REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO. 7036/98
AND CASE NO. 7632/98

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE FIRST APPLICANT

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA SECOND APPLICANT

and

EAST COAST SHIPPING (PTY) LTD RESPONDENT

J U D G M E N T

McCALL J.

The applicants have brought two applications in terms of section 13 of the Companies Act, No. 61 of 1973, for the provision of security by the respondent for the costs which the applicants will incur in two actions brought in this Court by the respondent against the applicants. Since the two actions are between the same parties and the issues which arise with regard to the provision of security are the same in both applications, it was agreed that they should be argued together. This judgment, therefore, deals with the relief claimed in both actions.

On the 27th March 1998 the second applicant, through its Department of Trade and

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Industry, seized certain tyres, acting in terms of section 3A(3) of the Import and Export Control Act, No. 45 of 1963. The respondent brought an application under Case No. 4498/98, in this Court, to set aside the said seizure. By notice dated 19 May 1998 the said tyres were detained by the first applicant in terms of section 88(1)(a) read with section 87(1) of the Customs and Excise Act, No. 91 of 1964. The respondent brought an application under Case No. 4759/98 to set aside the said detention. By notice dated the 24th June 1998 the Controller of Customs and Excise seized the said tyres, purporting to act in terms of section 88(1)(c) read with section 87 of the Customs and Excise Act. The respondent gave notice in terms of section 89(1) of the Customs and Excise Act on the 30th June 1998 and thereafter, in terms of section 89(3) of the Customs and Excise Act, instituted action under Case No. 7036/98, for the release of the said tyres and for damages in the sum of R200 000,00 per month from the date of seizure on 25 June 1998 to the date of release of the tyres.

In terms of three notices dated 19 May 1998 the Controller of Customs and Excise detained certain tyres in containers in terms of section 88(1)(a) of the Customs and Excise Act. By notice dated the 17th June 1998, the contents of the said containers were seized by the Controller in terms of section 88(1)(c) of the Customs and Excise Act. The respondent gave notice in terms of section 89(1) of the Customs and Excise Act on 30th June 1998 and instituted action in terms of section 89(3) of the said Act, under Case No. 7632/98, for release of the said tyres, and for an order that the applicants do all such things as may be necessary to procure the release of all and any liens over the tyres and, in particular, that they pay any demurrage claimed in connection with such liens.

The applicants have defended both of the said actions and now bring these applications for security for their costs in the said actions.

Before the decision of the Supreme Court of Appeal in ***Shepstone & Wylie and Others v Geyser N.O.*** 1998 (3) SA 1036 (SCA) it had been held in the Transvaal Provincial Division, in a line of cases commencing with ***Fraser v Lampert N.O.*** 1951 (4) SA 110 (T) at 115B, and by Thring J in the Cape Provincial Division in ***Henry v RE Designs CC*** 1998 (2) SA 502 (C) at 508-510, that a defendant or respondent should not be deprived of the benefit of the provisions in the Companies Act, relating to the provision of security for costs, unless "special circumstances" existed.

In the ***Shepstone & Wylie case*** (supra) the Supreme Court of Appeal refused to follow the "special circumstances" line of cases. Hefer JA, in delivering the judgment of the court said, at 1045I-1046D:-

> "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 case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security. (Compare *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)* 1997 (4) SA 908 (W) at A 919G--H; *Wallace NO v Rooibos Tea Control Board* 1989 (1) SA 137 (C) at 144B--D.) I prefer the approach in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 (CA) at 540a-b where Peter Gibson LJ said:
> 'The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.'

> These are probably the 'considerations of equity and fairness' mentioned in *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14D--F in regard to the consideration of an application for security for costs against a *peregrinus* , and which should, in my judgment, also prevail in an application under s 13."

Even before the ***Shepstone & Wylie case*** (supra), Baker J. in ***Wallace N.O. v Rooibos Tea Control Board*** (supra) had taken the view, in the Cape Provincial Division, that the court had a wide discretion when deciding whether or not security should be ordered. Furthermore, in ***Lappeman Diamond Cutting Works (Pty) Ltd v MI Group (Pty) Ltd (No. 1)*** (supra) Joffe J in the Witwatersrand Local Division, took the view that as a consequence of the enactment of the interim Constitution, the Full Bench authority in the Transvaal requiring the existence of "special circumstances" was not binding and that the discretion contained in S.13 is to be exercised "on the basis of a wide discretion without any predisposition for the granting of security" (919J-920A).

