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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO.: 13624/2022P

(1) REPORTABLE : YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES/NO

In the matter between:

SHAWN WILLIAMS N.O.

First Plaintiff

TEBOGO MORITIDI EUSTACE KWAPE N.O.

Second Plaintiff

and

ETHEKWINI MUNICIPALITY

First Defendant

ZIKHULISE GROUP (PTY) LTD

(Registration No.: 2016/087144/07)

Second Defendant

MS MABONG FLORA-JUNIOR MKHIZE

(Identity Number: 750406 0449 08 3)

Third Defendant

Heard on : 6 February 2026

Delivered on : 27 May 2026

JUDGMENT

LUTHULI AJ

INTRODUCTION

[1] This is an interlocutory application in terms of Section 8¹ of the Close Corporations Act, 1984 read with Rule 47² of the Uniform Rules of Court in which the First Defendant, eThekweni Municipality ("eThekweni"), seeks an order for security for costs against the First and Second Plaintiffs ("Plaintiffs / joint liquidators") who are joint liquidators of Zikhulise Cleaning Maintenance and Transport CC ("ZCMT") in the main action, wherein the joint liquidators seek judgment in the amount of R169,168,164.26 from the eThekweni for monies due and owing to ZCMT, but which were paid by eThekweni to the Second Defendant, Zikhulise Group (Pty) Ltd ("Zikhulise Group") instead, as a result of alleged fraud or misrepresentation. eThekweni also seeks an order for condonation for the late filing of the application.

¹ 8. **Security for costs in legal proceedings by corporations.** – When a corporation in any legal proceedings is a plaintiff or applicant or brings a counter-claim or counter-application, 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 costs of the defendant or respondent, or the defendant or respondent 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."

² (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 out any pleadings filed by the party in default, or make such other order as to it seem meet.'

[2] The First and Second Plaintiffs are the joint liquidators of ZCMT appointed on 06 September 2017. eThekwini awarded a construction contract for a housing project to ZMCT for which the latter undertook construction works and tendered invoices to the total amount claimed in the main action. Zikhulise Group, the Second Defendant, is a private company incorporated in March 2016. The Third Defendant is Ms Mabong Flora-Junior Mkhize ("Ms Mkhize"), the sole director of the Zikhulise Group and the sole member of ZMCT.

[3] eThekwini seeks security for costs from the Plaintiffs on the basis that the latter concedes that ZCMT is unable to pay its debts and, that its liabilities exceed its assets. At the hearing of the matter, I asked the parties to file further written submissions on the question whether an organ of state, like eThekwini, should be allowed to demand security for costs, in the absence of an allegation that the litigation is frivolous or vexatious or is brought for an ulterior purpose, in view of the obligations placed on organs of state by Section 7(2) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") to respect, protect, promote and fulfil the rights in the Bill of Rights, including the right of access to courts in section 34 of the Constitution? I am grateful to the parties for their efforts in preparing and filing the additional written submissions.

FACTUAL BACKGROUND

[4] ZCMT operated primarily as a construction entity and was awarded large contracts from public tenders for the construction of low-cost housing in numerous municipalities

in KwaZulu-Natal. On or about 25 February 2016, the South African Revenue Service ("SARS") brought an application for the winding up of ZCMT in the High Court, Pretoria under case number 14886/2016. When the winding up application was brought, ZCMT had already ceased to operate during 2015 due to its inability to procure confirmation of its tax compliance status in terms of Section 256 of the Tax Administration Act, 28 of 2011 due to its substantial outstanding tax debt.

[5] Due to the above tax and liquidation challenges, Ms Mkhize, the sole member of ZCMT, caused Zikhulise Group to be incorporated on 2 March 2016 for the purpose of carrying out the construction works of ZMCT. Contemporaneously, Ms Mkhize launched an application in the High Court, Pretoria under case number 18101/2016, on behalf of ZCMT for it to be placed under business rescue. That application was dismissed on 22 August 2017 and an order was granted placing ZCMT under provisional liquidation. It was placed under final winding up on 16 October 2020.

