THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 649/2010

In the matter between:

EXPLOITATIE- EN BELEGGINGSMAATSCHAPPIJ

ARGONAUTEN 11 B.V. **First Appellant**

ELIZABETH CORNELIA MARIA HONIG **Second Appellant**

and

GEORGE NICOLAAS HONIG **Respondent**

Neutral citation: *Exploitatie- en Beleggingsmaatschappij v Honig* (649/2010) [2011] ZASCA 182 (30 September 2011)

Coram: Mthiyane, Van Heerden, Bosielo and Leach JJA and Meer AJA

Heard: 13 September 2011

Delivered: 30 September 2011

Summary: Practice ─ security for costs ─ respondent seeking additional security after appellants had furnished security at the outset of proceedings ─ appellants' prospects of success in the main application somewhat bleak ─ that a factor to be taken into account in considering whether to order a peregrinus to furnish security.

ORDER

On appeal from: The Western Cape High Court, Cape Town (Davis J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

LEACH JA (Mthiyane, Van Heerden and Bosielo JJA and Meer AJA concurring)

[1] The first appellant is a private company incorporated in the Netherlands of which the second appellant is a director. The second appellant is the respondent's sister, and also resides in that country. The appellants were ordered by the Western Cape High Court, Cape Town (Davis J) to furnish security for the respondent's costs in sequestration proceedings they have instituted against him and his wife who are domiciled in the Western Cape. It is against this order that the appellants now appeal to this court with its leave, leave to appeal having been refused by the high court.

[2] On 25 April 2008, the appellants launched urgent motion proceedings in the high court seeking the sequestration of the respondent's estate. The respondent's wife was later joined as a party in those proceedings but played no part in the application for security, and I shall make no further mention of her.

[3] In order to establish their locus standi to seek a sequestration order, the appellants contended that as at March 2008 the respondent was indebted to the first appellant in an amount in Dutch guilders equivalent to about R181 million and to the second appellant in an amount of Dutch guilders equivalent to approximately R51 million. These sums they alleged were owed to them under two acknowledgements

of debt given by the respondent which, although due, remained unpaid.

[4] The appellants' application for a provisional sequestration order was set down as a matter of urgency for hearing on 13 May 2008. Hearing of this, the respondent took immediate steps to oppose the granting of such an order. Not only did he file what he referred to as a 'preliminary affidavit' – in which he sought time to fully reply to the appellants' allegations before a sequestration order was considered – but on 12 May 2008 he filed a notice under Uniform rule 47 calling upon the appellants to furnish security for costs in an amount of R250 000.

[5] When the matter was called on 13 May 2008 the proceedings were postponed to 14 October 2008 by agreement between the parties. In addition, it was ordered that the respondent file his supplementary opposing affidavit by 7 July 2008 and the appellants their replying affidavits on or before 11 August 2008 (further directions relevant to the filing of affidavits in an application to strike out material from the appellants' papers need not be mentioned).

[6] The respondent's notice under Uniform rule 47 of 12 May 2008 stated that, if the appellants contested their liability to give security or refused to furnish security in the amount claimed (R250 000) or any amount fixed by the registrar, the respondent might apply to court for an order that such security be given. At that stage the appellants did not contest that they were obliged to provide security. Instead, on 28 July 2008 their attorneys provided a security undertaking in which they confirmed they were holding the amount of R154 400 in trust on behalf of the appellants and unconditionally and irrevocably agreed to pay the respondent any amount up to that sum which might become payable to him by the appellants in respect of any final costs order. The respondent was apparently satisfied by this at the time, and the question of security was left there.

[7] I revert to the progress of the sequestration proceedings. The respondent failed to file his answering affidavits by 7 July 2008 as had been agreed, and only did so on 27 August 2008. He blamed the delay, inter alia, on the appellants' failure to expeditiously furnish security. The rights or wrongs of this need not be examined for present purposes. What must be mentioned is that the appellants, in turn, were tardy

and by the time of the postponed hearing on 14 October 2008, ie some six weeks after the respondent had filed his answering papers, they had still not filed their replying affidavits. This led to the application being postponed, once more by agreement, for hearing on 18 February 2009. However, the appellants only filed their replying affidavits on 3 February 2009 and, two weeks later on the date of the postponed hearing, they indicated that they were still not ready to proceed and were considering filing additional papers. This led to a further postponement by agreement, on this occasion for a period of seven months to 2 November 2009. At the same time the respondent was granted leave to file supplementary answering affidavits by 30 April 2009 and the appellants directed to deliver any supplementary replying papers by 30 June 2000. Although no costs orders had been made in respect of the postponements of 30 May 2008 and 14 October 2008, the appellants were ordered to pay the costs occasioned by the postponement on this occasion.