In the light of these decisions, I find it strange that the applicants' Heads of Argument in this case conclude with the statement that: "In the premises there are no special circumstances", actually citing the ***Shepstone & Wylie case*** (supra) and the case of ***Fedgen Insurance Co. Ltd v Border Bag Manufacturing (Pty) Ltd and Another*** 1995 (4) SA at 358F-G, in which Labe J at 358F, finding himself bound by the Full Bench decisions in the Transvaal, said that:-

> "....it is nevertheless clear that the first respondent in the present application must be able at least to point such special circumstances as will justify this Court in refusing the present application."

That case was decided before the ***Shepstone & Wylie case*** (supra) and is

inconsistent with the finding of Hefer JA in regard to the "special circumstances" line of cases in the Transvaal. Moreover, in ***Magida v Minister of Police*** (supra) Joubert JA, in considering the nature of the discretion to be exercised by a court when deciding whether a *peregrinus* ought to be ordered to furnish security for costs, had said, at 14D-E:-

> "Notwithstanding the obsolescence of the *cautio juratoria* as security on oath we must bear in mind that our common law principles which underlie its granting are still applicable in our modern practice when a peregrinus in his answering affidavit deposes to his inability to furnish security for costs owing to his *impecuniosity*, since it must be left to the judicial discretion of the Court by having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both the *incola* and the peregrinus to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs. Nor is there any justification for requiring the Court to exercise its discretion in favour of a *peregrinus* only sparingly."

Some of the "special circumstances" cases may, however, still be relevant, to the extent that they suggest what sort of considerations may properly be taken into account by a court in exercising its discretion to grant or refuse an application for security for costs.

In the present case, counsel for the respondent conceded, in their Heads of Argument, and in court, that the respondent would be unable to pay the applicants' costs if they successfully defended the actions brought by the respondent and it was therefore common cause that the only issue to be decided was whether the court should exercise its discretion against the applicants. However, counsel were not in agreement as to the considerations which should influence the Court in arriving at its decision.

Counsel for the applicants contended that, on the basis of indisputable facts, the applicants had a good defence - that it had "excellent prospects of success", and that the respondent was "the architect of its own misfortune". Counsel for the respondent, on the other hand, submitted that it had been held in a series of decisions that the court could not and should not decide the merits and that, save in cases of obvious vexatiousness (which vexatiousness would itself be a separate ground for the provision of security) it should not enquire into the merits or take them into consideration in deciding how to exercise its discretion. Counsel for the applicants submitted that when Hefer JA in the ***Shenstone P. Wallis*** [illegible] 1045I-J, referred to "all the relevant features" this included the merits or relative strengths and weaknesses of the claim and the defence.

It is necessary, therefore, to consider the decisions relevant to the question as to whether the Court can take into consideration the merits of the legal proceedings for the costs of which security is sought.

In ***Brollomer Tin Exploration Co. Ltd v Kameel Tin Proprietary Co., Ltd*** 1928 TPD 600, an application by a defendant, in an action instituted against it by a company, for security for costs, De Waal JP said, at 601-602:-

> "A large volume of evidence has been placed before us on affidavit by the respondent company seeking to justify its refusal to find security on the ground that the defence of the defendant in the action is not *bona fide*; but it seems to me that all reference to the *bona fides*, or otherwise, of the defendant company is somewhat irrelevant, because if the Court is satisfied that the plaintiff company possesses no assets, or insufficient assets, it seems to me it should exercise its discretion in favour of ordering the plaintiff to give security, as it is manifestly undesirable, if not impossible, for the Court at this stage of the proceedings to express any opinion as to the *bona fides* or otherwise

of the defence."

In ***Highlands North Investments Etc., Co. (Pty) Ltd v Land Values Ltd*** 1931 WLD 102 ,Tindall J in considering an application for the provision by a company of security for costs, said, at 105:-

> "In my opinion the Court is entitled to consider the nature of the particular case. Of course it was not intended that in an application for security the Court should enquire fully into the merits and form an opinion of the plaintiff's prospects of success. But it seems to me that the nature of the claim is not irrelevant : e.g. if the plaintiff company had a liquid claim, the Court would not order security on the mere statement by the defendant that he had entered appearance and that he denied liability."