[6] Of particular importance is that eThekwini owed ZCMT monies in terms of various invoices tendered for works under the housing project(s), prompting Ms Mkhize to launch legal proceedings for the recovery of monies due on behalf of ZCMT under case number 8614/2012. Pursuant to the recovery proceedings, eThekwini entered into a settlement agreement with ZCMT which was made an order of court. The settlement agreement reads as follows in relevant part:

- "3. *The First Respondent shall pay the Applicant in full for all outstanding construction work already done by the Applicant in respect of the completed houses for the project subject to verification from the First*

Respondent's officials, Department of Human Settlements and the NHBRC.

4. *The Applicant shall relinquish its rights in and to the CIVILS CONTRACT for the project save for its claim to be paid all retention amounts due for work completed to date..."*

[7] Ms Mkhize, as the sole director of Zikhulise Group submitted some 29 invoices to eThekweni for payment, together with instructions to pay Zikhulise Group. The payments were authorized and approved by Ms Beryl Nozipho Ntombifuthi Khanyile, formerly head of Human Settlements. Evidently, these payments were made to Zikhulise Group and not to ZCMT as contemplated in the relevant portion of the settlement agreement indicated above.

[8] The payments were made between the period 22 January 2021 to 13 August 2021 to Zikhulise Group in the total amount of R169,168,164.26 after the effective date of liquidation of ZCMT, being 25 February 2016.

[9] eThekweni avers that Ms Mkhize represented to it that ZCMT, a close corporation was converted into a private company, namely Zikhulise Group and that is what informed the authorization and approval of the payments made to Zikhulise Group. The Plaintiffs' version is that Ms Khize completed the application to convert the close corporation to Zikhulise Cleaning Maintenance and Transport (Pty) Ltd ("ZCMT (Pty) Ltd"). The conversion was successful and ZCMT became ZCMT (Pty) Ltd. Zikhulise Group is a completely separate and distinct entity altogether, which was registered prior to the conversion of ZCMT to ZCMT (Pty) Ltd. In any event the conversion was later set aside by a court order on application brought by the Plaintiffs.

[10] Further, when Ms Mkhize applied to the Companies and Intellectual Property Commission (“CIPC”) for the conversion, SARS had already launched its winding-up proceedings and after Ms Mkhize had also launched her business rescue proceedings. At the time that the winding up order was granted, SARS and the court were unaware of the conversion. Equally, at the hearing of the winding up and the business rescue applications, Ms Mkhize did not disclose to the court that ZCMT had been converted to ZCMT (Pty) Ltd. Ms Mkhize also signed a declaration to the CIPC wherein she confirmed that there were no pending liquidation or business rescue proceedings against ZCMT.

[11] On 3 March 2016, the day after the registration of Zikhulise Group, one Ms Samantha Holland, the personal assistant to Ms Mkhize addressed a letter, to “*To whom it may concern*” indicating that Zikhulise Group has noted the provisions of Regulation 18 of the Companies Act, No 71 of 2008 and has now complied with the ruling and disbanded the close corporation and incorporated ZCMT (Pty) Ltd. A further letter on the letterhead of Russel James and Co Inc (“Russel James”) addressed to “*To whom it may concern*”, purportedly confirming that Russel James were the statutory appointed auditors of Zikhulise Group who also serve as its company secretary. The letter further confirmed that the close corporation was converted to a company, and that the director is Ms Mkhize. It later turned out that the original letter prepared by Russel James in October 2017 was manipulated by the removal of the registration number of the company under the entity name. This resulted in a tender for which ZCMT had submitted a bid being awarded to Zikhulise Group.

eThekwini's submissions

[12] eThekwini submitted that Plaintiffs admit that ZCMT in liquidation is insolvent and cannot pay its debts. They further urge the court to have regard to the following considerations in the exercise of its discretion, namely:

- (a) the action has effectively been brought on behalf of SARS which is not permissible regard being had to Section 41(1)(h)(vi) and 41(3) of the Constitution;
- (b) there is no evidence of fraud, corruption or collusion with regards to the payments made to Zikhulise Group. Employees of eThekwini were not aware of the liquidation of ZCMT and they *bona fide* believed that ZCMT had been converted into Zikhulise Group. The belief was occasioned by the deception by Ms Mkhize and given that this is a case based on fraud, it is the end of the matter;
- (c) the Plaintiffs rely upon one court order in their pleadings. The notion of some other court order is a fabrication, postulated in a desperate attempt to get over prescription (which is fatal to the plaintiffs);
- (d) the Plaintiffs curiously allege that there was a corrupt relationship between eThekwini and Ms Mkhize, including deficient work and squandering of funds, whilst on the other they seek to recover funds from eThekwini. If the funds are tainted, then on what lawful basis are the Plaintiffs claiming same?

