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Security for costs – A White Elephant? A Chimera? Pie in the sky? ...On any basis a Herculean task

1 December 2021 *14 min read*

Security for costs

In the recent case of *McHugh N.O. & Others v Wright* [5641/2021) [2021] ZAWCHC 205 (19 October 2021) ("**the McHugh matter**"), the question of security for costs once again came before the Court in the context of an action instituted by Wright relating to disputes and claims concerning the estate of his late natural father, with the defendants bringing an application for security for costs premised largely on the fact that Mr Wright is a *peregrinus* (foreigner), based in the UK, and having no assets in South Africa.

In this matter, the application for security for costs was refused on the basis that *inter alia* even though the peregrinus in question (Wright) had conceded that his resources would be severely strained in the event that in addition to his own legal costs he would have to honour payment of security for costs, the payment of security for costs would render it impossible to pursue the litigation at all, the court was persuaded that Wright's case had merit and warranted proper hearing and due consideration.

Security for costs is a concept in which our law notionally affords and envisages a direction by the court, or arbitrator (as the case may be) concerning the payment into court, alternatively Trust/Escrow, of a fixed sum of money which the Court/Arbitrator (as the case may be) considers appropriate to secure the costs of the defendant in the event that the action fails.

Taking into consideration the nature of the person/party bringing an action, be it

- a juristic entity,
- a natural person,
- a person domiciled in the Republic of South Africa (incola), or
- a foreigner not having assets in the Republic of South Africa,

the Court must assess a number of factors before exercising its discretion as to whether or not security for costs in a given matter is warranted.

It has always been a measure which was stringently and in limited circumstances afforded by the Courts.

Of late, it appears that the prospects of securing an order for costs against a local resident (natural or juristic), have been eroded to the point of becoming a virtual impossibility, with only one unreported judgment[1] confirming such an award in relation to a natural local resident having been observed in the past seven years – this being handed down in 2017 and one other unreported judgment[2] which evidence security for costs being granted in respect of a local juristic entity (in this case against the notorious Gupta-Owned Oakbay Investments) other than in the case of *Boost Sport Africa (Pty) Ltd v South African Breweries (Pty) Ltd* [2015] ZASCA 91 ("**the Boost case**").

Now, with the McHugh judgment, even the comparatively less onerous exercise of seeking security for costs against a foreign litigant is proving to be quite a challenge. It seems that the combination of factors which favour the granting of such an award must be of such a nature these days that the court is effectively placed in a position of having to some extent prejudged the matter before a hearing takes place.

The philosophy behind the concept of security for costs

The philosophy behind the concept of security for costs is really one of protecting defendants from litigation which is vexatious, especially in circumstances where the claimant/plaintiff in question is a party whose financial status is questionable, rendering the question of recoverability of

costs in due course a matter of concern.

The question of whether or not security for costs should be granted should be assessed with regard to (a) common law and (b) statutory provision in order to assess the grounds upon which security for costs could be sought and granted.[3]

Rule 47 of the High Court does not set out the grounds upon which a party is entitled to seek security for costs, it only deals with the purely procedural aspects of such an application. So notionally it is available to a litigant. The Arbitration Act also contemplates either the arbitrator[4] or the High Court[5] being approached for security for costs.

Security for Costs
(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.
...
(3) If the party from whom security is demanded contests liability to give security or if he fails ...the other party may apply to Court on notice for an Order that such security be given and that the proceedings be stayed until such Order is complied with.

(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 it may seem meet."

Security for costs in respect of local/incola claimants

As a general rule in our law, and before the advent of the Constitution, a local resident (incola) (and by this is meant a natural person) could not be called upon to give security for costs.[6]

Section 34 of the Constitution now also enshrines access to court as a right in the Bill of Rights, which bolsters that position:

"Access to Court

34. Everyone has a 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."

There were some limited exceptional circumstances in which a local South African resident (natural or juristic) might be required to put up security for costs. These were effectively in relation to:

1. Actions brought by insolvent persons where the action is shown to be reckless or vexatious.
2. Security for costs against local companies.