In ***Turkstra v Goldberg N.O.*** 1946 TPD 535, Price J said, at 538:-

> "It is clear that the Court cannot enter into the merits of the dispute between the parties in the sense that it can express any opinion as to who is likely to succeed in the action, that I accept as axiomatic. The Court is, however, entitled to take into account, in my opinion, the kind of action which is being brought against the person who is claiming security, in order to decide whether it is right in all the circumstances of the case to order the Company to furnish security."

In ***Fraser v Lampert N.O.*** (supra) at 115B, Malan J said:-

> "In the exercise of the discretion regard should be had to the nature of the claim and some enquiry should be directed to the merits of the dispute. (Highlands North Investment Co. (Pty.) Ltd v Land Values Ltd., 1931 W.L.D. 102.) In the present case, *prima facie* at least, it appears that the liquidator will be confronted with a formidable task in endeavouring to establish the allegations upon which the claim is based."

In commenting on this passage, Ramsbottom J said in ***Kruger Stores and Another v Kopman and Another*** 1957 (1) SA 645 (W) at 649B-D:-

> "I think it is quite clear that the Court in *Fraser v Lampert, N.O., supra,*

> did not intend to overrule or cut down what had been said by the Provincial Division in the earlier case. I think that all the Court intended to do in *Fraser v Lampert, N.O.*, was to draw attention to the *Highlands North case, supra,* and to indicate that there might be circumstances arising out of the facts of the dispute which might lead the Court to refuse ordering security to be given as was done in the *Highlands North Investment Company case, supra*."

After citing part of the judgment of Tindall J in the ***Highlands North Investment Company case*** (supra) at 105, he continued, at 649I-650A:-

> "Now the circumstances of the present case are totally different. The matter being by application, I have in fact all the evidence before me, and the applicant's claim is certainly not of the kind referred to by Tindall J., in the passage which I have just quoted."

It would appear that Ramsbottom J was, in this passage, referring to the nature of the claim and not to its merits.

In ***Beaton v SA Mining Supplies (Pty) Ltd*** 1957 (2) SA 436 (W), in considering an application for security against a company which was the plaintiff in an action, Kuper J said, at 440D:-

> "I cannot and do not express any view as to the likelihood of the respondent's success in the action, but it is sufficient to say that the action is neither vexatious nor hopeless."

The action was one for payment of monies alleged to be due because of the conduct of the applicant and another in their management of the business of the respondent. After citing the remarks of Tindall J in the ***Highlands North Investment Co. case*** (supra) Kuper J continued, at 440H:-

> "Having regard therefore to the position occupied by the applicant at the time the causes of action arose, to the allegation that the respondent is insolvent only because of the misconduct of the applicant and to the nature of the claims, it is my view that special circumstances do exist

> as a result whereof I should exercise my discretion against the applicant and refuse to order the respondent to furnish security for the costs of the action."

Finally, in ***Vanda v Mbuqe and Mbuqe*** 1993 (4) SA 93 (TkGD), an application for an order that a peregrinus plaintiff furnish security for costs, White J said at 96C:-

> "The Court will, however, when exercising its aforesaid discretion, not inquire into the merits of the dispute - ..... "

There is, therefore, ample authority for the proposition that in deciding whether to order that a plaintiff, or applicant, company should be ordered to furnish security for the costs of the proceedings, the merits of the dispute are irrelevant and the court cannot and should not enquire into them or express any opinion on the prospects of success, save, possibly, if it is apparent that the plaintiff's action is not *bona fide* or is "vexatious" or "hopeless". See Kuper J in ***Beaton's case*** (supra) at 440. See also ***Fourie v Ratefo*** 1972 (1) SA 252 (O) at 256B-D and ***Agro Drip (Pty) Ltd v Fedgen Insurance Co. Ltd*** 1998 (1) SA 182 (W) at 187. The reasons for the court's refusal to enter into the merits are obvious. Where the proceedings brought by the company are by way of action, there will be no evidence before the court to enable it to assess the merits of the claim and the defence. Where the proceedings are by way of application, there may be disputes of fact which cannot be resolved on the papers. I do not believe, therefore, that the reference in the ***Shepstone & Wylie case*** (supra) to "all the relevant features" was intended to extend the enquiry to the merits of the dispute. See also ***Alexander v Jokl and Another*** 1948 (3) SA 269 (W) at 281 on the question of relevance.

