47 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.

(2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.

(3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, 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 to it may seem meet.

(5) Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.

(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient; and his decision shall be final.

Commentary

General. This rule does not set out the grounds upon which one party is entitled to demand security for costs from the other; it deals only with the purely procedural aspect of the matter. [1] Recourse must therefore be had to *(a)* the common law; and *(b)* statutory provisions to determine the grounds upon which security for costs could be demanded. [2]

(a) **The common law.** Under the common law an *incola* of the Republic cannot, as a general rule, be called on to give security for costs. [3] There are, however, exceptions to the general rule. The principles of the common law are briefly considered in the notes that follow.

(i) **Actions by *peregrini*.** A *peregrinus* [4] who is plaintiff (or applicant), [5] either in convention or reconvention, [6] and who does not own unmortgaged immovable property in

the Republic may be ordered to give security for the costs of his action. [7] A *peregrinus* plaintiff can be ordered to give security for the costs of an *incola* defendant in respect of the latter's claim in reconvention. [8] Save in the most exceptional circumstances, a *peregrinus* plaintiff should not, however, be ordered to give security for the amount of the judgment that may be awarded against him on a claim in reconvention by an *incola*. [9]

In *Magida v Minister of Police* [10] the Appellate Division, after a review of the Roman-Dutch authorities, held that at common law an *incola* did not have a right which entitled him as a matter of course to the furnishing of security for his costs by a *peregrinus*. [11] The court has a discretion whether or not to order security to be lodged in any given case, [12] a discretion which is to be exercised by having regard to all the relevant facts as well as considerations of equity and fairness to both parties. [13] 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 that have been incurred by him in defence of the claim. [14]

The discretion is a strict or true one, and accordingly the court's decision may be interfered with on appeal only in narrow circumstances. [15]

There is no justification for requiring the court to exercise its discretion in favour of a *peregrinus* only sparingly. [16] If the defendant *incola* is sufficiently safeguarded in other ways the court will not order the security to be given. [17] The underlying principle that in proceedings initiated by a *peregrinus* the court is entitled to protect an *incola* to the fullest extent, [18] should be read subject to the qualification that it is applicable only after the court, in the exercise of its discretion, had come to the conclusion that the *peregrinus* should not be absolved from furnishing security for costs. [19]

The factors which the court will consider in the exercise of its discretion to determine an application for security for costs are case-specific. [20] No list of factors to be

rigidly followed exists indicating which factors weigh more heavily than others. Some guidelines exist that may influence the court in the exercise of its discretion. These include whether the plaintiff's claim is made in good faith or whether it is *mala fide*, whether it can be concluded that plaintiff has a reasonable prospect of success and whether the application for security was used to stifle a genuine claim. [21] A respondent resisting an application for security for costs has to provide documentation to support allegations of impecuniosity, and a failure to do so might lead to the inference that the allegations are unfounded and that undisclosed documentation might contradict them. [22]

An applicant in an application for security for costs must demonstrate that there is a probability that the respondent would be unable to pay the applicant's costs, if awarded. The onus falls to be discharged by credible testimony which demonstrates that there is logical reason to believe that the *peregrinus* will be unable to pay the applicants' costs, should it fail in the action. [23]

If a plaintiff *incola* becomes a *peregrinus* during the course of the proceedings he may be ordered to furnish security. [24] If a *peregrinus* who has furnished security becomes an *incola* during the course of the proceedings the security may be released. [25]

An asylum seeker can acquire a domicile in South Africa thereby becoming an *incola* from whom security for costs cannot be demanded. [26]

The court has a discretion to grant an order for security for costs where both parties are *peregrini*. It has been held [27] that, although this rule might originally have been formulated to protect *incolae*, there is no reason why it should not protect *peregrini* who, by force of circumstance, are compelled to litigate in South African Admiralty courts. To refuse a *peregrinus* a right to claim security for costs could in certain instances lead to great injustice.

In *Silvercraft Helicopters (Switzerland) Ltd v Zonnekus Mansions (Pty) Ltd* [28] it was held that there is, in principle, nothing unjust in requiring security for costs from a *peregrinus* in contempt of court proceedings.

In *Blastrite (Pty) Ltd v Genpaco Ltd* [29] the respondent contended that the current common-law practice in terms of which a *peregrinus* may be ordered to furnish security for costs is inconsistent with the spirit, purport and

object of the Bill of Rights; that it violates the right to equality before the law and equal protection of the law contained in s 9(1) of the Constitution of the Republic of South Africa, 1996, in a manner that is irrational; and that it amounts to unfair discrimination. In an *obiter dictum* Schippers J rejected the respondent's contentions and held that the practice is neither irrational nor inconsistent with the Constitution. [30]

(ii) Actions by insolvents. 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 or vexatious. [31] 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 an 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. [32]

If the insolvent sues in accordance with a right specially preserved for him by the Insolvency Act 24 of 1936 he cannot be required to furnish security unless his or her action is vexatious. [33]

(iii) The action is vexatious, or reckless or amounts to an abuse of the process of the court. 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 action is vexatious or reckless or amounted to an abuse of the process of the court. [34]

If a plaintiff who is a man of straw litigates in a nominal capacity the court may order him to furnish security for costs, provided that the court is satisfied that the action or application is vexatious or reckless or amounts to an abuse of its process. [35]

The court has an inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the process of the court; [36] one of the ways of doing so is by ordering

the vexatious litigant to furnish security for the costs of the other side. [37] This power ought to be sparingly exercised and only in exceptional circumstances. [38]

An action is vexatious if it is obviously unsustainable. [39] While this must appear as a certainty in an application to dismiss or strike out a claim, [40] in an application for the 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. [41] 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. [42]

The term 'abuse of process' connotes that the legal machinery is employed for some ulterior purpose. In *Hudson v Hudson* [43] De Villiers JA said:

> 'When therefore the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of a Court to prevent such abuse. But it is a power which has to be exercised with great caution, and only in a clear case.'

In *Phillips v Botha* [44] the Supreme Court of Appeal describes the following definition of an abuse of civil process derived from an Australian case [45] as 'terse but useful':

> 'The term "abuse of process", connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings

> are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of a legal claim upon which a Court is asked to adjudicate, they are regarded as an abuse for this purpose.'

In *Beinash v Wixley* [46] it was said:

> 'What does constitute an abuse of the 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 a purpose extraneous to that objective . . .'

Security for costs against local companies. The Companies Act 61 of 1973 ('the previous Act') was repealed by the Companies Act 71 of 2008 ('the new Act'). [47] In terms of s 13 of the previous Act, [48] where a limited company was plaintiff or applicant in any legal proceeding, the court could at any stage order it to furnish security for costs if there was reason to believe that the company or its liquidator would be unable to pay the costs of the defendant or respondent if successful in his defence. The new Act lacks a provision equivalent to s 13 of the previous Act. The omission in the new Act of a provision such as s 13 of the previous Act caused much controversy [49] until the Supreme Court of Appeal brought clarity in *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd*. [50] Ponnan and Mbha JJA [51] laid down the position as follows: [52]

> '[12] The 1973 Companies Act has been repealed and replaced by the Companies Act 71 of 2008. Our most recent Companies Act, which "is a complete reinvention of our corporate law", does not contain an equivalent provision to s 13. There have been several decisions in which the High Courts have recently had occasion to consider whether, absent a counterpart to s 13 in our new Act, an incola company can be ordered to furnish security for costs. Those decisions — or more accurately some — have been discordant. Valuable as those decisions are, a discussion of each of them would likely contribute to a judgment that is indigestible. We thus approach the problem as if the matter were res nova. In doing so we obviously draw on the benefits and insights that a reading of those judgments has given.
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> [13] However, in the light of some of the views expressed in those decisions it may be prudent to pass certain general observations. First, our courts now derive their power from the Constitution itself, which in s 173 provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

As it was put by the Constitutional Court in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*:

> "This is an important provision which recognises both the power of Courts to protect and regulate their own process as well as their power to develop the common law. . .The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that Courts in exercising this power *must take into account* the interests of justice." [Emphasis in original.]

That our courts were endowed with such power even in our pre-constitutional era is evident from the following dictum of Corbett JA:

> "There is no doubt the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the

interests of the proper administration of justice . . ..”

According to the Constitutional Court:

> “The task of a . . . Court in determining its own proceedings is an important one. Its primary constitutional responsibility is to ensure that the proceedings before it are fair and it must give content to that obligation. This obligation has always been part of our law and is now constitutionally enshrined as a fundamental right in s 35(3) of the Constitution. The task of ensuring that the proceedings are fair will often require consideration of a range of principled and practical factors, some of which may pull in different directions.”

