SIEMENS TELECOMMUNICATIONS (PTY) LTD v DATAGENICS (PTY) LTD 2013 (1) SA 65 (GNP) D

Citation	2013 (1) SA 65 (GNP)
Case No	19253/2006
Court	North Gauteng High Court, Pretoria
Judge	Fabricius J
Heard	September 3, 2012
Judgment	September 11, 2012
Counsel	*HM Viljoen* for the applicant/defendant. *Z Schoeman* for the respondent/plaintiff.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Company — Proceedings by and against — Security for costs — Application for E furnishing of — Approach of court — While 1973 Companies Act made provision for furnishing of security for costs, 2008 Act containing no equivalent provision — Court's inherent power to regulate its own process not allowing it to extend common-law grounds on which security for costs could be granted — Incola company could not be compelled to give security for costs — Uniform Rules, rule 47(1) and Constitution, s 173. F

Headnote : Kopnota

The defendant company launched an application for security for costs after having filed notice that it would do so under rule 47(1) of the Uniform Rules of Court.
Held, that rule 47 did not create any rights for an applicant for security for costs, G but was solely and purely procedural in kind, providing only for the procedure to be adopted if a party was 'entitled' to security for costs. (Paragraph [5] at 68H – I.)
Held, further, that s 13 the Companies Act 61 of 1973 provided the court with a discretion to order a plaintiff company to furnish security for costs if there was reason to believe that the company would be unable to pay the defendant's H costs. Since the new Companies Act 71 of 2008 (which repealed the 1973 Act) made no provision for security for costs by companies, the common law still applied. (Paragraphs [7] – [9] at 70H – 71H.)
Held, further, that the high court's inherent power under s 173 of the Constitution to regulate its own process did not include a power to extend the common-law grounds on which security for costs could be granted. It did I not enable a court, under the mantle of regulating its own process, to impair the existing substantive rights of a litigant. Under the common law an incola plaintiff company had an unimpaired substantive right to pursue legal proceedings, and an incola company could not be compelled to give security for costs. Thus, even if a company embarked upon vexatious and/or speculative action, it could not be ordered to provide security for costs. (Paragraph [9] at 72C – F and 73B – D.) Application dismissed. J

Cases Considered

A **Annotations:**

Case law

*Giddey NO v JC Barnard and Partners*2007 (5) SA 525 (CC) (2007 (2) BCLR 125; [2006] ZACC 13): referred to

*Haitas and Others v Port Wild Props 12 (Pty) Ltd*2011 (5) SA 562 (GSJ): B criticised

Liquidator, Salisbury Meat Market Ltd v Perelson 1924 WLD 104: considered

Lombard v Lombardy Hotel Co Ltd (in Liquidation) 1911 TPD 866: referred to

*Magida v Minister of Police*1987 (1) SA 1 (A): discussed

Mears v The Pretoria Estate and Market Company Ltd 1907 TPD 951: C referred to

Ngwenda Gold (Pty) Ltd v Precious Prospect Trading 80 (Pty) Ltd (GSJ case No 2011/31664, 14 December 2011): doubted

*S v Thebus and Another*2003 (6) SA 505 (CC) (2003 (2) SACR 319; 2003 (10) BCLR 1100): referred to

Western Assurance Co v Caldwell's Trustee 1918 AD 262: dictum at 273 in fin D applied

Witham v Venables (1828) 1 Menzies 291: considered.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa, 1996, s 173: see *Juta's Statutes of South Africa 2011/12* vol 5 at 1-51

E The Companies Act 61 of 1973, s 13: see *Juta's Statutes of South Africa 2011/12* vol 2 at 1-209.

Rules Considered

Rules of court

The Uniform Rules of Court, rule 47(1): see Juta's *The Supreme Court Act* F *and the Magistrates' Courts Act and Rules* (2012) at 72.

Case Information

An application for security for costs (dismissed).

HM Viljoen for the applicant/defendant.

Z Schoeman for the respondent/plaintiff.

G *Cur adv vult.*

Postea (September 11).

