .

If the NDA is acceptable to you I will forward an executive summary highlighting the essence of the Concept and I look forward to discussing the way forward. . . .'

On 26 July Mr Fleming replied:

'I am not happy to sign a cont[r]act that prevents me from making use of an activity that I might have been exposed to/thought of etc etc. it is too restrictive.

SAB is a company with high ethical standards and one that you can trust.'

Undaunted, on 28 July Mr Webber wrote:

'. . . we fully understand SABMiller's position, but you need to appreciate our position too in that we are discussing and divulging very sensitive Intellectual Property . . .

We are happy to send you a two page summary for you to consider before any form of NDA is signed. We have utmost respect for SABMiller, your good standing as a company and global brand, but feel that it is reasonable as well as good business practice to be able to expect at least some sort of written undertaking that what we divulge and discuss remains highly confidential, from the perspective of both parties.'

On 31 July 2006 Mr Webber despatched the executive summary to Mr Fleming. After receipt of the executive summary on 21 August 2006, Mr Fleming wrote:

'Thanks for the mail. After reading your exec summary, I still don't believe there is a need to me to sign confidentiality contracts. It looks like an interesting concept but I certainly don't want to make any binding commitments right now.'

What those emails reveal is that Mr Webber appears to have disclosed the executive summary in the face of a refusal by Mr Fleming to sign a confidentiality undertaking.

[23] Further, in his answering affidavit in opposition to the application for security, Mr Webber stated:

'21.8 I was undeterred and determined to pitch the details of the concept to Mr Fleming. To this end I arranged to have a telephone conversation with him. I called Mr Fleming on 24 August 2006.

21.10 Mr Fleming reiterated that the plaintiff could trust the defendant. I apologized and stated that I was sure he understood that the plaintiff needed an assurance that the defendant would not use the concept without the plaintiff's permission. Mr Fleming gave me his assurance that the information that I was about to impart to him (the concept), would be received by him on a strictly private and confidential basis and would not be used without the consent of the plaintiff.'

But that, so contends the defendant, is not the case pleaded by the plaintiff in its particulars of claim. The defendant asserts that if regard is had to the exchange of emails, by 24 August 2006, the concept had already been disclosed by Mr Webber to Mr Fleming. Accordingly, so the contention proceeds, the case asserted under oath in this application is at odds with the plaintiff's pleaded case and, in addition, the plaintiff's pleaded case is not supported by the emails. It is, inter alia, for these reasons that the defendant denies the existence of the agreement as alleged by the plaintiff.

[24] Moreover, the defendant pleads[24] that the information comprising the fans challenge concept was disclosed in a patent application filed in terms of the Patent Co-operation Treaty (PCT) and assigned patent number PCT/US01/25784 (the PCT Patent). In dealing with this defence, Mr Webber stated in his answering affidavit: 'I deny the existence of the alleged patent or that it was public knowledge or public property or that it was in the public domain'. The priority date of the PCT patent is 28 August 2000. It bears an international publication date of 7 March 2002. According to the defendant the concept was thus available internationally. Moreover, South Africa is one of the National Designated States in the PCT patent. In terms of s 43B of the Patents Act 57 of 1978, 'an International Application designating the Republic shall be

[24] In that regard the defendant's plea reads:

'6.1 The defendant denies that Boost Sports International Limited was at any time the owner of the rights in the concept.

6.2 The defendant pleads that the concept was in the public domain prior to the date on which the executive summary relating to the concept was first provided to the defendant and was not therefore proprietary to the plaintiff or its purported predecessors in title, or to any person at that date.

In support of the aforegoing, the defendant will rely on the disclosures in PCT patent application WO 02/19206 published in March 2002, a copy of which is attached marked "P2".'

deemed to be an application for a patent lodged at the patent office in terms of this Act.' It is therefore clear according to the defendant that the plaintiff's concept was neither unique nor confidential as at the date on which the plaintiff alleges that the parties entered into a confidentiality regime in respect of the concept.

[25] It remains to add that the plaintiff has dismally failed to show that an order compelling it to furnish security will have the effect of it being forced to terminate its action. The lack of candour by the plaintiff's shareholders, who are funding the plaintiff's litigation but are unwilling to assist it in putting up security for the defendant's costs, is telling. It is not in dispute that the plaintiff does not trade and that it has no assets. Moreover, it will not be in a position to meet an adverse costs order should one ultimately be granted against it. Of the plaintiff`s four shareholders, two are professionals – one is an architect and the other a legal advisor. Of the remaining two, one is an entrepreneur and the other an estate agent. They claim not to have the resources to furnish any security (irrespective of the amount) for costs. The picture that emerges is that although these shareholders are funding the litigation, they are doing so in a manner that allows them to hide behind the corporate veil of the plaintiff. No evidence has been adduced by them that there has been an attempt to raise funds to put up security for the respondent's costs, but that they have been unable to do so. That reticence to take the court into their confidence should inexorably lead to the inference that the shareholders, who authorised the litigation on behalf of the plaintiff, impecunious as it was, are shielding behind an empty shell in order to avoid liability for costs.[25]

[26] In *MTN Service Provider* para 20, Brand JA pointed out that:

'One of the very mischiefs s 13 is intended to curb, is that those who stand to benefit from successful litigation by a plaintiff company will be prepared to finance the company's own litigation, but will shield behind its corporate identity when it is ordered to pay the successful defendant's costs. A plaintiff company that seeks to rely on the probability that a security order will exclude it from the court, must therefore adduce evidence that it will be unable to furnish

[25] *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* [2008] 4 All SA 50 (SCA) para 15.

security; not only from its own resources, but also from outside sources such as shareholders or creditors (see eg *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)* 1997 (4) SA 908 (W) 920G-J; *Keary Developments* at 540f-j; *Shepstone & Wylie* at 1047A-B; *Giddey NO* at paras 30, 33 and 34).'

Notwithstanding the obsolescence of s 13, that mischief remains.

[27] In the language of *Lombard* (at 877), when a company has everything to gain and nothing to lose, it would be putting a premium upon vexatious and speculative actions if such practice (namely, compelling security) were not adopted. In *Re Alluvial Creek Ltd* 1929 CPD 532 at 535, Gardiner J said in the context of a punitive costs order: 'Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.'

[28] It follows, for the reasons given, that there is no warrant for interfering on appeal with the discretion exercised by the high court (as to which see *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC)) in ordering the plaintiff to furnish security for the costs of the proceedings instituted by it against the defendant.

[29] In the result the appeal must fail and it is dismissed with costs, including those consequent upon the employment of two counsel.

_____
V M Ponnan
Judge of Appeal

_____
B H Mbha
Judge of Appeal

APPEARANCES:

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