Second, it is a well-established principle of statutory construction that the legislature must be taken to be aware of the nature and state of the law existing at the time when legislation is passed. The omission of a similar provision to s 13 from the 2008 Act must therefore be taken (prima facie at least) to import a change of intention on the part of the legislature. It must therefore follow that it is not open to a court to approach an enquiry such as this as if the position were unaltered and that s 13 is still part of our law. For to do so may well result in a court impermissibly intruding into the domain of the legislature. Third, it has been suggested that such a provision has been excluded because its inclusion would limit the fundamental right of access to the courts as enshrined in s 34 of the Constitution and would thereby be unconstitutional. But that may be to ignore the fact that a court was vested with a discretion in terms of s 13 and that in exercising its discretion a court performs a balancing act. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security, and 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. Significantly, on that score the European Court of Human Rights appears to have inclined to the view that security for costs pursued a legitimate aim, namely to protect a litigant from being faced with an

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irrecoverable bill for legal costs, and since regard was had to prospects of success the requirement could be said to have been imposed in the interests of the fair administration of justice. It is also noteworthy that back home, as long ago as *Lombard* it was stated by Bristowe J that the power to order security for costs is a most reasonable one. Why the legislature saw fit to exclude it (or a provision that mirrors it) is fortunately a debate that is not necessary for us to enter. Fourth, s 39(2) of the Constitution makes plain that, when a court embarks upon a course of developing the common law, it is obliged to “promote the spirit, purport and objects of the Bill of Rights”. This ensures that the common law will evolve, within the framework of the Constitution, consistently with the basic norms of the legal order that it establishes. Faced with such a task, a court is obliged to undertake a two-stage enquiry. It should ask itself whether, given the objectives of s 39(2), the existing common law should be developed beyond existing precedent — if the answer to that question were in the negative, that should be the end of the enquiry. If not, the next enquiry should be how the development should occur and which court should embark on that exercise. Fifth, the omission of a provision akin to s 13 from the new Act is strange, particularly since s 8 of the Close Corporations Act 69 of 1984, which has been interpreted in accordance with the principles that have evolved in relation to the corresponding provisions in the previous Companies Act, has been retained. It follows that the principles pertaining to the furnishing of security by a close corporation will henceforth differ from that applicable to a company. Such incongruity as may arise from that dichotomy is no invitation to a court to continue to approach an enquiry such as this in relation to a company as if s 13 were still in force.

[14] The onus is on the party seeking security to persuade a court that security should be ordered. As was the situation under s 13 in the past, a court in the exercise of its discretion will have regard to the nature of the claim; the financial position of the company at the stage of the application for security; and its probable financial position should it lose the action. The distinction to be drawn between the common law and that which prevailed in terms of s 13 is described thus by Brand JA in *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) paras 15–16:

> “Against an insolvent natural person, who is an *incola*, so it has been held, security will only be granted if his or her action can be found to be reckless and vexatious (see *Ecker v Dean* 1938 AD 102 at 110). The reason for this limitation, so it was explained in *Ecker* (at 111), is that the court’s power to order security against an *incola* is derived from its inherent jurisdiction to prevent abuse of its own process in certain circumstances. And this jurisdiction, said Solomon JA in *Western Assurance Co* v *Caldwell’s Trustee* 1918 AD 262 at 274, ‘is a power which . . . ought to be sparingly exercised and only in very exceptional circumstances’. (See also e g *Ramsamy NO* v *Maarman NO* 2002 (6) SA 159 (C) 173F–I).
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> In the exercise of its discretion under s 13 of the Companies Act, on the other hand, there is no reason why the court should order security only in the exceptional case. On the contrary, as was stated in *Shepstone & Wylie (supra)* at 1045I–J, since the section presents the Court with an unfettered discretion, there is no reason to lean towards either granting or refusing a security order.”

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[15] Accordingly, in terms of the common law, mere inability by an incola to satisfy a potential costs order is insufficient to justify an order for security; something more is required (*Ramsamy NO and Others v Maarman NO and Another* 2002 (6) SA 159 (C) at 172I–J). As Thring J put it (*Ramsamy NO* at 172J–173A) —

> “(w)hat this ‘something’ is has been variously described in a number of decisions. Thus in *Ecker v Dean* . . . it was said . . . that the basis of granting an order for security was that the action was ‘reckless and vexatious’ ”.

In *Ecker v Dean* 1937 AD 254 at 259 Curlewis CJ stated:

> “In *Western Assurance Co v Caldwell’s Trustee* (1918 AD 262) this court laid down that a court of law had inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the process of the court; one of the ways of doing so is by ordering the vexatious litigant to give security for the costs of the other side, and I know of no reason why the court below should not have [exercised] such an inherent jurisdiction.”

To once again borrow from De Villiers JP (*Lombard* at 877):

> “But, however, this may be the case of *Mears v The Pretoria Estate and Market Co* is an authority for the proposition that this court has the power to settle a question of practice like the present for itself. Innes CJ, on page 956, is reported as follows:
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> > ‘But after all, this is a question of practice which this court is justified in settling for itself; and I think that we should lay down the rule that an insolvent ought to give security for costs in a case like the present.’
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> And if that be so, there can be no doubt as to what the practice should be. Where a company is in liquidation it is sufficient ground for ordering security to be given; and when the company has everything to gain and nothing to lose, as in the present case, it would be putting a premium upon vexatious and speculative actions if such practice were not adopted.”

[16] Absent s 13, there can no longer be any legitimate basis for differentiating between an incola company and an incola natural person. And as our superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings, it must follow that the former can at common law be compelled to furnish security for costs. 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.

[17] According to Nicholas J in *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1339E–F:

> “In its 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 purpose 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 and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D–E Holmes JA observed:

> "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. *Ravden v Beeten* 1935 CPD 269 at p 276; *Burnham v Fakheer* 1938 NPD 63."

[18] *African Farms and Townships* was concerned with an application to strike out a claim. Since the common law is reluctant to limit access to court, an application for security for costs would seem to require a less stringent test than one for the stay of vexatious proceedings. The latter ends unsustainable litigation whereas the former contemplates the continuance of the proceedings with the safeguard of security for costs. Thus in *Fitchet v Fitchet* 1987 (1) SA 450 (E) at 454E – G Olivier J pointed out that:

> "It may well be that, in applications for security for costs, the test should be somewhat different. Where, in an application for dismissal of an action, the Court without hearing evidence on the merits will require moral certainty alone that the action is unsustainable, in an application for security for costs the merits test should be somewhat less stringent, and other factors, which are irrelevant in a dismissal application, should be taken into account. I am therefore in respectful agreement with the statement of Klopper J in *Davidson's Bakery (Pty) Ltd v Burger* 1961 (1) SA 589 (O) at 593E, viz:
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> > 'Myns insiens is die meriete van eiser se aksie nie altyd deurslaggewend nie, maar slegs 'n faktor wat in oorweging geneem moet word. Daar kan gevalle wees waar die Hof sekuriteitstelling sal verleen al word dit slegs bevind dat die kanse van welslae op die aksie alleen twyfelagtig is sonder dat dit gesê kan word dat dit geen vooruitsigte van sukses inhou nie.' "

[19] In *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C) para 26, Griesel J posited that the ordinary yardstick — a preponderance of probability — should find application in an enquiry such as the present. It is not envisaged, it seems to us, that a detailed investigation of the merits of the case should be undertaken. Nor is it contemplated that there should be a close investigation of the facts in issue in the action. As it was put by Streicher JA in *Zietsman v Electronic Media Network Ltd and Others* 2008 (4) SA 1 (SCA) para 21:

> "I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement 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." '

In *Systems Applications Consultants (Pty) Ltd t/a Securinfo v Systems Applications Products AG* [53] the issue before the Supreme Court of Appeal was whether the High Court could vary an order for security for costs which it had previously granted against a company, by reducing or releasing the security under circumstances where rule 47 did not make provision for such an order. The court held [54] that security for costs was a procedural matter

incidental to civil proceedings and that the High Court could under the provisions of s 173 of the Constitution vary its order, provided the applicant could prove that there were material changes that warranted the release or reduction of the security.

(b) **Statutory provisions.** The Close Corporations Act 69 of 1984 and the Arbitration Act 42 of 1965 provide for the giving of security for costs. Section 25 of the Superior Courts Act 10 of 2013 sets out the circumstances in which security for costs shall not be required. Each of these provisions will be dealt with in the notes that follow.

(i) Close corporations. Section 8 of the Close Corporations Act 69 of 1984 reads 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 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.'