[8]. Following this, both sides filed further affidavits although, once again, neither did so within the time constraints of the order of 18 February 2009. The bulk of the papers was due largely to the respondent disputing the appellants' claims against him. He alleged that their claims under the acknowledgements of debt had prescribed. The appellants adopted the contrary view. Both sides were supported by experts in Dutch law. It is unnecessary to detail the dispute for present purposes; suffice it to say that it was correctly conceded by counsel for the appellants that the dispute was genuine and bona fide.

[9] In any event, the papers on which the question of the respondent's sequestration fell to be determined were only finally placed before court in July 2009, and had swelled considerably since the appellants had provided security for costs a year before. At about that stage the respondent changed attorneys and, presumably as a result of the escalation of costs over the previous year, his new attorneys decided that the security already provided was insufficient. Accordingly, on 21 September 2009, the respondent served a further rule 47 notice on the appellants calling for additional security in a sum of R962 200. The appellants immediately and indignantly responded that they had already furnished security, that the respondents were not entitled to demand further security and that the amount demanded was 'ludicrous'. Undeterred, the respondent launched a formal application under rule 47

on 29 October 2009 seeking an order for additional security. This was just four days before the main application was due to be heard.

[10] On the date of the hearing on 2 November 2009, the sequestration proceedings were again postponed by agreement, this time to 16 March 2010. Presumably this was in part due to the pending rule 47 application to which the appellants had not yet filed answering papers; but importantly it was also because the parties were in the throes of settlement negotiations. This probably explains why it was only almost 4 months later, on 25 February 2010, that the appellants filed their answering affidavit in the security application. The respondent lodged his replying affidavit on 16 March 2010, the date of the postponed hearing, when the question of security alone was argued before Davis J. Two days later, on 18 March 2010, the learned judge issued an order that the appellants provide additional security for the respondent's costs 'in an amount and in such form as may be determined by the registrar' within five days of security being so determined, and staying the sequestration application pending the additional security being furnished. It is against this order that the appellants now appeal.

[11] This is a convenient stage to raise the issue of the respondent's alleged indebtedness to the appellants. Sequestration proceedings are designed to bring about a *concursus creditorem* to ensure an equal distribution between creditors, and are inappropriate to resolve a dispute as to the existence or otherwise of a debt. Consequently, where there is a genuine and bona fide dispute as to whether a respondent in sequestration proceedings is indebted to the applicant (as in this case), the court should as a general rule dismiss the application. This is the so-called '*Badenhorst rule*'. Named after the decision in *Badenhorst v Northern Construction Enterprises Ltd,*[1] this principle was reaffirmed by this court in *Kalil v Decotex (Pty) Ltd & another*[2] and applies equally in both winding up and sequestration proceedings.[3] It is a rule of long standing and good sense and is not likely to be departed from in circumstances such as the present. On this basis alone, the appellants may well face grave difficulty in obtaining a sequestration order

1 *Badenhorst v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (T) at 347-8.
2 *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 980B.
3 See eg *Sonnenburg McLouglin Inc v Spiro* 2004 (1) SA 90 (C) at 96B-C and *Meskin Insolvency Law* (1990) para 2.1.5.

against the respondent, as their counsel correctly conceded.

[12] Unfortunately neither the parties nor the learned judge took this into account. If they had, it may well have been possible to deal with the sequestration application on this limited issue alone rather than embarking upon an interlocutory skirmish about security for costs, a skirmish which must have grossly exacerbated the costs of both sides, especially with the matter coming to this court on appeal. Be that as it may, the *Badenhorst* rule is not inflexible and, indeed, was not applied in *Kalil v Decotex*[4] and there can be no guarantee that the appellants will fail in the main application on that score alone. Nevertheless it does make their prospects of successfully obtaining a sequestration order somewhat bleak ─ I put it no higher than that ─ which is a material factor to which I shall return in due course.