- (e) Plaintiffs have failed to take any steps to source funds for security. For this proposition they rely on *MTS Service Provider (Pty) Ltd v Afro Call (Pty) Ltd*³. The fact that proved creditors could be called upon to make a contribution does not excuse the provision of security. For this proposition, eThekwini relies on *Trust Bank Van Afrika Bpk v Lief and Another*.⁴
- (f) Plaintiffs have not demonstrated unequivocally that they will not be able to pursue the litigation if security were awarded. It is an important principle of law that the consequence of one's inability to pursue a claim if security is awarded, is not, by itself, sufficient to justify the court refusing to exercise its discretion in favour of granting security. For this, eThekwini relies on *Giddey NO v JC Barnard and Partners*⁵;
- (g) the court considers whether the close corporation in liquidation has demonstrated that the order directing it to furnish security will deal a death blow to its action albeit that if it does have that effect it will not, in and of itself, be an overriding consideration or even a sufficient reason to refuse an application for security. For this eThekwini relies on *Fusion Properties 233 CC v Stellenbosch Municipality*⁶. In the present matter, according to eThekwini, Plaintiffs have not demonstrated that an order directing the payment of security for costs will bring an end to their action.

³ 2007 (6) SA 620 (SCA) at 626B-D.

⁴ 1963 (4) SA 752 at 757 C.

⁵ 2007 (5) SA 525 (CC) at para [29]; See also *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* [2008] 4 All SA 50 (SCA) at para [12].

⁶ *Fusion Properties 233 CC v Stellenbosch Municipality* (932/2019) [2021] ZASCA 10 (29 January 2021) at para 34.

Joint Liquidators' submissions

[13] The joint liquidators contend that the provisions of Section 8 of the Close Corporations Act require the court to enquire whether there is reason to believe that the liquidator(s) will be unable to pay the costs of the defendant if it is successful in its defence. They submit further that it must be accepted that where creditors who are liable to contribute to any shortfall in the insolvent estate are of such means that they are able to contribute to such shortfall as they are obliged to, there can be no "reason to believe" that the liquidators will be unable to make payment of a costs order if granted against them.

[14] The liquidators submit that in the present matter, SARS is a proved creditor, a liquidating creditor, and will be liable to make a contribution in terms of the law. They further state that the issue is not about prospects of contribution, but there is certainty that SARS could make such contribution, if required. They further state that SARS as the liquidating and proved creditor is in law obliged to make a contribution to any shortfall in the insolvent estate, if such arise.

[15] It is also contended on behalf of the Plaintiffs that eThekwini has not discharged the onus resting on it of proving that the Plaintiffs as joint liquidators will not be able to pay an adverse costs order. They state further that the court must consider fairness, justice, and prospects of success, and the fact that they are not vexatious litigants. It is particularly relevant, so argues the Plaintiffs, that the litigation involves serious questions of fraud, collusion, and unlawful payments involving public funds; and

requiring security for costs in those circumstances would effectively bar them from performing their statutory duties, to the prejudice of creditors.

[16] Plaintiffs contend that the payments made to Zikhulise Group were *sine causa* and did not discharge eThekwini's obligations towards ZCMT. They contend, in the alternative, that the payments constituted a collusive and fraudulent disposition, the disposition is void *ab initio* in terms of Section 341(2) of the Companies Act of 1973 and the full amount remains due and payable to ZCMT's insolvent estate.

[17] the liquidators argue, finally, that the litigation is pursued for the benefit of the general body of creditors, that no finding has been made that the action is vexatious, reckless or abusive and that an order for security for costs would, on the evidence, materially impede or stifle the prosecution of their claim against the eThekwini in the main action.

LEGAL PRINCIPLES GOVERNING SECURITY FOR COSTS

[18] Rules 47(1) deals with the procedure to be adopted whenever security for costs is required and does not itself deal with matters of substance.⁷ Section 8 of the Close Corporations Act, in substance mirrors s13 of the old Companies Act, 1973. Section 13 did not find its way into the new Companies Act, 2008 when the old Companies Act was repealed and substituted by the former. However, the jurisprudence that had

⁷ *D F Scott (EP)(Pty) Ltd v Golden Valley Supermarket 2002* (A) SA 297 (SCA); [2003] 3 All SA 1 (A) at para 9.

developed continues to offer useful guidance in the interpretation and application of s8 of the Close Corporations Act.

