THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 932/2019

In the matter between:

FUSION PROPERTIES 233 CC **APPLICANT**

and

STELLENBOSCH MUNICIPALITY **RESPONDENT**

Neutral citation: *Fusion Properties 233 CC v Stellenbosch Municipality* (932/2019) [2021] ZASCA 10 (29 January 2021)

Coram: PETSE DP, SALDULKER and SCHIPPERS JJA and MATOJANE and SUTHERLAND AJJA

Heard: 20 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09H45 on 29 January 2021.

Summary: Practice and procedure – application for leave to appeal – referral for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 – leave sought against order of the high court directing applicant to provide security for costs in terms of s 8 of the Close Corporations Act 69 of 1984 – demand for security made under Uniform rules 47(1) and 47(3) – high court exercising narrow discretion in making order – powers of appellate court to interfere with exercise of such discretion circumscribed – no basis for interference on appeal established.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Allie J sitting as court of first instance):

The application for leave to appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Petse DP (Saldulker and Schippers JJA and Matojane and Sutherland AJJA concurring):

Introduction

[1] This is an application for leave to appeal against a judgment of the Western Cape Division of the High Court (the high court) brought by Fusion Properties 233 CC (Fusion) which was referred for oral argument in terms of s 17(2)*(d)*[1] of the Superior Courts Act 10 of 2013 (the Superior Courts Act). Fusion's adversary is the Stellenbosch Municipality (the municipality) which is an organ of state within the local government sphere.

[2] The application falls within the narrowest compass. By its very nature it requires, for its determination, full argument in relation to the merits of the entire case as if the appeal itself were being considered. For this reason,

[1] Section 17(2)*(d)* of the Superior Courts Act 10 of 2013 reads:
'The judges considering an application referred to in paragraph *(b)* may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.'

Fusion was directed to file six copies of the application for leave, as well as the full record in terms of rule 8 of this Court's rules. In addition, the parties were forewarned that they must be prepared, if called upon to do so, to address the court on the merits.[2]

Factual background

[3] The facts are fairly straightforward, and are briefly as follows. The legal skirmish between Fusion and the municipality has had a somewhat long and tortuous history. This is the third legal bout in which the parties have locked horns. The dispute has its genesis in an invitation for proposals published by the municipality during 2005 for the purchase and development of some eight erven that it owned.

[4] Believing that the municipality's invitation presented it with a lucrative opportunity for investment in property development, Fusion responded to the invitation. In pursuit of its ultimate objective, it commenced negotiations with the municipality with a view to concluding a written agreement of sale as a precursor to the proposed development. For reasons that are not necessary to canvass in this judgment, the intended sale fell through. The municipality disputed the existence of any valid agreement between it and Fusion. On the

[2] See order of this Court granted on 29 October 2019. It reads:
'1. The application for leave to appeal is referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013.
2. The parties must be prepared, if called upon to do so, to address the court on the merits.
3. For this purpose the applicant is to file five additional copies of the application for leave to appeal within one month of the date of this order and to comply with the rules of this Court by filing the record in terms of rule 8 within three months of this order and both parties are to comply with the remaining rules relating to the prosecution of an appeal.
4. If the applicant does not proceed with the application the applicant is to pay the costs relating to the application for leave to appeal.'

other hand, Fusion sought to hold the municipality to its bargain, asserting that the parties had concluded a valid agreement of sale.

[5] Determined not to yield to Fusion’s demands, the municipality then resorted to litigation. It applied to the high court for a declarator that there was no contractual nexus between it and Fusion. Fusion opposed the application. Ultimately, the high court (Desai J) dismissed the application and directed the parties ‘to negotiate in good faith’ in order to resolve their differences. However, the parties’ negotiations failed to bear fruit. Instead, on 23 April 2014 and, after much toing and froing, the municipality finally resolved not to proceed with the alienation of the erven to Fusion.

[6] On 5 November 2015 Fusion instituted legal proceedings against the municipality in which it claimed damages for breach of contract for some R32 million and ancillary relief. The legal foundation for the claim asserted by Fusion was that the municipality had, 'with the deliberate intention to prevent the fulfilment of the conditions' of certain clauses of the alleged agreement 'delayed the process and failed to negotiate in good faith with [Fusion]'. The municipality is resisting the claim which, as it appears from the record, is now ripe for trial. It is common cause that Fusion is an empty shell with no assets whatsoever. It is not engaged and has never engaged in any business activity. The development of the municipality's erven that it had laid it sights on was going to be its business venture of note in Stellenbosch.