[13] Counsel for the appellants contended that the high court ought to have dismissed the application for security due to the respondent's unduly delay in bringing it. He initially presented this in relation to three different periods: (a) from July 2008 to July 2009 when the respondent's new attorneys were appointed; (b) from then until 29 October 2009 when the security application was launched; and (c) from that date until the application was heard in March 2010. Counsel refined this argument by contending in respect of period (a) that the application ought to have been brought by 14 October 2008 when the sequestration proceedings were postponed for hearing in February 2009. In the alternative he argued that in respect of period (b) there had been an undue delay of more than a month from 21 September 2009 when the respondent had served his further rule 47 notice until the application for security was launched on 29 October 2009. In the further alternative he argued in respect of period (c) that once the proceedings were postponed on 2 November 2009, there had been no reason to delay the security application until the date of the postponed hearing in March 2010 and that it could have been enrolled for an earlier hearing and determined well before the main application.

[14] The difficulty I have with this argument is that it was not foreshadowed in the appellants' affidavits. All that the appellants alleged was that the respondent 'is not entitled to seek security for costs at such a late stage of the proceedings'. While as a

4 At 980H-I.

general rule a party is expected to apply expeditiously for security under rule 47 (which the respondent did in his first security notice), a party is entitled to seek additional security at any stage, although an unreasonable delay in doing so may be decisive in the exercise of the court's discretion. The appellants' allegation was therefore not merely argumentative but wrong. In addition, in motion proceedings the affidavits serve as both the pleadings and evidence relevant to the issues between the parties, and a party can only be expected to deal with averments raised by the other side and not with allegations possibly anticipated but which are not made.[5] Had the appellants raised the alleged delays and their contention that the court should decline to deal with the matter as a result, the respondent may well have offered a perfectly acceptable explanation. Without the respondent having being called upon to do so, it would not be proper to decide the application against him by having regard to an issue that he was not called upon to meet.

[15] In any event, on the facts that are disclosed there does not appear to have been any undue delay:

(a) In respect of the first alleged delay, the postponement on 14 October 2008 was less than three months after the original security of R154 400 had been provided. It was also before the appellants had even filed their replying affidavits which were only delivered on 3 February 2009. There is no reason to think that the security already provided had been exhausted by October 2008 or that the appellant required additional security at this early stage of the proceedings.

(b) There is no explanation for the delay between the respondent giving his rule 47 notice calling for further security on 21 September 2009 and the launching of the application for such security, but the respondent had not been called on to provide one. It may well be that this delay was caused by the settlement negotiations which were underway when the applications were postponed on 2 November 2009, but that is a matter of speculation. However the delay was no more than a month and that, in itself, does not seem to be any good reason to deny the respondent security to which he would otherwise be entitled.

(c) In regard to the contention that the security application should have been heard at some stage after the postponement on 2 November 2009, it is common cause that both the security application and the sequestration proceedings were

5 Cf *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 37H-J.

postponed to 16 March 2010 by agreement and as a matter of convenience as Davis J, who was to hear both applications, was steeped in the matter. And importantly, the postponement was due in part to allow the parties to attempt to settle. I can think of nothing more likely to jeopardise settlement negotiations than the respondent promptly insisting upon disposing of the application for security for costs. Moreover the appellants themselves only filed their answering affidavits in the security application on 25 February 2010, almost three months after the application for security had been launched. In these circumstances it hardly lies in the mouth of the appellants to complain of any undue delay.

[16] In the light of all these considerations, there is no merit in the appellants' contention that the application for security should have been refused by reason of any undue delay on the part of the respondent. I therefore turn to the further issues raised.

[17] As was correctly conceded by counsel for the appellants, where in ongoing litigation a party seeks security additional to that already provided, regard may be had not only to prospective costs but to those already incurred.[6] The respondent explained that he had already paid his previous attorneys more than R1 million for opposing the sequestration proceedings and two other legal proceedings brought against him by the second appellant or entities under her control, although he was unable to say what portion of that sum related solely to the sequestration application as the attorneys had not accounted to him. However the sum he had paid did not include a further R270 000 which his first attorneys were seeking to recover from him, being the fee charged by the expert they had employed to testify on the issue of prescription in Dutch law. In addition, after taking over the sequestration proceedings in mid-2009, by 22 September 2009 his new attorneys had already charged an amount excess of R148 000 for their services; and would of course charge further for their services as the litigation progressed. In these circumstances the security provided by the appellants at the outset of proceedings is clearly adequate.