Judgment

Fabricius J:

H [1] The applicant in this application for security for costs applied for an order that the plaintiff in the proceedings furnish it with security for costs in the amount of R250 000, alternatively in the amount to be determined by the registrar of this court. It also asked that the relevant action between them be stayed pending compliance with that order. Should the plaintiff fail to comply with such order within 20 days of date thereof, the I defendant would be granted leave to apply on the same papers, as amplified as may be necessary, for the dismissal of the plaintiff's action. A costs order was also sought.

[2] On 3 September 2012 I dismissed the application with costs. I will refer to the parties as they are in the main action. Defendant launched J the application after having filed a notice that it would do so in terms of

rule 47(1) of the Uniform Rules of Court. The relevant part of rule 47 in A the present context reads as follows:

> ''(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.' B

In that notice the grounds upon which the mentioned security was claimed were said to be the following:

> [2.1] There was reason to believe that the plaintiff would be unable to pay the defendant's costs if the defendant was successful in its opposition of this matter, by reason of the fact that a letter dated C 24 November 2011, setting out the defendant's concerns that it was not certain whether plaintiff was carrying on any business, and was operational, and whether they in fact were in a position to make payment of any adverse costs order, remained unanswered. It was said that, unless proof of plaintiff's ability to make payment of any costs orders that might arise was furnished D within five days, this would be deemed to be an admission on plaintiff's part that it would be unable to make payment of any subsequent costs order. No other grounds were relied upon in the relevant notice. However, in the founding affidavit defendant's attorney went a lot further. It was said that the trial had E been set down for 15 October 2012. Trial had previously been set down for 19 February 2011, but was postponed at the instance of the plaintiff who was ordered to pay the wasted costs. Plaintiff then made an application for leave to appeal against the costs order, which application was dismissed, not surprisingly. F Pursuant thereto, four bills of costs were drawn, and taxed on 2 September 2011. Payment thereof was demanded, but not received timeously, and accordingly a writ of execution was issued and sent for service on 15 September 2011. The address indicated for the service of the writ of execution was the address that appeared on the face of the summons issued by plaintiff. G The return of service indicated that the relevant premises were 'vacant and locked'. Thereafter plaintiff was requested to furnish its latest business address. No response to these letters was received. Thereafter the mentioned rule 47(1) notice was delivered. Plaintiff did not respond to this notice, but towards the end H of September 2011 forwarded proof of payment by the plaintiff of the major part of the amount due under the taxed costs order. Thereafter, on 24 November 2011, defendant wrote a further letter to plaintiff expressing its concerns again, and calling upon them to provide proof that it would be in a financial position to make payment of any costs order that may ultimately be made. I Again no response was received to this letter, and accordingly a second notice in terms of rule 47(1) was delivered on 20 January 2012. I have mentioned its terms.
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> [2.2] Defendant's attorney contended in the founding affidavit that, whilst plaintiff may have previously (and belatedly) made payment of three bills of costs, it did not follow that plaintiff had the J

Fabricius J

A financial ability to make payment of further, or more substantial, costs orders that might be against it. The defendant was accordingly justifiably concerned that plaintiff would be unable to make payment of any subsequent costs order. It was submitted that the amount of R250 000 was realistic and accurate, in B the light of the estimate of the likely costs that would be incurred until the finalisation of the trial in October 2012. Defendant was also concerned that plaintiff was no longer in business, and was no longer operational. In that context one would have expected of the plaintiff to have furnished the defendant with a copy of its latest financial statements and/or bank statements, so it was said.

C [3] In its answering and opposing affidavit it was said on behalf of plaintiff that the wasted costs, to which the defendant had been entitled, had in fact been paid. There was no other due and payable adverse costs order that had not already been paid in full by plaintiff. The original rule 47(1) notice of 19 September 2011 had been superseded by a new rule D 47(1) notice of 20 January 2012, and plaintiff was still in business and operational. The sheriff's return of service that I have mentioned was inaccurate, inasmuch as it did not refer to the actual premises at which plaintiff operated its business. It merely referred to a corner address. A party to litigation was not entitled to demand proof of ability to pay E costs, while at the same time deeming the other party, without further ado, to be unable to make such payment in the future, should such proof not be presented. It was denied that there was any justification for the order sought, and further that the grounds relied upon were in any event insufficient to warrant such an order. It was also alleged that the F prospects of success for plaintiff's claim were good, inasmuch as it was an action based on goods sold and delivered, which the defendant had simply failed to pay for. Defendant's estimate of the amount required was disputed, and it was also alleged that defendant was in any event not entitled to plaintiff's financial documents at that stage of the proceedings.