In *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* [55] the Supreme Court of Appeal recognized the fact that 'the principles pertaining to the furnishing of security by a close corporation will henceforth differ from that applicable to a company'. [56]

It is submitted that the principles laid down under s 13 of the now repealed Companies Act 61 of 1973 ('the previous Act') apply *mutatis mutandis* to the provisions of s 8 of the Close Corporations Act 69 of 1984, [57] which is similar to s 13 of the previous Act except that it makes provision, unlike s 13, [58] for security to be given by a plaintiff or applicant in reconvention. The notes that follow accordingly set out the position under s 13 of the previous Act and apply *mutatis mutandis* to the provisions of s 8 of the Close Corporations Act 69 of 1984.

Where a company was in liquidation, s 13 of the previous Act applied where the liquidator took proceedings on the company's behalf, i e to enforce a right vested in it. [59]

The section did not, however, apply where a liquidator took proceedings as such based on a right vested in him, for example, the right vested in a liquidator to have a disposition set aside in terms of s 31 of the Insolvency Act 24 of 1936 read with s 339 of the previous Act. [60] Moreover, where a liquidator was exercising a power to recover for the benefit of the company an amount which had been paid out by it, the court could, generally, exercise its discretion not to order security for costs to be given in favour of the party alleged to have been the beneficiary of the disposition. [61]

The object of s 13 of the previous Act was to protect persons against liability for costs in regard to any action instituted by bankrupt companies. [62] The main purpose of s 13 was to ensure that companies, who were unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, did not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable expenses. [63] The discretion contained in s 13 was to be exercised upon a consideration of all the relevant features, without any predisposition for the granting of security. [64] In the exercise of its discretion the court had regard to the nature of the claim, the financial position of the company at the stage of the application for security, and its probable financial position if it should lose the action; a full enquiry into the merits of the contemplated litigation was not required, [65] save, possibly, if it was apparent that the plaintiff's action was not *bona fide* or was vexatious or hopeless. [66] The court also had regard to the plaintiff's attempt to find financial assistance from its shareholders and creditors or other affiliates, backers or interested persons because they were the ultimate beneficiaries of a successful action. [67] Where all the plaintiffs made common cause and where it was clear

that, if the defendant was successful in his defence, an order jointly and severally for payment would be made by the court, that was a feature which the court had to consider in the exercise of its discretion. [68] If the pooled resources of all the plaintiffs were sufficient to ensure payment of any costs order in favour of the defendant, the

court was entitled, in the exercise of its discretion and having regard to the overall financial position of the plaintiffs, to decline to order any or all of the plaintiffs to furnish security for costs. [69] The court had to carry out a balancing exercise. On the one hand it had to weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it had to weigh the injustice to the defendant if no security was ordered and at the trial the plaintiff's claim failed, and the defendant found himself unable to recover from the plaintiff the costs which had been incurred by him in his defence of the claim. [70] In addition, in exercising its discretion in terms of section 13, a court had to bear in mind the provisions of s 34 of the Constitution and weigh them in the light of other factors laid before it. [71] The discretion with which a court of first instance was vested by s 13 was a narrow and strict one. [72]

In *Fusion Properties 233 CC v Stellenbosch Municipality* [73] the position was summarized as follows by the Supreme Court of Appeal: [74]

> 'There are at least three principles to be derived from . . . *Giddey* and *Shepstone & Wylie* . . . 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 the 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 s 13 is "to deter would-be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects are poor".'

It is submitted that the onus of establishing that the close corporation or its liquidator will be unable to pay the costs of the defendant or respondent if successful in his

defence is on the party applying for security. [75] The respondent close corporation must establish that the order for costs might well result in its being unable to pursue the litigation [76] and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospects of success. [77] The phrase 'if it appears that there is reason to believe' in s 13 of the previous Act placed a much lighter burden of proof on the applicant for security than, for instance, the phrase 'the court is satisfied'. [78] Section 13 plainly required (and s 8 still requires) a two-stage enquiry. [79] At the initial stage, and in order to discharge the onus, the applicant for security had to adduce facts on which the court could conclude that there was reason to believe that the plaintiff would be unable to satisfy an adverse costs order. [80] If the court could not come to such a conclusion, it was the end of the matter [81] and the application was bound to be refused. [82] However, if the court was satisfied that a case had been made out, it had to, at the second stage, decide, in the exercise of its discretion, whether or not to compel security against the company [83] or, where applicable, the close corporation. [84]

It was not necessary to show that the company was insolvent. [85] At the same time the mere fact that a company was in liquidation would create 'reason to believe' that it would be unable to pay the costs. [86] The fact that a company's liabilities exceeded its assets was prima facie evidence that it would, if unsuccessful, be unable to pay the applicant's costs. [87] Section 13 did not contemplate that a company in liquidation could be excused from giving security for costs because of the prospect that proved creditors could be called upon to pay the costs as part of the costs of liquidation. [88]

The best means of countering an application to furnish security is for the close corporation to produce its balance sheet. An adverse inference may be drawn should it fail to do so. [89]

A close corporation may be ordered to furnish security for costs already incurred as well as for those still to be incurred. [90]

As regards delay in the bringing of an application for security, see the notes s v 'As soon as practicable' to subrule (1) below.

(ii) Arbitration. Section 21 of the Arbitration Act 42 of 1965 provides that a division of the High Court shall have the same power of making orders in respect of security for costs as it has for the purpose and in relation to any action or matter in that court. It has been held that this section of the Arbitration Act 42 of 1965 by necessary implication includes the ancillary power set out in s 13 of the (now repealed) Companies Act 61 of 1973 to order a stay of proceedings in a proper case. [91]

(iii) Local plaintiff. Section 25 of the Superior Courts Act 10 of 2013 provides that if a plaintiff in civil proceedings in a division of the High Court resides within the Republic, but outside the area of jurisdiction of the particular division, such plaintiff shall not by reason only of that fact be required to give security for costs in the said proceedings. See further the notes s v 'General' to s 25 of the Act in Volume 1 third edition, Part D.

(iv) Other cases. Rule 47A provides that, notwithstanding anything contained in the Uniform Rules of Court, a person to whom legal aid is rendered by a statutorily established legal aid board is not compelled to give security for the costs of the opposing party, unless the court directs otherwise. See further the notes to rule 47A s v 'Unless the court directs otherwise' below.

Subrule (1): 'A party entitled . . . to demand security for costs.' This subrule does not indicate the types of case in which one party is entitled to demand security for costs from the other; it deals only with the purely procedural aspect of the matter. Recourse must therefore be had to the common law and to statutory provisions which deal with security for costs. See the notes s v 'General' above.

'As soon as practicable.' Prior to the introduction of rule 47 it was accepted that delay in applying for security is not necessarily a fatal bar to the application. [92] There is nothing in the present rule which suggests delay in demanding or applying for security is to be regarded as fatal. [93]

'After the commencement of the proceedings.' The proceedings must be pending and final judgment not have been granted. [94]

'Deliver a notice.' The notice under this subrule, whilst it may form part of the party and party costs in the main action between the parties, is not in any way part of the application under subrule (3) to compel the furnishing of security. The costs incurred in relation to the notice cannot, therefore, be taxed as part of the costs of the application under subrule (3). [95]

A notice filed under the subrule is not a further step in the proceedings which falls within the ambit of rule 30(1); it relates to a peripheral matter and falls outside the provisions of that rule. [96]

'Setting forth the grounds upon which such security is claimed.' As to the grounds upon which security could be claimed,

see the notes s v 'General' above.

Subrule (2): 'The amount . . . only is contested.' The registrar has the power, under this subrule, to determine the amount of security in the event of a dispute between the parties. In terms of subrule (3) it is for the court to resolve any dispute as to the liability of a party to furnish security.

The fact that security has been furnished on an uncontested basis does not detract from the fact that security for costs as contemplated by this rule has been furnished. [97]

'The registrar shall determine the amount.' The amount of security to be ordered is entirely within the discretion of the registrar (or the court under subrule (3)). Each case must be decided on its own merits, and circumstances which might weigh heavily with the court in one case may be of little value in another. [98]

The best evidence the court can have before it as to the amount that should be given as security is the evidence of legal experts who have brought their minds to bear on the matter and have given an estimate of what the costs are likely to be. [99]

'His decision shall be final.' It is to be noted that, although the registrar's decision regarding to the amount of security is final, the applicant for security is enabled under subrule (6) to apply for an increase if the amount is no longer sufficient.

Notwithstanding the fact that the registrar's determination of the *quantum* of security for costs is final, the court nevertheless has jurisdiction to review such determination. [100]

See further the notes s v 'Appeal' below.

Subrule (3): 'Contests his liability to give security.' It is for the court to resolve any dispute as to the liability of a party to furnish security. In terms of subrule (2) the registrar determines the amount of security in the event of a dispute between the parties.