[18] The appellants sought to avoid the general rule of practice that a peregrinus

6 Cf *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990 (4) SA 196 (C) at 206D-207A and *Cooper & 'n ander NNO v Mutual & Federal Versekeringsmaatskappy Bpk* 2002 (2) SA 863 (O) at 875B-876D.

should provide security for an incola's costs by relying on the judgment in this court in *Magida v Minister of Police*,[7] in which an impecunious peregrinus was excused from providing security, and making the bald and unsubstantiated averment that the appellants '. . . will be unable to furnish security for costs, due to the (respondent) failing to honour his debts towards them the (appellants) are hardly in a position to finance their own costs . . .'. However the appellants' case on this issue was ambivalent. While pleading poverty, on the one hand, they alleged, on the other, that the respondent would have no difficulty in recovering a costs order by suing them in Europe. Of course the appellants cannot have it both ways. If their financial status was relevant to the question of security it was incumbent upon them to take the court into their confidence and make sufficient disclosure of their assets and liabilities to enable the court to make a proper assessment thereof in the exercise of its discretion. In the case of the first appellant, a private company, this is generally done by disclosing its current balance sheet. This the appellants did not do. In these circumstances and in the light of the appellants' allegation that any costs order would be recoverable by way of litigation abroad, it must be accepted that the financial status of the appellants is in itself no reason to refuse security. This distinguishes this case from the decision in *Magida* relied upon by the appellants in which the fact that the peregrinus was indigent was a material consideration taken into account.

[19] As against that, the fact that the respondent will have to proceed against the appellants abroad if he obtains a costs order in his favour, with the associated uncertainty and inconvenience that would entail – and it is his undisputed allegation that it would be substantially more expensive to do so than litigating in this country – is one of the fundamental reasons why a peregrinus should provide security. In these circumstances it is not surprising that the high court exercised its discretion not to absolve the appellants from providing security. And it must be remembered that in adjudicating on whether to order security for costs a court exercises a narrow or strict discretion[8] with which a court of appeal will only interfere if the court below failed to exercise such discretion judicially or did so on an incorrect factual finding or

7 *Magida v Minister of Police* 1987 (1) SA 1 (A).
8 *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) pars 20-23.

on the basis of wrong legal principles.[9]

[20] Of course, as already mentioned, the high court failed to take any account of the difficulty the appellants face by reason of the *Badenhorst* principle. But if anything it is factor which operates in favour of the respondent. Although there are authorities to the effect that a court will not enquire into the merits of the main dispute in the exercise of its discretion as to security for costs,[10] like all rules of practice that rule should not be seen to be wholly inflexible. In *Zietsman v Electronic Media Network* 2008 (4) SA 1 (SCA), albeit in considering an appeal against an order of security made by the Commissioner of Patents ─ who under s 17(2)(b) of the Patents Act 57 of 1978 is entitled to have regard to the prospects of success of a party in considering whether security should be furnished ─ the court was influenced largely by the fact that the respondents had not disclosed their defence. In this regard Streicher JA said at 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.'

[21] In the present case, too, it is not necessary to deal with the merits of the dispute between the parties in the main application. But even without doing so, in the light of the *Badenhorst* principle the appellants clearly face a considerable hurdle and the prospects of their success in the main application appear to be bleak as already mentioned. That being the case, there is a distinct possibility of the appellants being ordered to pay the respondent's costs in the sequestration application, a factor which makes it all the more important for the respondent to be secured.

[22] Although not taken into account by the high court, this factor would undoubtedly have reinforced its decision had it been. Moreover, the appellants have failed to establish any error of fact or law on the part of the high court which justifies

9 See *Giddey NO* paras 19 and 22.
10 *Arkell and Douglas v Berold* 1922 CPD 198, *Alexander v Jokl & others* 1948 (3) SA 269 (W) at 281, *Santam Insurance Co Ltd v Korste* 1962 (4) SA 53 (E) at 56B-C and *Fourie v Ratefo* 1972 (1) SA 252 (O) at 256C-D.

interference with its discretion. In these circumstances there is no room for a finding that the order of the high court should be set aside.

[23] The appeal is dismissed with costs.

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L E Leach
Judge of Appeal

APPEARANCES:

For Appellant:	R Engela Instructed by: Ward Ward & Pienaar, Cape Town Symington & De Kok, Bloemfontein
For Respondent:	R Le Breton Instructed by: Francis Thompson & Aspden, Cape Town Claude Reid Inc, Bloemfontein