G [4] The parties to the action are two companies conducting their business within the jurisdiction of this court. They are what the Roman and Roman-Dutch authorities refer to as 'incolae'. The question that obviously arises, or ought to have arisen, is that: on which basis in law a company within the jurisdiction of the court can be ordered to provide H security for costs of a subsequent action in which it may not be successful?

[5] It is clear that rule 47 does not create any rights for an applicant for security for costs. It is solely and purely procedural in kind. It only provides for the procedure to be adopted if a party is 'entitled' to security I for costs. The question must therefore always be: what is the source of such entitlement? Is it the common law, or does a particular statute provide for such entitlement? As far as the procedural aspects are concerned see Van Loggerenberg & Farlam *Erasmus: Superior Court Practice* at B1-340. In this judgment I will only concern myself with the entitlement of a party to demand security for costs and, because that is J the issue before me, the right of an incola defendant company to

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demand security from an incola plaintiff company. Obviously the same A rules will apply if their roles are reversed.

[6] Since 212 AD, and by way of the enactment of Emperor Antoninus Magnus (Caracalla) the difference between the *ius civile*, which applied to Roman citizens, and the *ius gentium*, which was that branch of Roman B private law which was available to both Roman citizens and peregrini (foreigners), was abolished, and Roman law never developed a *ius peregrinum.* Foreigners were thus persons outside of Roman territory. A brief overview is given by Joubert JA in *Magida v Minister of Police*1987 (1) SA 1 (A) at 7 – 8. Roman-Dutch law however developed so that it became possible to distinguish between an incola, and also a domiciled C foreigner and non-domiciled foreigner. It is also interesting that the Roman-Dutch jurisdiction called the domiciled foreigners 'incolae', *inwonende vreemdelingen*, whereas the non-domiciled foreigners were *extranei*, *exteri*, *buitenlanders* and *uitlanders*. There was therefore a distinction which later developed between natural-born inhabitants D domiciled in their own native region, domiciled foreigners and non-domiciled foreigners. A non-domiciled foreigner who initiated civil proceedings against an incola could, in the discretion of the court, be compelled to furnish security for payment of the costs of his adversary, and for payment of that for which his adversary may be awarded in reconvention. E (See *Magida* at 9 – 10). It is noteworthy that the court had a discretion in that context. This discretion, it seems to me, had mainly to be exercised in the context of an incola claiming security for his costs against a non-domiciled foreigner, inasmuch as he did not have a right flowing from substantive law. It was a question of practice in the Dutch courts that the judge would hold an enquiry to investigate the matter fully. My F brief

reference to this interesting history is intended to convey that, even in the case of a peregrinus, a discretionary order was made which took all relevant facts into account, and notions of fairness and equity to both parties. This included the fact that a peregrinus should not on account of his impecuniosity be deprived of prosecuting his action against an G incola. He could also not be compelled to provide security beyond his means. I mention this only in the present context to indicate that the position between two litigants within the jurisdiction of the court was substantially different. Under the common law an incola company could not be compelled to give security for costs at all. In *Witham v Venables* (1828) 1 Menzies 291 the following was said: H

> '(N)o person, who is either *civis 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, that every person, who is neither *civis municeps, nec incola*, may, as plaintiff be called on to give security for costs, unless he prove that he is possesed of immovable I property situated within the colony.'

This dictum clearly indicates that incolae cannot be compelled to give security for costs. A peregrinus could under certain circumstances, however, be so called upon. In *Liquidator, Salisbury Meat Market Ltd v Perelson* 1924 WLD 104 the following was said by De Waal J at 107: J

Fabricius J

> A '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, 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. I know of only B one exception to the general rule, namely, that an unrehabilitated insolvent who sues independently of his trustee in regard to the general administration of his estate may be ordered to give security for costs.'