[19] In *Giddey NO v JC Barnard and Others*⁸ the Constitutional Court noted that '...the main purpose of s13 is to ensure that companies, who are 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. In the same decision the court stated that 'section 13 of the Companies Act confers a discretion upon courts to order the payment of security for costs by a plaintiff company if there is reason to believe that the company will be unable to pay costs of its opponent'.⁹

[20] Three principles have arisen prominently in relation to the courts exercise of discretion to award security for costs. First, a court seized with an application to compel a plaintiff or applicant to furnish security for costs retains an unfettered discretion. Second, the court needs to 'balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its costs in the litigation'. Third, the salutary purpose of s13 of the Companies Act is 'to deter would-be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects are poor'.¹⁰

⁸ See fn 5 above.

⁹ *Id.*, at para 6.

¹⁰ See *Fusion Properties* supra at fn 6 at para 24.

[21] An insolvent may be ordered to furnish security for the costs of an action brought by him but will not ordinarily be ordered to do so unless it is shown that his action is reckless and vexatious. The mere fact that he is insolvent and that the action is one which would ordinarily be brought by the creditors does not entitle the defendant to demand security for costs, nor is there a presumption that such action is vexatious. These matters, however, and the fact that there has been previous litigation on the same subject matter, are factors to be taken into account by the court in exercising its discretion.¹¹

[22] As a general rule, the mere inability of a plaintiff or applicant, as the case may be, who is an *incola*, to satisfy a potential costs order against him is insufficient in itself to justify an order that he furnish security for his opponent's costs. Something more is required. The court must be satisfied that the main application is vexatious or reckless or amounted to an abuse of the process of the court.¹² The court has an inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the process of the court,¹³ one of the ways of doing so is by ordering the vexatious litigant to furnish security for the costs of the other side. This power ought to be sparingly exercised and only in exceptional cases.¹⁴

[23] An action is vexatious if it is obviously unsustainable. While this must appear as a certainty in an application to dismiss or strike out a claim, in an application for the

¹¹ *Israel v Burger* 1961 (1) SA 827 (O).

¹² *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* (unreported, SCA case 20156/2014 (1 June 2015)), para [15].

¹³ *PriceWaterHouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) at 80H-J; *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning* 2012 (3) SA 128 (WCC) at 131H – 132D. *Belmont House (Pty) Ltd v Gore and Another* NNO 2011 (6) SA 173 (WCC).

¹⁴ *Zietsman v Electronic Media Network Ltd* 2008 (4) SA 1 (SCA) at 4E.

furnishing of security for costs the test is less stringent and other factors, which are irrelevant in an application for the dismissal of a claim, should also be taken into consideration. One such factor is the financial ability of the plaintiff to comply with an order to pay the defendant's costs of the action should it prove to be unsuccessful. In *Beinash v Wixley*¹⁵ it was said:

'What does constitute an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept "abuse of process". It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for purposes extraneous to that objective...'

DISCUSSION

[24] It is common cause that the joint liquidators pleaded in the main action that ZMCT is unable to pay its debts and that its liabilities exceed its assets. But is that the end of the matter? eThekwini contends that it is. They further argue that Plaintiffs have failed to take any steps to source funds for security. The fact that proved creditors could be called upon to make a contribution does not excuse the provision of security. For this proposition, eThekwini relies on *Trust Bank Van Afrika Bpk v Lief and Another*.

[25] *Trust Bank* appears to be clearly distinguishable on two grounds upon which the court relied for its conclusion:

¹⁵ 1997 (3) SA 721 (SCA) at 734F-G.

1. Firstly, the court said that creditors might withdraw their proved claims and thereafter cease to be liable for costs incurred after the withdrawal. There is no suggestion here that SARS, the only proved creditor, will or is likely to withdraw its proved claim;
2. Secondly, that there may be unreasonable and unpredictable delay in furnishing costs where so ordered. Once again, here there is only one proved creditor, SARS, and there is no suggestion on the papers that SARS would not be able to foot the bill should there be a shortfall or that there would be tardiness or delay.