'Furnish security in the amount demanded.' If these words are to be construed as referring to the initial demand mentioned in subrule (1), it would be open to a defendant to demand an exorbitant amount of security for costs and then to apply for a stay of the action on the ground that the plaintiff had failed or refused to furnish security in the amount demanded. [101] It has accordingly been held that the demand mentioned in this subrule does not refer to the initial demand by the defendant, but a demand which he has become entitled to make by reason of a determination by the registrar or an agreement between the parties. [102]

'Apply to court . . . for an order.' It is usual practice in an application for an order under this subrule to include a prayer that in the event of security not being furnished within the time stipulated, the applicant be given leave to apply on the same papers, amplified as may be necessary, for the dismissal of the proceedings. [103]

The court may, in its discretion, order the costs of an unsuccessful application to be costs in the cause. [104]

Subrule (4): 'The court may . . . dismiss any proceedings.' The subrule gives effect to the decision in *Excelsior Meubels Bpk v Trans Unie Ontwikkelingskorporasie Bpk*. [105] The measure to dismiss proceedings is an extreme one and a court will be slow to adopt that measure where another remedy is available. [106] Thus, the power to dismiss proceedings must be exercised sparingly and with circumspection. [107]

Subrule (5): 'Unless the court otherwise directs.' In exercising its discretion, the court must not adopt an 'all or nothing' approach but rather consider the respective interests of the parties and the effect on them of the court order. [108] This subrule does not impose any restriction on the form of security the court can direct to be given.

'Be given in the form, amount and manner.' The normal practice is that security takes the form of a suitable bank, institutional or personal guarantee. It has been held [109] that movable property can be given as security but in order to comply with the object of the rule it must be tangible, durable and possess value, although these attributes are not exhaustive.

'Directed by the Registrar.' This subrule does not impose any restriction on the form of security the registrar can direct to be given.

Subrule (6): 'Increase the amount thereof.' The registrar may under this subrule increase the amount of security 'if he is satisfied that the amount originally furnished is no longer sufficient' and he can do so without need for a prior order of court authorizing him to do so. [110] The subrule renders obsolete the decision in *Sasol Marketing Co Ltd v Allied Stationers (Pty) Ltd* [111] in which it was held that the registrar, having fixed the amount of security, is *functus officio* and cannot increase it. There has never been any doubt that the court, in fixing the amount of security, need not make a final order but may make an interim order fixing an amount and give the applicant leave to approach the court at any future time for further security. [112]

The fact that security was furnished pursuant to the provisions of this rule on an uncontested basis does not preclude a party from applying to the registrar under this subrule for an increase in such security. [113]

'His decision shall be final.' See the notes to subrule (2) s v 'His decision shall be final' above.

Appeal. The decision of a court pursuant to an application brought in terms of rule 47(3) that a party who has refused or failed to furnish security in an amount as determined by the registrar under rule 47(2) must furnish security in the amount thus determined by the registrar, is appealable. [114]

It is well established that the discretion of a court in regard to security for costs is a narrow and strict one. It would therefore not be appropriate for an appellate court to interfere with an order for security for costs made under s 8 of the Close Corporations Act 69 of 1984 as long as it was judicially made, on the basis of the correct facts and legal principles. If the court took into account irrelevant considerations, or bases the exercise of its discretion on wrong legal principles, its judgment could be overturned on appeal. Beyond that, however, the decision of the court of first instance would be unassailable. [115]

As a general rule, appeals against orders of security should be dealt with by a full court and not by the Supreme Court of Appeal. In *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* [116] the following was stated: [117]

> 'There is another issue that merits mention. As indicated, leave to appeal to this court was granted by the court below. There being no demonstrable misdirection in its reasoning, such leave should never have been granted. In the event that leave was warranted, there still is no reason why the matter could not have been dealt with by the full court in terms of s 20(2) of the Supreme Court Act 59 of 1959. The principles governing applications of this nature, which present no complexities, are by now settled as evidenced by the cases cited above. This court has previously remonstrated against appeals against security orders being brought to it, at great expense to the litigants and to the detriment of difficult cases more deserving of its attention. It is hoped that litigants and the High Courts will heed this concern.'

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1 *Simpson's Motors v Flamingo Motors* 1989 (4) SA 797 (W) at 798I; *Siemens Telecommunications (Pty) Ltd v Datagenics (Pty) Ltd* 2013 (1) SA 65 (GNP) at 71I–72A; *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) at 301G; *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at 43C–D; *Fusion Properties 233 CC v Stellenbosch Municipality* (unreported, SCA case no 932/2019 dated 29 January 2021) at paragraph [20].

2 *ICC Car Importers (Pty) Ltd v A Hartrodt SA (Pty) Ltd* 2004 (4) SA 607 (W) at 615G; *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at 43C–D.

3 As to the general rule, see, for example, *Witham v Venables* (1828) 1 Menz 291; *Liquidator, Salisbury Meat Market Ltd v Perelson* 1924 WLD 104 at 107; *Brollomer Tin Exploration Co Ltd v Kameel Tin Proprietary Co Ltd* 1928 TPD 600 at 601; *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 (T) at 396B–397B. See also Voet 2 8 1.

4 Domicile or residence of some permanent or settled nature is sufficient to constitute a person an *incola* in so far as the question of being bound to furnish security for costs is concerned (see *Protea Assurance Co Ltd v Januszkiewicz* 1989 (4) SA 292 (W); *Toumbis v Antoniou* 1999 (1) SA 636 (W) at 641).

5 *Brearley v Faure, Van Eyk and Moore* (1905) 22 SC 2; *Lowndes v Rothschild* 1908 TH 49; *Kachelnik v Afrimeric Distributors (Pty) Ltd* 1948 (4) SA 279 (C).

6 *Thomson, Watson & Co v Poverty Bay Farmers' Meat Supply Co* 1924 CPD 23; *Banks v Henshaw* 1962 (3) SA 464 (D); *Africair (Rhodesia) Ltd v Interocean Airways SA* 1964 (3) SA 114 (SR); *Sandock Austral Ltd v Exploitation Industrielle et Commerciale-Bretic* 1974 (2) SA 280 (D) at 284–5; *B & W Industrial Technology (Pty) Ltd v Baroutsos* 2006 (5) SA 135 (W) at 143G–H.

7 *Witham v Venables* (1828) 1 Menz 291; *Lumsden v The Kaffrarian Bank* (1885) 3 SC 366; *Schunke v Taylor and Symonds* (1891) 8 SC 103; *Saker & Co Ltd v Grainger* 1937 AD 223 at 227; *B & W Industrial Technology (Pty) Ltd v Baroutsos* 2006 (5) SA 135 (W) at 143G–H; *Silvercraft Helicopters (Switzerland) Ltd v Zonnekus Mansions (Pty) Ltd* 2009 (5) SA 602 (C) at 606E; *Futura Footwear Limited v Salomon S.A.S* (unreported, KZD case no 5459/2011 dated 30 October 2012).

8 *Saker & Co Ltd v Grainger* 1937 AD 223 at 226–7; *B & W Industrial Technology (Pty) Ltd v Baroutsos* 2006 (5) SA 135 (W) at 141G–142A; *Silvercraft Helicopters (Switzerland) Ltd v Zonnekus Mansions (Pty) Ltd* 2009 (5) SA 602 (C) at 608I–609E and the authorities there referred to.

9 *B&W Industrial Technology (Pty) Ltd v Baroutsos* 2006 (5) SA 135 (W) at 144G–H, criticizing and not following *SA Iron and Steel Corporation Ltd v Abdulnabi* 1989 (2) SA 224 (T); *Silvercraft Helicopters (Switzerland) Ltd v Zonnekus Mansions (Pty) Ltd* 2009 (5) SA 602 (C) at 610E–612I; *Schleyer v Marschall* (unreported, GP case no 2020/2019 dated 19 August 2021) at paragraph [36]. See also (2007) 19 *SA Merc LJ* at 393–9.

10 1987 (1) SA 1 (A).

11 At 12B; and see *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC) at paragraph [10]; *McHugh NO v Wright* (unreported, WCC case no 5641/2020 dated 19 October 2021) at paragraph [27]; *Liebman v Liebman In re: Liebman v Liebman* (unreported, GP case no 24227/2021 dated 5 December 2022) at paragraph [9] and the cases there referred to; *Mystic River Investments 45 (Pty) Ltd v Zayeed Paruk Inc* 2023 (4) SA 500 (SCA) at paragraph [7]. The *Magida* decision seems to herald a much more lenient approach towards the whole issue of security of costs by *peregrini* and many of the older cases must be read as qualified by this decision. Decisions such as *Rapanos NO v Rapanos NO* 1958 (2) SA 705 (T), *Santam Insurance Co Ltd v Korste* 1962 (4) SA 53 (E) and *SA Television Manufacturing Co (Pty) Ltd v Jubati* 1983 (2) SA 14 (E) in which the court refused to exercise its discretion in favour of a *peregrinus* must now be treated with circumspection.

