IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number:10743/2020

(1) REPORTABLE: ~~NO~~/YES
(2) OF INTEREST TO OTHER JUDGES: ~~NO~~/YES
(3) REVISED. ~~NO~~/YES

08 MARCH 2022

DATE SIGNATURE

In the matter between:

MOHAU AND KGAUGELO CC **Applicant**

and

THE COMMISSIONER FOR SOUTH AFRICAN

REVENUE SERVICE **Respondent**

JUDGMEMT

MAKHOBA J

1. On the 16th November 2018, 7th November 2019 and 12 December 2019 respectively the South African Revenue Service (SARS) seized motor vehicles together with the consignments of fuel which were transported by the said motor vehicles. The motor vehicles and the consignments of fuel belongs to the applicant. The respondent alleges that the applicant utilised the motor vehicles to import the fuel consignments into South Africa in breach of and or in non-compliance with the applicable provisions of the Customs and Exercise Act 91 of 1964 hereinafter referred to as *"the CEA"*.

2. The applicant instituted the review application to set aside the seizure notices. The respondent (SARS) is opposing the review application.

3. On the 19th November 2020 the respondent served a notice in terms of Rule 47(1) of the Uniform Rules of Court on the applicant's attorney. In this notice by the respondent to the applicant. The applicant is called upon to furnish SARS with security for its costs in the review application in the amount of R750 000 00 (seven hundred and fifty thousand) or such amount as may be fixed by the registrar.

4. Thus the issue before this court is whether the applicant is liable to furnish security, the amount of such security is to be determined by the registrar. The respondent for its request for security for costs relies on section 8 of the Close Corporation Act 69 of 1984 and the common law. The onus of establishing that the applicant should be ordered to furnish security for costs rests on the respondent.

5. The following are grounds upon which the application is opposed by the respondent

5.1 As a general rule courts should not lightly award costs against an unsuccessful litigant in proceedings against the state. When departing from the general rule a court should set out reasons that are carefully articulated and convincing.

5.2 The application for security for costs is launched as an abuse of process.

5.3 In terms of rules 6(11) and 6(15) of the rules of court the applicant delivered a notice in terms of which it seeks the striking out of certain averments contained in the affidavit of the respondent.

5.4 The applicant did not furnish any explanation why it delayed in bringing this application.

5.5 The mere inability of an applicant who is an *incola* to satisfy a potential costs order against it, is sufficient to justify an order that such an applicant furnishes security for the potential costs of its opponent.

5.6 To order the provision of security for costs would unjustifiably limit applicant's rights to have the dispute resolved by the courts.

5.7 SARS in the review application has not filed an answering affidavit and the applicant has not had the opportunity to file a replying

affidavit. The applicant submits that this is relevant consideration in favour of not granting the application to furnish security for costs.

6. The respondent's counsel addressed all the questions raised above by the applicant. Counsel for the respondent refutes all the points raised by the applicant against the granting of the order sought by the respondent.

7. Section 8 of the Close Corporation Act provides as follows:
"when a corporation in any legal proceedings is a plaintiff or applicant or brings a counterclaim or counterapplication, the court concerned may at any time during the proceedings if it appears that there is reason to believe that the corporation or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant in reconvention, if he or she is successful in his or her defence, require security to be given for those costs and may stay all proceedings till the security is given".

8. It is not in dispute that the provisions of section 8 are similar to the provisions of section 13 of the repealed Companies Act, 61 of 1974. The legal principles laid down under section 13 therefore continue to apply *mutatis mutandis* to the provisions of section 8.

9. The merits of the dispute are irrelevant for purpose of the court deciding on whether or not to order the furnishing of security unless if the application is not *bona fide,* is vexatious or hopeless.[1]

[1] Erasmus: Superior Court Practice RS 15, 2020

10. Our common law also provides for the security for costs where the action or application is vexatious, reckless or amounts to an abuse of the process of the court.[2]

11. The court has inherent jurisdiction to prevent abuse of its own process and will grant an application for security of costs if the incola's action can be found to be reckless and vexatious.[3]

12. 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.
(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike any pleadings filed by the party in default, or make such other order as to it may seem meet."