In the present case it would be impossible for me, simply by reading the plaintiff's particulars of claim and the defendants' pleas in the two actions to form any opinion

of the prospect of success or of the merits of the respective claims and the defences. Faced with this obvious difficulty, counsel for the applicants sought to incorporate into these proceedings the papers in the aforementioned applications brought by the respondent in the present applications to set aside the seizure and detention of its tyres and asked this Court to arrive at a decision on the merits of the respondent's actions based on certain evidence in those applications and, in particular, certain facts which, it is claimed, are common cause. Indeed, counsel for the applicants went so far as to hand in their Heads of Argument in Case No. 4494/98 and asked that they be taken into consideration in assessing the merits of the respondent's actions. In that application the question arose as to whether the goods should be sold and the money should take the place of the goods under seizure. In their Heads of Argument counsel said:-

> "On behalf of Trade and Industry we will contend that it is the exclusive power of the Criminal Court, after hearing all the relevant evidence, to decide whether the specific goods should be forfeited to the State as envisaged by Section 4(2) of the Import and Export Control Act. This can only be done once all the evidence, both on the merits and on the issue of forfeiture has been presented."

This, it seems to me, is an indication of an acceptance by the applicants that the issues which arise in the actions can only be determined after all of the relevant evidence has been heard. Moreover, as counsel for the respondent in this application correctly pointed out, if the applicants contended that the actions were not *bona fide* or that they were hopeless or vexatious they should have brought the applications for security on those grounds, which they did not do. This is hardly surprising, as the respondents had no alternative but to institute the actions in terms of section 89(3) of the Customs and Excise Act to prevent forfeiture of its goods, and their conduct in doing so can, in the circumstances, hardly be described as *mala fide*

or vexatious. It may well be, as contended by the applicants, that the respondent may have difficulty in justifying some of its conduct which gave rise to the seizure of the tyres, but the outcome of its actions may nevertheless depend upon the Court's findings on certain disputed facts, such as whether or not the respondent was acting as an agent. Furthermore as the respondent's counsel pointed out, the respondent could be partially successful and partly unsuccessful in the two actions to recover the tyres.

I do not intend, therefore, to accept the invitation to assess the merits of the respondent's actions, either by referring to the papers filed in the respondent's aforesaid applications, or at all.

On the other hand, there is ample authority for the proposition that in coming to a decision as to how it should exercise its discretion to order or refuse security for costs, the court may take into consideration the nature of the claim and the defence. Counsel for the respondent relied heavily on the following passage from the judgment of Price J in the ***Turkstra case*** (supra) at 538-539:-

> "In a case like the present, where the Company has been deprived of all its assets by the action of the person who is being sued, if the Court were to order security for the costs of the action it would really mean that the more complete the alleged unlawful disposition by the Company, through the action of the person who is being sued, the more difficult would it be to enforce the rights of the Company and to protect the creditors. Any officer in control of the Company could use his position to divest the Company of all its assets and then, when he was threatened with an action, he could demand security, and the Company, through the action of such officer, having been completely impoverished by the transfer of its assets to him, would be unable to proceed with the action to set aside the unlawful dispositions. This would be a very undesirable position."

In ***Fedgen Insurance Co. Ltd v Border Bag Manufacturing (Pty) Ltd*** (supra) Labe J said, at 359C-D:-

> "The nature of the claim becomes relevant when by some pre-existing act or omission the defendant has brought about the position that the plaintiff has been deprived of its assets." Referring to the ***Turkstra and the Beaton cases*** (supra).

See also ***Trust Bank van Afrika Bpk v Lief and Another*** 1963 (4) SA 752 (T) at 755A.

In the present case the very seizure by the applicants of the tyres in question has had two important consequences which, in my view, tip the scale of fairness and equity heavily in favour of the respondent.

The first is that it stands to reason that, as a result of that seizure of the tyres, the respondent's ability to find security in the sum of R500 000,00 has been seriously affected. Although the applicants do not admit the respondent's allegation that the value of the tyres confiscated is in the region of R6½million, they do concede, in their replying affidavit, that:-

> "(I)t is without a doubt that the Respondent has definitely suffered a financial blow in respect of these tyre casings which had been seized by the Applicant."

It would, in my judgment, be unjust to allow the applicants to rely upon the respondent's financial embarrassment, caused as it is by the applicants' own acts of seizure of the tyres, to support their contention that the respondent should provide security because it will be unable to pay the applicants' costs.