12 *Sitecki v Sitecki* 1917 TPD 165 at 169; *Estate Fawcus v Wood* 1934 CPD 243; *Saker & Co Ltd v Grainger* 1937 AD 223 at 227; *Rattray v Sinclair* 1938 NPD 379; *Alexander v Jokl* 1948 (3) SA 269 (W) at 273–4; *Santam Insurance Co Ltd v Korste* 1962 (4) SA 53 (E) at 56; *Drakensbergpers Bpk v Sharpe* 1963 (4) SA 615 (N); *Berger v Aiken* 1964 (2) SA 396 (W); *Fourie v Ratefo* 1972 (1) SA 252 (O); *SA Television Manufacturing Co (Pty) Ltd v Jubati* 1983 (2) SA 14 (E); *Vanda v Mbuqe & Mbuqe* 1993 (4) SA 93 (Tk GD) at 95F–G; *Silvercraft Helicopters (Switzerland) Ltd v Zonnekus Mansions (Pty) Ltd* 2009 (5) SA 602 (C) at 607H; *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC) at paragraph [10]; *Barker v Bishops Diocesan College* 2019 (4) SA 1 (WCC) at 8B–C; *Liebman v Liebman In re: Liebman v Liebman* (unreported, GP case no 24227/2021 dated 5 December 2022) at paragraph [9] and the cases there referred to; *Mystic River Investments 45 (Pty) Ltd v Zayeed Paruk Inc* 2023 (4) SA 500 (SCA) at paragraph [7].

13 *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14E and 15D; *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC) at paragraph [10]; *Liebman v Liebman In re: Liebman v Liebman* (unreported, GP case no 24227/2021 dated 5 December 2022) at paragraph [9] and the cases there referred to; *Mystic River Investments 45 (Pty) Ltd v Zayeed Paruk Inc* 2023 (4) SA 500 (SCA) at paragraphs [7]–[8].

14 *Shepstone & Wylie v Geyser NO* 1998 (3) SA 1036 (SCA) at 1046B; *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2002 (1) SA 841 (E) at 843G–F; *Northbank Diamonds Ltd v FTK Holland BV* 2003 (1) SA 189 (NmS) at 195D–E; *Sentraal-Suid Koöperasie Bpk v Bessemer Steel Construction (Pty) Ltd* 2004 (3) SA 552 (W) at 558I–559A; *Beliza Investments CC t/a Micra Hardware and Building Supplies v UCKG Properties* 2004 (4) SA 197 (TkHC) at 206F–H; *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at 530D–G and 538B–E; *Boost Sports Africa (Pty) Ltd v South African Breweries Ltd* 2014 (4) SA 343 (GP) at paragraph [21]; *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 (2) SA 166 (SCA) at 172C; *Fusion Properties 233 CC v Stellenbosch Municipality* (unreported, SCA case no 932/2019 dated 29 January 2021) at paragraph [23]; *TCI Investments Proprietary Limited v Bravospan 192 CC* (unreported, WCC case no 10885/2020 dated 13 September 2021) at paragraph [11]; *Mystic River Investments 45 (Pty) Ltd v Zayeed Paruk Inc* 2023 (4) SA 500 (SCA) at paragraphs [7]–[8]. See also *Joytech SA (Pty) Ltd v Tetraful 1060 CC* 2012 (5) SA 215 (KZD) at 217B–218C.

15 *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at 534C–535F; *McHugh NO v Wright* (unreported, WCC case no 5641/2020 dated 19 October 2021) at paragraph [26]; *Mystic River Investments 45 (Pty) Ltd v Zayeed Paruk Inc* 2023 (4) SA 500 (SCA) at paragraph [12].

16 *Per* Joubert JA in *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14E, thereby effectively overruling in this respect a decision such as *Santam Insurance Co Ltd v Korste* 1962 (4) SA 53 (E) at 56D–F; *Mystic River Investments 45 (Pty) Ltd v Zayeed Paruk Inc* 2023 (4) SA 500 (SCA) at paragraph [7]. See also *Africair (Rhodesia) Ltd v Interocean Airways SA* 1964 (3) SA 114 (SR) at 118B; *Silvercraft Helicopters (Switzerland) Ltd v Zonnekus Mansions (Pty) Ltd* 2009 (5) SA 602 (C) at 609G; *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC) at paragraph [28]; *McHugh NO v Wright* (unreported, WCC case no 5641/2020 dated 19 October 2021) at paragraph [27].

17 *Hulbert & Co v Caporn & Marriott* (1890) 7 *CLJ* 261; *Bovenzer v Bovenzer* (1898) 15 *CLJ* 203.

18 *Saker & Co Ltd v Grainger* 1937 AD 223 at 227.

19 *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14G; *Silvercraft Helicopters (Switzerland) Ltd v Zonnekus Mansions (Pty) Ltd* 2009 (5) SA 602 (C) at 609G.

20 In *Magida v Minister of Police* 1987 (1) SA 1 (A) the Appellate Division had regard, *inter alia*, to the fact that the *peregrinus* was economically active within the jurisdiction where he was earning his livelihood, and the fact that execution of the judgment was possible where the *peregrinus* resided in the (former) Republic of the Ciskei. In *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV v Honig* 2012 (1) SA 247 (SCA) it was held (at 255B–C) that the fact that the applicant for security for costs would have to proceed abroad against a *peregrinus* respondent if he obtained a costs order in his favour, with the associated uncertainty and inconvenience that would entail, and that it would be substantially more expensive to do so than litigating in the Republic, was one of the fundamental reasons why a *peregrinus* should provide security. It was also held (at 256A–B) that if the respondent in an application for security for costs clearly faced a considerable hurdle in the proceedings that had been instituted against the applicant for security, and the prospects of his success in the main proceedings appeared to be bleak and there was a distinct possibility of him being ordered to pay the applicant's costs in the main proceedings, that constituted a factor which made it all the more important for the applicant to be secure. See also *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC) at 626G–627D. In *Vanda v Mbuqe & Mbuqe* 1993 (4) SA 93 (Tk GD) it is said (at 95H–96B) that factors which will make the court less disposed to order a *peregrinus* to furnish security include the fact that he is not a *vagabundus* (i e is a person of fixed domicile), is impecunious and unable to furnish security, is an honourable man or resides at a place where the judgment sought can be enforced. See also *SA Iron and Steel Corporation Ltd v Abdulnabi* 1989 (2) SA 224 (T) at 233F–H; *Silvercraft Helicopters (Switzerland) Ltd v Zonnekus Mansions (Pty) Ltd* 2009 (5) SA 602 (C) at 607H–I and 609G; *Alam v Minister of Home Affairs* 2012 (5) SA 626 (ECP) at 632D–633F; *Futura Footwear Limited v Salomon S.A.S* (unreported, KZD case no 5459/2011 dated 30 October 2012) at paragraphs 5 and 6; *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC) at 625E–F; *Barker v Bishops Diocesan College* 2019 (4) SA 1 (WCC) at 8B–12D; *Schleyer v Marschall* (unreported, GP case no 2020/2019 dated 19 August 2021) (factors that come into play are the *peregrine's* impecuniosity, whether the order compelling security would deprive him of the right to litigate against the *incola*, whether he is economically active within the jurisdiction of the court and whether the execution of the court's judgment is possible in the jurisdiction in which he resides — none of these factors are decisive (at paragraph [33]); it is neither in accordance with modern commercial needs, nor just and equitable

to impose the burden of having to provide security upon a *peregrinus* plaintiff, where the plaintiff resides in a civilised country with a civilised legal system, and where there is nothing preventing an *incola* defendant from instituting proceedings against the *peregrinus* plaintiff in his own country (at paragraph [37])); *McHugh NO v Wright* (unreported, WCC case no 5641/2020 dated 19 October 2021) (the *peregrinus* may in any event not have sufficient exigible assets to satisfy an adverse costs order (at paragraphs [32]–[33]); the lack of assets could frustrate his ability to pursue the litigation if he were required to put up security for the respondent's costs (at paragraph [34]); he did not embark on the litigation frivolously (at paragraph [36]); his claim is not fanciful (at paragraph [36]); he has laid a cogent basis for his allegations of fraud to be tried, and a court will, in the interests of upholding the law, be reluctant to deprive a litigant who cogently alleges that he is the victim of fraud, of a trial of his case (at paragraph [37]); the parties demanding security are in a conflicted position in the litigation (at paragraph [39]); *Liebman v Liebman In re: Liebman v Liebman* (unreported, GP case no 24227/2021 dated 5 December 2022) at paragraph [9] and the cases there referred to.

21 *Barker v Bishops Diocesan College* 2019 (4) SA 1 (WCC) at 8F–H.