Thus, securing security for costs against a natural person always entailed two requirements – inability to pay and implausibility of suit. The position on the local juristic person has changed.

The Old Companies Act 61 of 1973

The Old Companies Act 61 of 1973, in force until May 2011, contained a provision at Section 13 which allowed a party to seek security for costs if:

"...at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence..."

Notably, under this provision, the only criteria needed to obtain security for costs was the question of impecuniosity (inability to pay). The nature of the claim (being vexatious or otherwise abusive) did not play any role in the assessment.

Brandt J's comments in the case of *MTN Service Provider (Pty) Ltd v Afro Core (Pty) Ltd* 2007 (6) SA 620 (SCA) explain the rationale behind section 13:

"One of the very mischiefs of S13 is intended to curb, is that those who stand to benefit from successful litigation by a plaintiff company will be prepared to finance the company's own litigation, but will shield behind its corporate identity when it is ordered to pay the successful defendant's costs. A plaintiff company that seeks to rely on the probability that a security order will exclude it from the court, must therefore produce evidence that it will be unable to furnish security; not only from its own resources, but also from outside sources such as shareholders or creditors."

The New Companies Act 71 of 2008 did not contain such a provision

This omission and the criteria to be met for securing an order for security for costs in relation to incola juristic entities were dealt with in the Boost Case.[7] In deciding that the Court is empowered to and must regulate its own guidelines and procedures, and accepting that the omission in the New Companies Act was deliberate on the part of the Legislature, and therefore not the domain of the Court's to question or alter under the doctrine of

separation of powers (notwithstanding that a similar provision to that of section 13 continued to exist in section 8 of the Close Corporation Act 69 of 1984) it was held:

"Absent section 13 there can no longer be any legitimate basis for differentiating between an incola company and incola natural persons.

… Accordingly, even though there may be poor prospects of recovering costs, a court, in its discretion, should only order the furnishing of security for such costs by an incola company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse".

Thus, insofar as both natural and juristic local residents are concerned (with the possible exclusion of close corporations where section 8 still prevails), to obtain security for costs:

1. the litigant/plaintiff in question must be in a state of impecuniosity;

and

2. the matter must be vexatious or reckless.

In *Fisheries Development Corporation of SA Ltd v Jorgensen & Another: Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others* 1979 (3) SA 1331 (W) at 1339E-F it was held that:

"In the legal sense 'vexatious' means 'frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant' (shorter Oxford English dictionary). Vexatious proceedings would also no doubt include proceedings which although properly instituted are continued with the sole purposes of causing annoyance to the defendant: 'abuse' connotes a mis-use, an improper use, a use mala fide, a use for an ulterior motive."

In *African Farms & Townships Limited v Cape Town Municipality* 1963 (2) SA 355 (A) at 56D it was stated:

"An action is vexatious and an abuse of the process of court inter alia if it is obviously unsustainable. This must appear as a certainty, and not merely on a preponderance of probability"

These are quite strident views to take in the context of live litigation where a trial has not run its course.

In the Boost case, that combination of factors (impecuniosity and vexatious suit) mercifully existed. Only one known case with the right combination of factors has, in seven years since, materialised in respect of local juristic entities – namely the Oakbay matter referenced above.

It is a rare matter indeed where the confluence of impecuniosity and vexatious conduct converge such that an application for security for costs is justifiable. It will similarly be a brave court which presented with such a rarefied matter is so confident concerning the vexatious nature of the matter that it is prepared to effectively pronounce upon the merits of a matter that has not yet been heard because to do so would inevitably invite criticism of inherent bias, restrictions being placed on the right to access to court and/or to fair administration of justice – a review of such a decision might inevitably follow.