A further consequence of the seizure by the applicants of the tyres, in the exercise

of the draconian powers conferred upon them in terms of the two relevant Acts is that the respondent was forced to come to court by instituting the relevant actions within the very limited time constraints imposed by section 89 of the Customs and Excise Act. The whole process of seizing goods without an order of court, authorised by the provisions of that Act, and then forcing the person affected to institute proceedings to claim them back, whilst it may very well be a necessary tool in the hands of customs and excise officials, smacks of self-help and expropriation without compensation and deprives the possessor of the goods of the right to obtain a spoliation order under the common law. To add to the powers already conferred upon the State by the Act in question the right to demand security for the actions which the respondent was compelled to bring would, in my view, be unconscionable. In this regard the respondent, in support of its contentions, sought to invoke certain of the provisions in the Constitution. In my view the unfairness which would result were an order for the provision of security for the applicants' costs to be made proclaims itself, and I do not find it necessary in addition to invoke the aid of the Constitution in order to decide which way I should exercise my discretion in this matter.

There are, however, further factors which convince me that the injustice to the respondent which will result if it is prevented from pursuing its claims because it is unable to furnish security, outweighs any injustice which the State might suffer if the respondent's claims were to fail.

The first is that it is common cause that a large portion of the tyres in Lindsay's Warehouse have been sold, by agreement between the parties, and the proceeds thereof are being kept in trust pending the outcome of the actions instituted by the

respondent. The respondent says, in its answering affidavit, that they have been sold for approximately R1 million. Although the applicants, in reply, claim that they have no knowledge of this allegation, there is no reason to disbelieve it. This means that, if the respondent loses the actions, the applicants, representing the State, will be able to have recourse to the funds held in trust, which should more than cover the costs in respect of which security is sought.

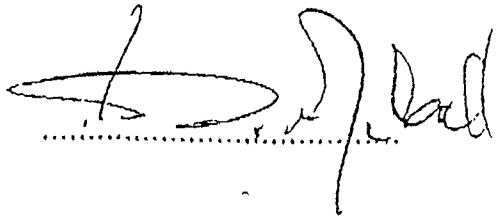
The second matter is that, according to the respondent, the value of the balance of the tyres is some R5½ million. If the respondent loses the actions, these tyres will be forfeited to the State. Although it may be argued that the State is, in any event, on the applicants' version, entitled to the forfeiture to it of the tyres in question, the fact of the matter is that if the respondent loses its actions, the State will not be out of pocket, in as much as the amount which will accrue to it from the sale of the tyres will far exceed the costs incurred by it.

Finally, there is, in my view, merit in the respondent's contention that the applicants could and should have had the issues determined before now by instituting criminal proceedings. If the applicants are so confident about the merits of their case, I would have thought that criminal proceedings would have been instituted by now, bearing in mind that more than two years has elapsed since the tyres were seized. However, should the issues, or some of them, be determined against the respondent, in criminal proceedings, before the respondent's actions come to trial, then there would be nothing to prevent the applicants from approaching the Court, on the same papers, supplemented as far as may be necessary, for an order for the provision of security for the costs of the actions. I propose to make an order in that regard.

There is one other argument which the applicant raised, namely, that the directors of the respondent, if they really have confidence in the respondent's case, will, or should, be able to muster the necessary finances to provide the required security. The applicants relied in this regard on what was said in the ***Shepstone & Wylie case*** (supra) at 1047A-B. In my view the probabilities are that, having regard to the huge losses which the respondent will suffer if its actions fail, the respondent will have explored every possibility in an attempt to raise the necessary funds to provide the security rather than take the risk of having its actions dismissed.

Taking all of the relevant circumstances into consideration, therefore, I am of the view that the two applications for the provision of security should be refused. The parties agreed that the successful party should be awarded the costs occasioned by the employment of two counsel.

It is accordingly ordered that the applications in Case No. 7036/98 and 7632/98 are dismissed, with costs, such costs to include the costs consequent upon the employment by the respondent of two counsel. Should there be a change of circumstances, favouring an order for the provision of security before the actions instituted by the respondent come to trial, the applicants are authorised to renew their applications on the same papers, supplemented as far as may be necessary.



Argument heard on :	26 April 2000
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Counsel for the respondent :	K.J. Kemp SC
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Instructed by :	Pearce Lister & Company
Judgment handed down on :	4 July 2000