In that context reference was then made to *Mears v The Pretoria Estate and Market Company Ltd* 1907 TPD 951. Prior to that decision the C majority of the court in *Lombard v Lombardy Hotel Co Ltd (in Liquidation)* 1911 TPD 866 at 877 and 878 held that according to the common law an incola cannot demand security for costs from another incola. This was therefore the common law, and it is abundantly clear that it was essentially based on the philosophy, if I can call it that, that '(t)he courts D of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action'. See *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 273 in fin. I refer to this dictum at this stage because of the argument that is often raised, namely, that accepting that no general right to security exists in the present context, a court may well order that E security be furnished, on the basis that certain proceedings are used either for an ulterior motive, disclose no cause of action or real defence, or are otherwise vexatious and frivolous. I am of the view, however, that that type of investigation is part of a court's inherent power and duty to protect and regulate its own procedure. This is, however, a totally F different enquiry from what the common law is in the context of the provision of security by one incola to another. This common-law power and duty have now been given constitutional recognition by s 173 of the Constitution (inherent power of courts to regulate their own process). In my view it is important that one does not confuse the two different concepts: the one dealing with security for costs in the context of resident G litigants (incolae), the other dealing with a court's inherent power and duty to regulate its own procedure. I have referred to some of the reasons which make it necessary that the court has and exercises such power where necessary.

[7] In 1926 the common law was altered by the introduction of the H Companies Act 46 of 1926, and in particular s 216 thereof, which stated that, where a limited company was plaintiff or applicant in any legal proceedings, a court that had jurisdiction in the matter could, at any stage, if it appeared by credible testimony that there was reason to believe that the company, or, if the company was in liquidation, the I liquidator thereof, would be unable to pay the costs of the defendant or respondent if successful in its defence, require sufficient security be given for these costs, and could stay all proceedings until security was given. This Act was repealed by the Companies Act 61 of 1973. In particular s 13 of that Act provided that, where a limited company was the

plaintiff or applicant in any legal proceedings, a court could at any stage order it J to furnish security for costs if there was reason to believe that the

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Fabricius J

company, or, if the company was being wound up, its liquidator, would A be unable to pay the costs of the defendant or respondent if successful in its defence, and could stay all proceedings until security was given. Under both of these Acts, one must note, claims in reconvention were excluded. As I have said, s 13 conferred a discretion upon a court to order a payment of security for costs under certain circumstances. This B obviously constituted an exception to the ordinary common-law rule that plaintiffs who reside in South Africa may institute actions in our courts without furnishing security for costs. See also s 29 of the Supreme Court Act 59 of 1959 which provides as follows:

> 'When a person residing within the Republic is a plaintiff in civil C proceedings in the court of any division, the area of jurisdiction whereof does not extend to the place where he resides, he shall not by reason only of that fact be required to give security for costs in those proceedings.'

[8] The Constitutional Court, in the context of s 13, has held that its D main purpose was to ensure that companies, which were unlikely to be able to pay costs, and 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 expenses. The courts, in that context, had to balance a potential injustice to a plaintiff if it was E prevented from pursuing a legitimate claim as 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 claim, and yet 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. See *Giddey NO v JC Barnard and Partners* F 2007 (5) SA 525 (CC) (2007 (2) BCLR 125; [2006] ZACC 13) at 530.