22 *Barker v Bishops Diocesan College* 2019 (4) SA 1 (WCC) at 4H–I.

23 *Schleyer v Marschall* (unreported, GP case no 2020/2019 dated 19 August 2021) at paragraphs [34]–[35].

24 *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14C; and see *Drakensbergpers Bpk v Sharpe* 1963 (4) SA 615 (N).

25 *Alexander v Jokl* 1948 (3) SA 269 (W) at 274.

26 *Alam v Minister of Home Affairs* 2012 (5) SA 626 (ECP) at 627D–E, 629G–H, 630A–E, 631E–I and 632D.

27 *MV Guzin S (No 2) Hamburgische Landesbank — Girozentrale v Allied Sales Corporation* 2002 (6) SA 127 (D) at 130G–H.

28 2009 (5) SA 602 (C) at 616D.

29 2016 (2) SA 622 (WCC).

30 At 627F–630H.

31 *Ecker v Dean* 1938 AD 102 at 110 in which the earlier conflicting decisions are reviewed; see, for example, *Mears v Pretoria Estate & Market Co Ltd* 1907 TS 951; *Marks v Kalk* 1910 TS 40; *Nederlandsche ZA Hypotheek Bank v Mears* 1913 TPD 704; *Kilfoil v Fisher* 1916 WLD 1; *United Party Club v Trustees United Party Club* 1930 WLD 132; *Wessels v Wessels' Trustee* 1935 TPD 225. See also *Israel v Burger* 1961 (1) SA 827 (O) at 831C–832D; *Director, Law Society of Cape of Good Hope v Budricks* [2000] 2 All SA 541 (SE) at 544*g*–545*b*; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 625A–C.

32 *Ecker v Dean* 1938 AD 102 at 110. See also *Uys v Volkskas Bpk* 1945 TPD 421; *Davidson's Bakery (Pty) Ltd v Burger* 1961 (1) SA 589 (O); *Israel v Burger* 1961 (1) SA 827 (O).

33 *Wessels v Wessels' Trustee* 1935 TPD 225; *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W); *Hobson NO v Abib* 1981 (1) SA 556 (N).

34 *Fitchet v Fitchet* 1987 (1) SA 450 (E) at 453I–454A; *Ramsamy NO v Maarman* 2002 (6) SA 159 (C) at 172I; *Boost Sports Africa (Pty) Ltd v South Africa Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at 50C–I; *Corwil Investments Holdings (Pty) Ltd v Investec Securities (Pty) Ltd* (unreported, GJ case no 11126/2021 dated 5 April 2022) at paragraphs [37]–[42].

35 *Mears v Brooks's Executor and Mears's Trustee* 1906 TS 546 at 550; *Pillemer v Israelstam and Shartin* 1911 WLD 158; *Crest Enterprises (Pty) Ltd v Barnett and Schlosberg NNO* 1986 (4) SA 19 (C) at 22A–E; *Ramsamy NO v Maarman* 2002 (6) SA 159 (C) at 173A–G.

36 *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 271; *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 517; *Hudson v Hudson* 1927 AD 259 at 268; *Zietsman v Electronic Media Network Ltd* 2008 (4) SA 1 (SCA) at 4E. See also *Fisheries Development Corporation of SA Ltd v Jorgensen* 1979 (3) SA 1331 (W) at 1338F–G; *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734D; *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) at 412C–D; *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) at 80H–J; *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C) at 13G–H; *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning* 2012 (3) SA 128 (WCC) at 131H–132D. In *Belmont House (Pty) Ltd v Gore and Another NNO* 2011 (6) SA 173 (WCC) it was held (at 178D–G) that the power to stop or prevent proceedings will be exercised sparingly and only in exceptional, clear cases. It was held (at 178E–F) that proceedings will be stayed when they are vexatious or frivolous or when their continuance, on all the circumstances of the case, is, or may prove to be, an injustice or serious embarrassment to one or other of the parties but not merely to avoid injustice and inequity. See also *Winprop (Pty) (Ltd) v Bahlekazi* (unreported, GJ case no 28781/2021 dated 13 December 2022) at paragraph 32; *Emam v Carlson* (unreported, WCC case no 20740/2022 dated 11 April 2023) at paragraph 5.

37 *Ecker v Dean* 1937 AD 254 at 259, 1938 AD 102 at 111; *Fitchet v Fitchet* 1987 (1) SA 450 (E) at 453J–454A; *Zietsman v Electronic Media Network Ltd* 2008 (4) SA 1 (SCA) at 4E.

38 *Ecker v Dean* 1938 AD 102 at 111.

39 *Ravden v Beeten* 1935 CPD 269 at 276; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D–E; *Fisheries Development Corporation of SA Ltd v Jorgensen* 1979 (3) SA 1331 (W) at 1339E–F; *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C) at 13H; *Boost Sports Africa (Pty) Ltd v South Africa Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at 51B–E; *Corwil Investments Holdings (Pty) Ltd v Investec Securities (Pty) Ltd* (unreported, GJ case no 11126/2021 dated 5 April 2022) at paragraphs [39]–[42]; *Apex Commodities (Pty) Ltd v Agri Trading Service (Pty) Ltd In re: Agri Trading Services (Pty) Ltd v Apex Commodities (Pty) Ltd* (unreported, GP case no 18620/2018 dated 26 September 2022) at paragraphs 17 and 38–39.

40 *Ravden v Beeten* 1935 CPD 269 at 276; *Burnham v Fakheer* 1938 NPD 63; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D; *Bisset v Boland Bank Ltd* 1991 (4) SA 603 (D) at 608G. See, however, *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C) at 17H–18B where Griesel J disagreed and declined to follow these authorities and held that a preponderance of probability is sufficient to decide any civil case in favour of a litigant.

41 *Fitchet v Fitchet* 1987 (1) SA 450 (E) at 454F; *Corwil Investments Holdings (Pty) Ltd v Investec Securities (Pty) Ltd* (unreported, GJ case no 11126/2021 dated 5 April 2022) at paragraph [40].

42 *Fitchet v Fitchet* 1987 (1) SA 450 (E) at 454H; *Corwil Investments Holdings (Pty) Ltd v Investec Securities (Pty) Ltd* (unreported, GJ case no 11126/2021 dated 5 April 2022) at paragraphs [40] and [43]–[51]; *Apex Commodities (Pty) Ltd v Agri Trading Service (Pty) Ltd In re: Agri Trading Services (Pty) Ltd v Apex Commodities (Pty) Ltd* (unreported, GP case no 18620/2018 dated 26 September 2022) at paragraphs 20–25; and see *Davidson's Bakery (Pty) Ltd v Burger* 1961 (1) SA 589 (O) at 593A–C.

43 1927 AD 259 at 268. See also *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) at 414I–J and 416B–F.

44 1999 (2) SA 555 (SCA) at 565E–F.

45 *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 91.

46 1997 (3) SA 721 (SCA) at 734F–G; and see *Standard Bank of South Africa Ltd v Mpongo* 2021 (6) SA 403 (SCA) at paragraph [47]; *TMT Services & Supplies (Pty) Ltd t/a Traffic Management Technologies v MEC: Department of Transport, Province of KwaZulu-Natal* (unreported, SCA case no 1059/2020 dated 15 March 2022) at paragraph [37].

47 The new Act, with the exception of s 11(1)*(a)*(ii) and (iii), came into operation on 1 May 2011 (Proc R32 in *GG* 34239 of 26 April 2011).

48 The historical background of the section is considered in *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 (T). See also *Boost Sports Africa (Pty) Ltd v South Africa Breweries* 2015 (5) SA 38 (SCA) at 43F–46C.

49 The different views, and decisions, were discussed in the previous edition of this work [Service 41, 2013] at B1–343/344–1.

50 2015 (5) SA 38 (SCA), confirming the decision in *Boost Sports Africa (Pty) Ltd v South African Breweries Ltd* 2014 (4) SA 343 (GP). See also *Apex Commodities (Pty) Ltd v Agri Trading Service (Pty) Ltd In re: Agri Trading Services (Pty) Ltd v Apex Commodities (Pty) Ltd* (unreported, GP case no 18620/2018 dated 26 September 2022) at paragraphs 17–18; T Bekker 'Furnishing security for costs by an *incola* company — at last some legal certainty, or more confusion? *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* (SCA)' (2017) 134.3 *SALJ* 498.

51 Mhlantla JA, Fourie and Gorven AJJA concurring.

52 At paragraphs [12]–[19] (footnotes omitted).

53 Unreported, SCA case no 1371/2018 dated 2 July 2020.

54 At paragraphs [16]–[28].

55 2015 (5) SA 38 (SCA).