The predicament becomes even more contentious in the context of private arbitration proceedings where, unlike in the court system where a different Judge will hear the application for security for costs from the Judge who will in due course hearing the main proceedings, a private arbitrator must consider all aspects brought before him/her in the course and scope of the conduct of the matter, from inception to conclusion. An arbitrator can never grant security for costs if it must apply the Boost case, because a review is almost inevitable. Parties to arbitration can always approach the High Court, but this delays the arbitration proceedings.

As was conceded in the Boost case, referencing the mischief which section 13 sought to address, it was stated:

"… that mischief remains – and it is manifest."

That fact notwithstanding (and it is seen in practice on a routine basis), the available principles for granting security for costs were whittled down to the rule of thumb which is that security for costs will not be granted in respect of any local (natural or juristic).

In consequence, the pursuit of security for costs in relation to suits brought by local parties, is nigh on impossible in the High Court, and impractical and arguably impossible in private arbitrations.

Security for costs against Foreign Peregrinus claimants

Notionally a peregrinus plaintiff can be ordered to give security for costs, however, exceptional circumstances are a prerequisite, notwithstanding the procedural and logistical obstacles presented in the recoverability of costs in a foreign jurisdiction.

In the case of a foreign litigant (peregrinus), the courts must still consider various factors in the exercise of the discretion to order security for costs or not. Here there is no closed or specific list of factors which can rigidly be followed as indicative guidelines of what might constitute relevant considerations.

With the McHugh case, it can be seen that the courts are prepared to take a view concerning the merits of the main claim, not as vexatious, but as having merit, in finding that security should not be awarded, even where impecuniosity was conceded.

In the realm of admiralty Law, section 5(2)(b) and (c) of the Admiralty Act, provides for security for costs. In the *Northern Endeavour Shipping Pty Ltd v Owner of NYK Isabel and Another*[8] the principles to be applied to the assessment of whether security was payable included, in additional to jurisdictional requirements being fulfilled, "*the applicant must establish a prima facie claim that is prima facie enforceable in the forum in which security is sought; and a genuine reasonable need for security on a balance of probability*". Here again, the hurdles are set quite high.

Parties from all walks are thus, despite constrained financial circumstances, and suspect motives, entitled to bring their proceedings. There is a raft of authority and a bill of rights which endorses that position. Either luck or extreme circumstances alone will get an applicant over the line.

One wonders quite how much the mischief is that it is playing out in our courts right now as a consequence of the inability to look to parties, in particular entities, to behave responsibly and not conduct litigation in a fashion which is reckless, but the position is clear – the concept of security for costs in South Africa seems to have become so difficult – indeed nigh impossible to attain that it could be relegated to the realms of antiquity – good luck to those who try to get it!

Read the South Africa chapter in the IBA Arbitration Guide, authored by director Des Williams.

by Jennifer Smit, Director and Kyle Grootboom, Candidate Attorney

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[1] P v P Northwest Division of the High Court, Mahikeng; Case Number 610/1996 (Re: P v P (610/1996) [2017] ZANWHC 69)

[2] Oakbay Investments (Pty) Ltd) intervening in the matter of *Lurco Group SA (Pty) Ltd v Kurt Knoop N/O and nine others* case number 38647/2019 in a judgment of Motojane J

[3] Boost Sport Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) at 43C-D

[4] Under powers granted to him by virtue of agreement between the parties Arbitration Act 42 of 1965 section 14(1)(b) – parties often for instance agree to High Court Rules applying; AFSA Rules Article 21 contemplate the scenario in which a party refuses to pay its share of costs and states that "*The arbitrator may make such order as to costs on such application as he deems just.*"

[5] Arbitration Act section 21(1)

[6] This was the case even before the introduction of the Bill of Rights and the Constitution. See for example Withan v Venables (1828) (1) Menz 291; Liquidator, Sailsbury Meat Market Ltd v Perelson 1924 WLD 104 at 107; Borollomeer v Kameel Tin Proprietary Co Ltd 1928 TPD No. 600 at 601; Van Zyl v Euodia Trust MS (BPK) 1983 (3) SA 394 (T) at 396B-397B

[7] Supra

[8] 2017 (1) SA 25 (SCA)



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