[26] The Plaintiffs indicated that the fact that they are unable to pay their debts as a whole, does not mean that they are unable to pay eThekwini's costs of suit. They submitted that they are still in the process of collecting from various sources and as such, the Plaintiffs foresee that they will be in a position to pay costs in the event of them being unsuccessful in their claim against eThekwini. They further submitted that if there is a shortfall in the estate as a result of legal costs, the proved creditors (including SARS) will be liable to make a contribution.

[27] This question of the duty of creditors to make a contribution arose and was dealt with aptly in *FirstRand Bank Limited v Master of the High Court (Pretoria) and Others*¹⁶, where the court said:

¹⁶ *FirstRand Bank Limited v Master of the High Court (Pretoria) and Others* (1120/19) [2021] ZASCA 33; 2021 (4) SA 115 (SCA) (7 April 2021) ("*FirstRand Bank*")

[37] The next question is what happens if the only other creditor (in addition to the secured creditors who rely solely on their security) is a petitioning creditor who has not proved its claim such as in this case? Then s 14(3) comes into play. When there is no free residue or it is insufficient and a contribution is required in terms of s 106, a creditor who instituted the sequestration proceedings is required to contribute, whether or not it has proved a claim, not less than they would have had to contribute if they had proved the claim stated in his petition.

[38] Section 14(3) must be read with s 106. That much is clear from the wording of the actual provision. Even though the petitioning creditor has not proved a claim, it is compelled to contribute 'in the event of a contribution by creditors under section one hundred and six whether or not he has proved a claim against the estate'. In terms of s 14(3), the petitioning creditor will always have to contribute. The section contains no exceptions. The petitioning creditor is placed in the same position as it would have been in had it proved its claim."¹⁷

[28] The onus to prove the 'reason to believe' rests on eThekweni, the applicant in an application for security for costs. The court in *That's Life Estate CC v Ambassador Letting Agency*¹⁸, per Kollapen J(as he then was):

"The operative phrase in the section that 'it appears that there is reason to believe ... that the corporation will be unable to pay the costs of the defendant...' was interpreted as follows in Vuma Intertrade CC v Geometric Intertrade CC 2001 (2) SA 1068 (W):-

'... although the phrase 'reason to believe' places a much lighter burden of proof on an applicant than, for instance, 'the court is satisfied' ... the

¹⁷ See *FirstRand Bank*, at para 37 – 38.

¹⁸ *That's Life Estate CC v Ambassador Letting Agency CC (42249/2020) [2020] ZAGPPHC 715 (8 October 2020) ("That's Life")*

'reason to believe' must be constituted by facts giving rise to such belief...and a blind belief based on such information or hearsay as a reasonable man ought or could not give credence to, does not suffice...in short there must be facts before the court on which the court can conclude that there is reason to believe that a plaintiff close corporation will be unable to satisfy an adverse court order and the onus of adducing such facts rests on the applicant'.¹⁹

[29] The court in *That's Life* also referred with approval to '*Henogsberg on the Close Corporations Act*' and observed as follows:

"In 'Henogsberg on the Close Corporations Act' the learned author describes Section 8 as incorporating a test in two parts.

*'An application for costs must be considered in two stages. First, the applicant for security bears the onus of establishing that there is reason to believe that the corporation, if unsuccessful, will be unable to pay applicant's costs, failing which the application will be unsuccessful. At this stage there is no onus on the respondent to satisfy the court that it will be able to satisfy any order for costs that maybe granted against it.'*²⁰

[30] From the above it is clear that before the court embarks on the exercise of considering all relevant factors which are pertinent to the exercise of its discretion to grant or to refuse an application for security for costs, there must be facts before it which would support the 'reason to believe'. It is after these facts are placed before the court that it is in a position to exercise its discretion one way or the other. The mere existence of those facts which support 'the reason to believe' does not, in and of itself,

¹⁹ See *That's Life* at para 15.

²⁰ *Id.*, at para 17.

constitute a foregone conclusion in favour of awarding security. That is only but the first step. The second step is to consider the trilogy of factors enunciated in *Giddey NO v JC Barnard and Others above*. However, if there is no reason to believe, then s 8 of the Close Corporations Act will not have been met and that would be the end of the matter.

Are there facts in support of "reason to believe"?