56 At 49D.

57 In *Henry v R E Designs CC* 1998 (2) SA 502 (C) at 507F–G, Thring J sets out to interpret and apply s 8 of the Close Corporations Act 69 of 1984 in accordance with the principles that have been evolved in cases pertaining to the corresponding provisions in companies legislation. See also *Siemens Telecommunications (Pty) Ltd v Datagenics (Pty) Ltd* 2013 (1) SA 65 (GNP) at 71H–I and *Fusion Properties 233 CC v Stellenbosch Municipality* (unreported, SCA case no 932/2019 dated 29 January 2021) at paragraphs [22]–[24] and [26]–[38].

58 See *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 (T).

59 *Fraser v Lampert NO* 1951 (4) SA 110 (T); *Trakman NO v Livschitz: In re Livschitz v Trakman NO* 1996 (2) SA 384 (W) at 392G.

60 *Waisbrod v Potgieter* 1953 (4) SA 502 (W) at 506F–507A; *Trakman NO v Livschitz: In re Livschitz v Trakman NO* 1996 (2) SA 384 (W) at

392G–393A. Despite the repeal of the previous Act, its provisions regarding winding-up and liquidation set out in Chapter 14 thereof continue to apply until a date to be determined by the Minister (item 9 of Schedule 5 of the Companies Act 71 of 2008).

61 *Trakman NO v Livschitz: In re Livschitz v Trakman NO* 1996 (2) SA 384 (W) at 393A.

62 *Hudson & Son v London Trading Company Ltd* 1930 WLD 288 at 291; *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)* 1997 (4) SA 908 (W) at 919F–G; *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2000 (2) SA 400 (SE) at 403H–I; *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2002 (1) SA 841 (E) at 843E; *Northbank Diamonds Ltd v FTK Holland BV* 2003 (1) SA 189 (NmS) at 194H–I; *Sentraal-Suid Koöperasie Bpk v Bessemer Steel Construction (Pty) Ltd* 2004 (3) SA 552 (W) at 554C; *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at 530A–B; *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 (2) SA 166 (SCA) at 172B–C; *TCI Investments Proprietary Limited v Bravospan 192 CC* (unreported, WCC case no 10885/2020 dated 13 September 2021) at paragraph [10].

63 *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at 530C–D; *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 (2) SA 166 (SCA) at 172B–C; *Fusion Properties 233 CC v Stellenbosch Municipality* (unreported, SCA case no 932/2019 dated 29 January 2021) at paragraph [22]; *TCI Investments Proprietary Limited v Bravospan 192 CC* (unreported, WCC case no 10885/2020 dated 13 September 2021) at paragraph [10].

64 *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)* 1997 (4) SA 908 (W) at 919G–J; *Shepstone & Wylie v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045I–1046D; *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (4) SA 799 (W) at 808D–J, 809A–811E; *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2000 (2) SA 400 (SE) at 403J–404C; *Commissioner, South African Revenue Service v East Coast Shipping (Pty) Ltd* 2000 (4) SA 533 (D) at 536I–537D; *Paradigm Capital Holdings (Pty) Ltd v PAP Computer Services CC* 2000 (4) SA 1070 (W) at 1073B–D; *Northbank Diamonds Ltd v FTK Holland BV* 2003 (1) SA 189 (NmS) at 195D; *Sentraal-Suid Koöperasie Bpk v Bessemer Steel Construction (Pty) Ltd* 2004 (3) SA 552 (W) at 558H–559C; *Beliza Investments CC t/a Micra Hardware and Building Supplies v UCKG Properties* 2004 (4) SA 197 (TkHC) at 206E; *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at 537D and 538B–E; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 625D; *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 (2) SA 166 (SCA) at 172B–C; *TCI Investments Proprietary Limited v Bravospan 192 CC* (unreported, WCC case no 10885/2020 dated 13 September 2021) at paragraph [11]. See also *Joytech SA (Pty) Ltd v Tetraful 1060 CC* 2012 (5) SA 215 (KZD) at 217B–218C.

65 *Highlands North Investment Co (Pty) Ltd v Land Values Ltd* 1931 WLD 102 at 105; *Turkstra v Goldberg NO* 1946 TPD 535 at 538–9; *Kruger Stores (Pty) Ltd v Kopman* 1957 (1) SA 645 (W) at 649; *Rapanos NO v Rapanos NO* 1958 (2) SA 705 (T) at 707; *Davidson's Bakery (Pty) Ltd v Burger* 1961 (1) SA 589 (O) at 593–4; *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981 (4) SA 662 (W) at 663G; *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2000 (2) SA 400 (SE) at 406B–C; *Commissioner, South African Revenue Service v East Coast Shipping (Pty) Ltd* 2000 (4) SA 533 (D) at 538F–540C; *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2002 (1) SA 841 (E) at 846A; *Beliza Investments CC t/a Micra Hardware and Building Supplies v UCKG Properties* 2004 (4) SA 197 (TkHC) at 204D–E. A delay on the part of a defendant in requesting security in terms of s 13 of the previous Act timeously was an important and decisive factor in the exercise of the court's discretion (*ICC Car Importers (Pty) Ltd v A Hartrodt SA (Pty) Ltd* 2004 (4) SA 607 (W) at 616H and 617E–618G).

66 *Commissioner, South African Revenue Service v East Coast Shipping (Pty) Ltd* 2000 (4) SA 533 (D) at 540C.

67 *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 626B; *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 (2) SA 166 (SCA) at 172F–173A.

68 *Northbank Diamonds Ltd v FTK Holland BV* 2003 (1) SA 189 (NmS) at 202C–D.

69 *Northbank Diamonds Ltd v FTK Holland BV* 2003 (1) SA 189 (NmS) at 202D–F.

70 *Shepstone & Wylie v Geyser NO* 1998 (3) SA 1036 (SCA) at 1046B; *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2002 (1) SA 841 (E) at 843G–F; *Northbank Diamonds Ltd v FTK Holland BV* 2003 (1) SA 189 (NmS) at 195D–E; *Sentraal-Suid Koöperasie Bpk v Bessemer Steel Construction (Pty) Ltd* 2004 (3) SA 552 (W) at 558I–559A; *Beliza Investments CC t/a Micra Hardware and Building Supplies v UCKG Properties* 2004 (4) SA 197 (TkHC) at 206F–H; *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at 530D–G and 538B–E; *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 (2) SA 166 (SCA) at 172C; *Boost Sports Africa (Pty) Ltd v South African Breweries Ltd* 2014 (4) SA 343 (GP) at paragraph [21]; *Fusion Properties 233 CC v Stellenbosch Municipality* (unreported, SCA case no 932/2019 dated 29 January 2021) at paragraph [23]; *TCI Investments Proprietary Limited v Bravospan 192 CC* (unreported, WCC case no 10885/2020 dated 13 September 2021) at paragraph [11]. See also *Joytech SA (Pty) Ltd v Tetraful 1060 CC* 2012 (5) SA 215 (KZD) at 217B–218C.

71 *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at paragraph [30]; *TCI Investments Proprietary Limited v Bravospan 192 CC* (unreported, WCC case no 10885/2020 dated 13 September 2021) at paragraph [12].

72 *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (4) SA 799 (W) at 804G–808B; *Northbank Diamonds Ltd v FTK Holland BV* 2003 (1) SA 189 (NmS) at 196B–I; *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at 534C–535F; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 623I–624C; *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 (2) SA 166 (SCA) at 172A; *McHugh NO v Wright* (unreported, WCC case no 5641/2020 dated 19 October 2021) at paragraphs [28]–[29].

73 Unreported, SCA case no 932/2019 dated 29 January 2021.

74 At paragraph [24] (footnotes omitted).

75 See, for example, *Roseville Buildings (Pty) Ltd v Powis & Co (1923) Ltd* 1942 NPD 94; *Henry v R E Designs CC* 1998 (2) SA 502 (C) at 510H; *Northbank Diamonds Ltd v FTK Holland BV* 2003 (1) SA 189 (NmS) at 194F–G; *Beliza Investments CC t/a Micra Hardware and Building Supplies v UCKG Properties* 2004 (4) SA 197 (TkHC) at 204E–F; *FirstRand Bank v Pather* 2005 (4) SA 429 (N) at 432F–G; *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at 530E; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 625H–I. See also *Joytech SA (Pty) Ltd v Tetraful 1060 CC* 2012 (5) SA 215 (KZD) at 217B–218C.

76 *Shepstone & Wylie v Geyser NO* 1998 (3) SA 1036 (SCA) at 1046G–I; *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at 530E–F; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 625F–H. The close corporation must in this regard, adduce 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 (*MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 625C–E; *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 (2) SA 166 (SCA) at 172F–173A).

77 *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at 530F.