13. The respondent (SARS) provides the following facts in support of its application against the applicant:

13.1 The applicant is not registered for value added tax (VAT).

13.2 The applicant is not registered for pay as you earn (PAYE).

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[2] D.Harms, Civil Procedure in the Superior Courts, B-340(1)
[3] MTN Service provider (Pty) Ltd v Afro Call (Pty) Ltd 2007 (6) SA 620 (SCA) at 625 A to D(paragraph)

13.3 For the tax years 2009 to 2019 the applicants submitted no income tax returns.

13.4 For the tax years 2018 and 2019 the applicant declared to SARS that it was dormant.

13.5 The applicant declared to SARS that it was not a party to any contract in terms of which it had undertaken to conduct any activity or hold any assets on behalf of another person.

13.6 Applicant declared that it owns no immovable property.

14. The basis of the application to strike out certain averments contained in the founding affidavit or respondent's affidavit is that the averments are either irrelevant, argumentative, speculative, abusive, scandalous defamatory, vexatious, subject to legal privilege or constitutes inadmissible hearsay.

15. In *Swissborough Diamond Mines (Ptd) Ltd and Others vs Government of the Republic of South Africa and Others*[4] the court referred to various decisions and re-emphasised that for the striking out of any matter in an affidavit which is scandalous, vexatious or irrelevant the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.

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[4] 1999 (2) SA 279 (T) at 336 J to 337 see also Beiriash v Wixley 1997 (3) SA 721 (SCA) at 733 B see also Tittys Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 368 F-G and Breedenkamp and Others v Standard Bank of South Africa Ltd and Another 2009 (S) SA 304 (GSJ) at paragraph 77

16. In my view the application to strike out by the applicant has no merit and it must fail.

17. I am satisfied that the documentary evidence relied upon by the respondent will not prejudice the applicant if it is admitted. Thus the court admits the evidence.

18. The court need not embark upon a detailed investigation of the merits of the case. In addition, there should not be a close investigation of the facts in issue in the action[5].

19. The applicant may produce its balance sheet or set of accounts to demonstrate its ability to pay the respondents legal costs[6]. However, this cannot be elevated to a rule[7].

20. I am of the view that the mere fact that the applicant in the review application failed to file the answering affidavit cannot jeopardize the respondent's application for security of cost because it does not prejudice the applicant in this application.

21. Furthermore, I am of view that the fact that the applicant failed to register for VAT, PAYE and failed to submit tax return leaves me with no option but to infer that the applicant might not be in a position to pay for its costs

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[5] Boost sports v SA Breweries 2015 (5) SA 38 (SCA) at paragraph 19 page 52

[6] Henry v R.E Designs CC 1998 (2) SA 502 (C) at 512D, ICC Car importers (Pty) Ltd v A Hartrodt SA Pty Ltd 2004 (4) SA 607 (W) at 611 H-I

[7] 2001 (2) SA 1086 (W) at 1071-1072

in the review application. This is exacerbated by the applicant's failure to produce a balance sheet even though an offer to provide security for cost was made but rejected by the respondent. Taking these factors holistically I am of the view that the respondent must succeed in its application against the applicant.

22. I, make the following order:

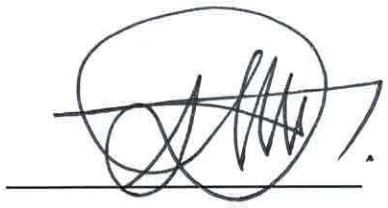
22.1 That the applicant furnishes security for the respondent's costs in the main application (instituted by the applicant under the above case number) the amount to be fixed by the registrar, within 10(ten) days of an order in terms of this interlocutory application.

22.2 That the main application be stayed until such time as the applicant furnishes security for the respondent's costs.

22.3 That in the event that the applicant fails to furnish the security for the respondent's costs within 10 (ten) days, the respondent be authorized to apply to court on the same papers, amplified as may be necessary for the dismissal of the main application.

22.4 Application to strike out is dismissed with costs.

22.5 Applicant to pay respondent's costs including the cost of two counsel.



D. MAKHOBA

JUDGE OF THE GAUTENG DIVISION PRETORIA

APPEARANCES:

For the applicant:	**Advocate T Barnard**
Instructed by:	**VFV Attorneys**
For the respondent:	**Advocate JA Meyer SC**
Instructed by:	**Macrobert Attorneys**
Date heard:	**25 January 2022**
Date of Judgment:	08 **March 2022**