[31] On establishing facts in support of a reason to believe, surmise, speculation and even belief, which is not supported by the necessary facts, would certainly not suffice.²¹ There can be no doubt that the onus to prove so is on the applicant, however, it may be assisted in its task by material or facts put before the court by the respondent company.²²

[32] In present instance, to establish reason to believe that the Plaintiff's will not be able to pay the costs if unsuccessful in the main action, eThekwini relies on a concession in the Plaintiffs' particulars of claim that "*ZCMT was at all material times and is at present unable to make payment of the debts and, its liabilities exceed its assets*". They also state that Plaintiffs have failed to take any steps to source funds for security. According to eThekwini, the fact that proved creditors could be called upon to make a contribution does not excuse the provision of security.

²¹ *Northbank Diamond Limited v FTK Holland BV and Others* (SA 9 of 2001) [2002] CASC 2 (21 February 2002) (Supreme Court of Namibia)

²² *Id*

[33] Apart from the concession, eThekwini has put up no evidence whatsoever, in support of a 'reason to believe'. Concerning the concession, Plaintiffs have indicated that they are in the process of collecting debts due to the estate of ZCMT and undertake to pay costs if unsuccessful in the main action. However, should there be a shortfall, SARS as the sole proved creditor is, in any event, obliged to make a contribution. The obligation on SARS to make a contribution, if required has been put to bed in *FirstRand Bank*. At the hearing of the matter, it was clear, and indeed counsel for eThekwini indicated that he was not aware of the decision in *FirstRand Bank*.

[34] There has been no suggestion by eThekwini that SARS will be unable to make the necessary contribution in the event of a shortfall. To the extent that eThekwini contends that the fact that creditors could make a contribution does not in and of itself absolve the corporation from furnishing security for costs as contemplated in *Trust Bank*, this proposition should not be regarded as a general rule. Each case must be decided on its own merits. *Trust Bank* is distinguishable from the present case on the grounds already mentioned above, and those are that there is no element of reasonable unpredictability of multiple creditors or any prospects of tardiness or delay to furnish security, if so ordered, is involved in this matter.

[35] In the absence of facts in support of a reason to believe, there is not bases for this court to venture into the second step in assessing whether security for costs should be awarded. This is so because establishing facts in support of a reason to believe, is antecedent to the exercise of a court's discretion with due regard to the relevant factors. The court cannot exercise its discretionary powers in a vacuum.

[36] In the circumstances I find that eThekwini has failed to discharge the onus resting on it to adduce facts in support of a 'reason to believe' that the Plaintiffs will be unable to pay costs if unsuccessful in the main action. This should be the end of the matter.

[37] Even if I am wrong in my finding on the existence of facts in support of a reason to believe that the Plaintiffs will be unable to pay costs if unsuccessful in the main action, I am, nevertheless, disinclined to award security for costs for a number of cumulative reasons. First, eThekwini has not filed a plea in the main action upon which this court can assess its defence to Plaintiffs pleaded case or consider whether there are any prospects of success one way or the other. There is a bold claim in the founding papers by eThekwini that the Plaintiffs must overcome prescription. However, there is no attempt to set out in the founding papers what is the basis for the claim of prescription. Surely the onus to set out the grounds for the plea of prescription rests on eThekwini. It was not done.

[38] The duty on a court to consider the pleadings was highlighted in *Fusion Properties*²³, per Petse DP, thus:

"Insofar as the prospects of success of Fusion's action are concerned, it must be said that in assessing the merits of the plaintiff's case, a court is not required nor expected to undertake an in-depth analysis as a trial court would at the end of a trial. It is sufficient that a court has a fair sense of the strength and weakness of the antagonists' respective cases. For as Streicher JA explained in Zietsman v Electronic Media Network Ltd and Others [2008] ZASCA 4; 2008 (4) SA 1 (SCA) it is not expected that a court 'should in an application for security attempt to resolve the dispute between the parties. Such a requirement

²³ See *Fusion Properties* fn 6 *supra*.

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'

After evaluating Fusion's pleaded case against the municipality's plea as well as the common cause facts, the high court concluded that Fusion's allegations in its particulars of claim did not set out with sufficient particularity, the respects in which the [municipality] is alleged to have frustrated the fulfilment of the conditions precedent."