78 *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 (W) at 1071E–H; and see *FirstRand Bank v Pather* 2005 (4) SA 429 (N) at 432C–D; *Computer Brilliance CC v Swanepoel* 2005 (4) SA 433 (T) at 444B–D.

79 *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 622H.

80 *Henry v R E Designs CC* 1998 (2) SA 502 (C) at 507E–508D and 510G–I; *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 (W) at 1071E–H; *Northbank Diamonds Ltd v FTK Holland BV* 2003 (1) SA 189 (NmS) at 193I; *Beliza Investments CC t/a Micra Hardware and Building Supplies v UCKG Properties* 2004 (4) SA 197 (TkHC) at 204F–205H; *FirstRand Bank v Pather* 2005 (4) SA 429 (N) at 432C–D; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 622I; *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 (2) SA 166 (SCA) at 171F–G.

81 *Northbank Diamonds Ltd v FTK Holland BV* 2003 (1) SA 189 (NmS) at 193I; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 622I.

82 *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 622I.

83 *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) at 622I–623A.

84 *Henry v R E Designs CC* 1998 (2) SA 502 (C) at 515E–F; *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 (W) at 1071E–F.

85 *Viviers v Williams Builders & Contractors Ltd* 1936 TPD 273; *Henry v R E Designs CC* 1998 (2) SA 502 (C) at 507I–508A; *Beliza Investments CC t/a Micra Hardware and Building Supplies v UCKG Properties* 2004 (4) SA 197 (TkHC) at 205A–B.

86 *Trust Bank van Afrika Bpk v Lief* 1963 (4) SA 752 (T) at 755C.

87 *Ferreira v Arlinders Ltd* 1964 (1) SA 631 (O).

88 *Trust Bank van Afrika Bpk v Lief* 1963 (4) SA 752 (T) at 757C.

89 *Milne v Sadowa Minerals (Pty) Ltd* 1956 (2) PH F89; *Equitable Trust and Insurance Co of SA Ltd v Registrar of Banks* 1957 (1) SA 689 (T); *Henry v R E Designs CC* 1998 (2) SA 502 (C) at 512D–513A; but see *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 (W) at 1071I–1072A; *ICC Car Importers (Pty) Ltd v A Hartrodt SA (Pty) Ltd* 2004 (4) SA 607 (W) at 611H–I. See, however, *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV v Honig* 2012 (1) SA 247 (SCA) at 254H–255B.

90 *Henry v R E Designs CC* 1998 (2) SA 502 (C) at 510C–D where *Brollomer Tin Exploration Co Ltd v Kameel Tin Co (Pty) Ltd* 1928 TPD 600 (incorrectly referred to in the judgment as *Brollomer Tin Exploration Co Ltd v Kameel Tin Co (Pty) Ltd* 1928 TPD 647) and *Kruger Stores (Pty) Ltd v Kopman* 1957 (1) SA 645 (W) are referred to. See also *Price Forbes (Africa) Ltd v Schwartz* 1966 (4) SA 118 (W).

91 *Sasko Bpk v Futurus Construction (Pty) Ltd* 1988 (4) SA 170 (W) at 171I. See also *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990 (4) SA 196 (C) at 204F–205F.

92 *Lagesen v Electric Lamps Regenerators Ltd* 1914 WLD 76; *British American Assurance Co v Moretti (1)* 1936 CPD 497; *Francis & Graham Ltd v East African Disposal Co Ltd* 1950 (3) SA 502 (N).

93 See *Drakensbergpers Bpk v Sharpe* 1963 (4) SA 615 (N) at 618; *SA Iron and Steel Corporation Ltd v Abdulnabi* 1989 (2) SA 224 (T) at 236D–F. In *Magida v Minister of Police* 1987 (1) SA 1 (A) it is said (at 13J–14A) that normally the application should be brought before *litis contestatio*. In *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV v Honig* 2012 (1) SA 247 (SCA) it was held (at 253A–B) that while, as a general rule, a party was expected to apply expeditiously for security under rule 47, a party was entitled to seek additional security at any stage, although an unreasonable delay in doing so might be decisive in the exercise of the court's discretion. It was therefore wrong to allege that the party might not apply for security for costs at a late stage of the proceedings. See also *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC) at 626D–E.

94 *H R Holfeld (Africa) Ltd v Karl Walter & Co GmbH (2)* 1987 (4) SA 861 (W).

95 *Jacobs v SA Transport Services* 1986 (2) SA 301 (E).

96 *Market Dynamics (Pty) Ltd t/a Brian Ferris v Grögor* 1984 (1) SA 152 (W).

97 *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990 (4) SA 196 (C) at 207H.

98 *Schunke v Taylor and Symonds* (1891) 8 SC 103 at 111; *Africair (Rhodesia) Ltd v Interocean Airways SA* 1964 (3) SA 114 (SR) at 118F. On factors to be taken into consideration, see *Trakman NO v Livschitz: In re Livschitz v Trakman NO* 1996 (2) SA 384 (W) at 389A–390J.

99 *Nederlandsche ZA Hypotheek Bank v Mears* 1913 TPD 704 at 706; *Avenue Shipping Co Ltd v SA Railways and Harbours* 1936 CPD 486.

100 *Trakman NO v Livshitz* 1995 (1) SA 282 (A) at 289G. In *Pharumela v St John's Apostolic Faith Mission of SA* 1975 (1) SA 311 (T) at 313A it was held that the court can do so not only on the ground that the registrar had acted *mala fide* or from improper motives, or has not applied his mind to the matter or exercised his discretion at all (*Shidiack v Union Government* 1912 AD 642 at 651–2) but also where the court is satisfied that the registrar was clearly wrong in the amount he fixed (*Legal and General Assurance Society Ltd v Lieberum NO* 1968 (1) SA 473 (A) at 478B). See also *Wood v Assistant Registrar, General Division, Rhodesia* 1971 (3) SA 561 (R); *Trakman NO v Livschitz: In re Livschitz v Trakman NO* 1996 (2) SA 384 (W).

101 *Sasko Bpk v Futurus Construction (Pty) Ltd* 1988 (4) SA 170 (W) at 175C.

102 *Sasko Bpk v Futurus Construction (Pty) Ltd* 1988 (4) SA 170 (W) at 175G–176A.

103 See the order granted in *SA Television Manufacturing Co (Pty) Ltd v Jubati* 1983 (2) SA 14 (E) at 20B; and see the order proposed in 2007 (August) *De Rebus* 28 at 29. See also *Gisman Mining and Engineering Co (Pty) Ltd (in liquidation) v LTA Earthworks (Pty) Ltd* 1977 (4) SA 25 (W) at 26E.

104 *Rosenblum v Marcus* (1884) 5 NLR 82; *Setecki v Setecki* 1917 TPD 165 at 169; *Estate Fawcus v Wood* 1934 CPD 243 at 249.

105 1957 (1) SA 74 (T). See also *Caluza v Minister of Justice* 1969 (1) SA 251 (N) at 254; *Selero (Pty) Ltd v Chauvier* 1982 (3) SA 519 (T) at 522B.

106 *Wallace NO v Commercial Insurance Co of SA Ltd* 1999 (3) SA 804 (C) at 809I–810B and 811D–G.

107 *Investec Bank Ltd v Knoop* (unreported, GJ case no 2011/11563 dated 20 March 2023) at paragraph [5], referring to *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 27; *Kuiper v Benson* 1984 (1) SA 474 (W) at 477A; *Molala v Minister of Law and Order* 1993 (1) SA 673 (W) and *Sanford v Haley NO* 2004 (3) SA 296 (C) at paragraph [8].

108 *Paradigm Capital Holdings (Pty) Ltd v PAP Computer Services CC* 2000 (4) SA 1070 (W) at 1073C.

109 *Majunga Food Processes SARL v SA Dried Fruit Co-Operative Ltd* 2000 (2) SA 94 (C) at 96G–H.

110 *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990 (4) SA 196 (C) at 208B.

111 1961 (1) SA 370 (O).

112 See, for example, *Hudson & Son v London Trading Company Ltd* 1930 WLD 288; *Montesse Township and Investment Corporation (Pty) Ltd v Standard Bank NO* 1964 (1) SA 14 (T) at 15F–16B; and see *Wood v Assistant Registrar, General Division, Rhodesia* 1971 (3) SA 561 (R) at 564F–565D.

113 *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990 (4) SA 196 (C) at 207J–208F.

114 *MV Akkerman: Fullwood Shipping SA v Magna Hellas Shipping SA* 2000 (4) SA 584 (C) at 590B–C.

115 See, for example, *Fusion Properties 233 CC v Stellenbosch Municipality* (unreported, SCA case no 932/2019 dated 29 January 2021) at paragraphs [25]–[29].

116 2009 (2) SA 166 (SCA).

117 At 174B–D.