[9] The Companies Act of 1973 was repealed by the new Companies Act 71 of 2008. This new Companies Act does not provide for security for costs by companies at all. In my view this means that the common law G must apply, and I have said what it is in the present context. Whether or not the omission to provide such security in the new Act was an oversight by parliament, or whether it was done because of the provisions of s 34 of the Constitution which reaffirms the common law relating to access to courts, may be an interesting debate, but it is of no consequence. The common law applies. H

It must however be remembered that s 8 of the Close Corporations Act 69 of 1984, which is not affected by s 224(2) read with sch 3 of the Companies Act, 2008, provides for security for costs in legal proceedings by corporations under certain circumstances. In an as yet unpublished article (it is to be published in the *THRHR* November 2012 edition, titled I 'Security for costs by local companies: Back to 1909 in the Transvaal, or not?') the authors, advocates Van Loggerenberg & Malan of the Pretoria Bar, submit that in the interpretation of this section the court should be guided by the principles laid down under s 13 of the Companies Act of 1973. In my view this is sound. I must also note that rule 62 of the magistrates' courts rules, which is modelled on rule 47 of the Uniform J

Fabricius J

A Rules of Court, deals only with procedural aspects of applications for security for costs. I am also of the view in that context that the common law prevails as regards incola companies. In the magistrates' courts therefore, in civil proceedings an incola company cannot be compelled to give security for costs. The void left by the omission of s 13 in the new B Companies Act of 2008, according to the aforementioned authors, ought to be addressed by way of legislative invention. I agree with that proposal and its reasoning. There have been suggestions in a recent case that the court ought to 'develop the common-law' in this context, but such suggestions are without any merit.

C I need to make brief reference to a recent judgment of this court, in *Haitas and Others v Port Wild Props 12 (Pty) Ltd*2011 (5) SA 562 (GSJ). In that decision the learned judge relied on the aforementioned provision of s 173 of the Constitution to order a plaintiff company to file security for costs. As I have said, I do not believe that that section can be properly D applied to the topic of the furnishing of security, and I therefore do not agree with the learned judge's reasoning. The question really is whether a high court's inherent power under the Constitution to regulate its own process, taking into account the interests of justice, includes a power to extend the common-law grounds on which security for costs could be E granted. In my view the answer must be in the negative. Under its constitutional power to regulate its own process, a high court does not have the power to create substantive law. The creation of substantive law is reserved for its inherent power to develop the common law. Section 173 of the Constitution does not enable a court, under the mantle F of regulating its own process, to impair the existing substantive rights of a litigant. Under the common law, as I have said, an incola plaintiff company has an unimpaired substantive right to pursue legal proceedings.

G A mere reference to the development of the common law in this context would also be of no assistance. Before that exercise can be done, a number of questions must first be asked and answered. The first enquiry would be, whether, given the objectives of s 39 (2) of the Constitution (interpretation and development of the common law), the existing common law should be developed beyond existing precedent. If this H leads to a negative answer, that would be the end of the enquiry. If it leads to a positive answer, the next enquiry would be how the development should occur, and whether a court should embark on that exercise. The need to develop the common law under s 39 (2) could, it has been held, arise in at least two instances. The first would be when a rule of the I common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision, but may fall short of its merit, report and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective J normative value system' found in the Constitution. See *S v Thebus and*

Fabricius J

*Another*2003 (6) SA 505 (CC) (2003 (2) SACR 319; 2003 (10) BCLR 1100) A at 524 – 529.

The *Haitas* decision, therefore, does not deal with the development of the common law in the present context at all. The same reference to 'development of the common-law' was made in the unreported judgment B of L van der Merwe AJ in *Ngwenda Gold (Pty) Ltd v Precious Prospect Trading 80 (Pty) Ltd* (GSJ case No 2011/31664, 14 December 2011). The learned acting judge seems to suggest that the common law may require 'something more than mere insolvency or impecuniosity' in the context of incola plaintiffs or applicants (para 19). If this were intended to be a reinterpretation of the common law, I do not agree with C it. In common law an incola company could not be compelled to give security for costs, and no exception to this rule existed. Thus, even if a company embarked upon vexatious and/or speculative action, it could not be ordered to provide security for costs. This was also the view of the learned authors of the aforementioned article to be published in *THRHR*, and I agree with them. D

[10] Because of the common law as I have stated it in the present context, it was my view that the applicant had not made out a case for the relief sought, and accordingly I made the order that I did.

Applicant's/Defendant's Attorneys: *Jacobson & Levy Inc*. E

Respondent's/Plaintiff's Attorneys: *GP Venter Attorneys*.