[39] Second, there is no allegation supported by facts that the litigation is reckless and vexatious or is an abuse of court process or brought for an ulterior purpose.²⁴ eThekweni should know that a court assessing an application for security must have regard to the pleadings in the main action and that it is only upon the assessment of the pleadings that a court can consider whether the litigation is reckless or vexatious. It chose not to file a plea but to approach the court first. In the absence of a plea, it seems to me that the court has not been placed in a position to properly consider the strengths and weaknesses of the antagonists' case. Third, the matter involves serious allegations of impropriety on the part of municipal officials. One would have thought that eThekweni would welcome and encourage the litigation in efforts to possibly recover monies allegedly paid irregularly, if so proven. It is remarkable that eThekweni's efforts appear rather to thwart the litigation, without any suggestion in the papers that the case is recklessly and/or vexatiously brought.

[40] Fourth, the potential prejudice to the Plaintiffs, were this court to order security for costs appears to be immense. Creditors of ZCMT would have little to no chance of

²⁴ See Israel v Burger fn 11 above.

recovering their debts, and there is no suggestion in the papers that they could recover their debts by other means. There is the added duty on the part of eThekwini to recover irregular expenditure, if so found. Against this, eThekwini states that at the Section 417 and 418 enquiry held over 11 days between September 2021 and September 2023, there was no evidence of fraud, collusion or impropriety, yet it incurred costs which it could not recover. Accordingly, so says eThekwini, it would not be in a position to pay for what it considers to be potentially lengthy litigation. This is no reason to grant security for costs without more. Firstly, there is no plea to the particulars of claim and secondly, there is no evidence of any budget allocation for the legal services unit in eThekwini juxtaposed against the costs incurred in this matter, upon which to ground a claim that eThekwini is unable to meet the litigation expenses associated with this matter. There is simply no evidence of any kind to support the allegation.

[41] Fifth, eThekwini admits that in making payments to Zikhulise Group, municipal officials were motivated by deception at the instance of Ms Mkhize. Why then would eThekwini resist the litigation? I am somewhere between perplexed and concerned.

[42] The above reasons, cumulatively considered, suggest to me that it would not be in the interests of justice and fairness, and most certainly not in the public interests to order that the Plaintiffs pay security for costs.

CONDONATION

[43] It is trite that a court has the inherent power to protect and to regulate its own processes.²⁵ The arguments in relation to condonation are of a technical nature, and although a poor explanation is given to justify the delay in instituting the application in terms of Rule 47, I considered that the matter is of sufficient public importance to be disposed of on a mere technicality. To dispose of such an important matter on a technicality would be to opt for the easy way out that could leave a bitter taste in the proverbial mouth of justice and fairness.

[44] The above statement should not be read or understood to suggest that to refuse an application for condonation is to opt for an easy way out. A court always has a discretion which must be exercised judicially. I also considered that both parties have not always kept to their timelines for filing papers, and the delay is not unreasonably excessive, and there is no material prejudice occasioned thereby.

[45] In the exercise of my discretion, having regard to the public interest I grant condonation for eThekwini's non-compliance with the time periods for filing this application.

The state's duty in terms of section 7(2) of the Constitution

[46] At the hearing of this matter, I asked counsel for eThekwini whether it was open to an organ of state to seek an order for security for costs against a private body or company in the absence of an allegation by the organ of state supported by facts that

²⁵ See Section 173 of the Constitution.

the litigation is frivolous or vexatious or is brought for an ulterior purpose, having regard to the duty of the state in s 7(2) of the Constitution. Section 7(2) provides as follows:

“(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

[47] This question was not pertinently raised by the parties for decision. However, I considered the purpose of s 8 of the Close Corporations Act read with Rule 47 of the Uniform Rules of Court, which the Constitutional Court in *Giddey NO v JC Barnard and Others* noted ‘...the main purpose of s13 is to ensure that companies, who are 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’.

[48] Stripped to its bare essentials, the mischief sought to be arrested is companies or corporations who are unlikely to be able to pay the costs of litigation if unsuccessful, instituting litigation vexatiously or in circumstances where there are no prospects of success thus causing their opponents undue and irrecoverable legal expenses. The question is, if an applicant for security who is an organ of state does not allege and prove through facts that the litigation is brought vexatiously or demonstrate absence of prospects of success, should it nevertheless be entitled to seek an order for security for costs? This is a question of law.

[49] I requested the parties to file further written submissions addressing this point, which they did. eThekwini proposes that the question has two components to it, the first being whether, procedurally, the court is entitled to pose the question in the absence of it having been raised on the papers? And the second being whether the question is a sound one in law? On the first question eThekwini argues that even where there is an issue which involves basic human rights guaranteed by the Constitution, it is for the parties, either in the pleadings or affidavits, to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it and to insist that the parties deal with them.

[50] eThekwini proceeds to argue that Section 8 of the Close Corporations Act has not been challenged either frontally or otherwise as required by our jurisprudence. On the second component as proposed by eThekwini, they argue that the Plaintiffs have not demonstrated that an order directing security will bring an end to their action, on the contrary, the argument goes, the liquidating creditor is SARS and the latter is funding the litigation so the action will not come to an end.

[51] Relying on the judgment of the Supreme Court of Appeal in *Fusion Properties*²⁶, which involved Stellenbosch Municipality, eThekwini argues that the SCA was evidently comfortable with the current state of the law in regard to the provision of security at the instance of an organ of state. According to eThekwini, if this court pursues the question posed, it would be declining to follow the position in law binding

²⁶ See *Fusion Properties* fn 6 above.

on it arising from the fusion judgment, and further, a court is not required nor expected to undertake an in-depth analysis as a trial court would at the end of a trial. The question posed by the court would have a result that fundamentally changes the position in *Fusion Properties*.

[52] The arguments advanced by eThekwini are incorrect, and here's why. Whilst the argument regarding the parties defining the issues and the prohibition against a court introducing its own issues is correct, a court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case.²⁷ This much was stated by the SCA in the selfsame paragraph upon which eThekwini relies in the same judgment. That is subject to the proviso that no prejudice will be caused to any party by it being decided.²⁸ In this matter, the parties were afforded an opportunity to file further written submissions to address the question, and they did, so there's no prejudice to any party and none was claimed. eThekwini's nit picking in this regard demonstrates lack of candour with the court and is frowned upon.

[53] It is unclear why reference is made to a constitutional challenge to s 8 of the Close Corporations Act, as that has nothing to do with the question posed by the court. eThekwini doesn't answer the question posed by the court at all. It does not even mention the section of the Constitution it has been invited to address.

[54] Whilst security for costs is a discretionary matter which involves a balancing act. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing

²⁷ See *Fusion Properties* fn 6 at para 13.

²⁸ *Id.*

a proper claim by an order for security, as against that it must weigh the injustice to the defendant if no security is ordered and the plaintiff's claim fails and the former finds himself or herself unable to recover costs.²⁹ In the exercise of its discretion, the court would consider that organs of state stand on a different footing. Because of the constitutional duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights, the state has a higher duty to establish frivolity or vexatiousness or poor prospects of success in the litigation before it can seek an order for security against a private litigant.

[55] This is not to say the court's discretion is eradicated where organs of state are involved, it is not. It is one of the considerations out of a number to which the court will have regard. Organs of state must establish a compelling case because an order for security has the effect of limiting a litigant's right of access to court in section 34³⁰ of the Constitution which is at odds with the state's duty in terms of section 7(2) of the Constitution. In *Chief Lesapo*³¹, the Constitutional Court said the following:

"[t]he right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes, without resorting to self-help. *The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very*

²⁹ See *Fusion Properties* fn 6 above at para 33; See also, *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* [2015] ZASCA 93; 2015 (5) SA 38 (SCA) at para 13.

³⁰ Section 34 of the Constitution which is headed: 'Access to courts' provides: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

³¹ *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 PARA 22.

powerful considerations would be required for its limitation to be reasonable and justifiable."

[56] This will prevent organs of state from invoking the provisions of section 8 read with Rule 47 to financially outmuscle private litigants whose cases have not been shown to be frivolous, vexatious or lacking prospects of success and thereby avoid accountability.

[57] I have already found that eThekweni has failed to discharge the onus resting on it to establish a reason to believe that the Plaintiffs would be unable to pay costs in the event that they are unsuccessful in the main action. This is a further reason I would dismiss the application.

Costs

[58] There is no reason why costs should not follow the result.

Order

[59] in the result, the following order is made

1. The application for condonation for non-compliance with the time periods prescribed in Rule 47 of the Uniform Rules of Court is granted;
2. The application is dismissed;

3. The applicant/first defendant is ordered to pay costs, such costs to include the costs occasioned by the employment of two counsel on Scale C.



S.M LUTHULI

ACTING JUDGE OF THE HIGH COURT

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