[7] Realising that there was no realistic prospect of it recovering its litigation costs against Fusion if it were successful in resisting the claim, on account of Fusion's parlous financial state, the municipality invoked s 8 of the

Close Corporations Act 69 of 1984 (the Close Corporations Act) and, on 10 December 2018, delivered a notice in terms of rule 47(1) of the Uniform Rules of Court. In this notice, the municipality demanded security for costs in the sum of R2 626 431.06. This amount was alleged to represent 'estimated reasonable costs in defending the action'.[3] For its part, Fusion contested its obligation to give security for costs in the amount required or any portion thereof.

[8] Undaunted by Fusion's stance in contesting its liability to furnish security for costs, the municipality brought an interlocutory application in terms of rule 47(3) read with rule 6(11). It claimed an order directing Fusion to provide security for costs in the sum of R2 626 431.06 and that the action be stayed until the security was furnished.

[9] In pursuit of the application, the deponent to the municipality's founding affidavit asserted, amongst others, the following. That Fusion had not conducted business since 2007 and owned no immovable or movable assets. And that in response to a notice in terms of rule 35(3) to make available for inspection its audited financial statements and bank statements from 2005 to 2019, Fusion had stated that these documents were not in its possession and their whereabouts were unknown. It was unclear whether these documents even existed. Thus, the likelihood that Fusion was able to pay the municipality’s costs was remote.

[10] Explaining the delay in demanding security for costs, the municipality's deponent alleged firstly, that the documents discovered were voluminous,

[3] Attached to the notice was a draft bill of costs detailing how the amount required was computed.

comprising approximately 250 lever arch files. Secondly, it decided not to request security until it was certain that Fusion had the necessary authority to institute the action: it could not challenge Fusion's authority and request it to provide security for costs simultaneously. Thirdly, in a pre-trial minute, the municipality had stated that it would decide whether to request security for costs upon inspection of the documents requested in its rule 35(3) notice. Upon receipt of Fusion's response to that notice, it was evident that Fusion did not have financial statements and would not be able to pay costs.

[11] Fusion opposed the application for security for costs, essentially on the following grounds. The application was not brought as soon as practicable after the commencement of proceedings, as contemplated in rule 47(1) of the Uniform Rules of Court. In terms of s 8 of the Close Corporations Act, a court may at any time during proceedings require a close corporation to furnish security for costs and may stay proceedings until the security is given, if there is reason to believe that the corporation will be unable to pay the costs of the opposing party if it is successful in its defence. Had Fusion not been a close corporation but a company, it would not be obliged to put up security for costs. This, so it was alleged, was because the Companies Act 71 of 2008 (the 2008 Companies Act) abolished s 13 of the former Companies Act 61 of 1973, which provided for a company to put up security for costs; and 'having abolished large portions of the Close Corporations Act', the 2008 Companies Act 'has effectively abolished the concept of future close corporations'. Fusion also alleged that there was 'no logical reason why a corporation should be treated more onerously than a company with limited liability in respect of security for costs'. This, it said, was inconsistent with the right of access to

court in s 34 of the Constitution, because it ‘impacts on the corporation's right of pursuing legitimate claims’.

[12] Fusion also asserted that the municipality had delayed inordinately in seeking security for costs. More specifically, there were delays from the date on which the action was instituted; after the date on which the municipality’s discovery affidavit had been signed ie 17 November 2017; after Fusion had replied to the rule 35(3) notice; and after its refusal to provide security. Fusion alleged that security was being sought in circumstances where the pleadings had closed, discovery had been made, the case was ripe for hearing, and significant expenses relating to printing and copying had been incurred.

[13] The application came before Allie J, who granted an order substantially in the terms prayed for in the municipality's notice of motion. [4] After evaluating the facts and having had regard to the relevant legal principles, the high court said the following:

'A court would have regard to the common law and any applicable statute in deciding the grounds upon which security for costs should be ordered.

Section 13 of the old 1973 Companies Act provided that in certain circumstances, namely when there is reason to believe that the company will be unable to pay the costs, a company

[4] The order reads thus:

'1. Respondent shall pay security in an amount to be determined by the Registrar of this Court, for Applicant's costs in the pending action, in the form of an interest bearing cash deposit with the Registrar, alternatively by way of irrevocable guarantee issued by a South African commercial bank within 10 (ten) days of the amount being determined by the Registrar;
2. All proceedings in the Respondent's pending action against Applicant are hereby stayed, pending Respondent's compliance with paragraph 1 of this order;
3. Applicant is hereby granted leave to re-enrol the application on the same papers, duly supplemented, if necessary, for an order in terms of Rule 47(4) that Respondent's action be dismissed in the event that Respondent fail to comply with paragraph 1 of this order;
4. Respondent shall pay applicant's attorney and client costs in the application to strike out;
5. Respondent shall pay the costs of this application for security for costs on a party and party basis.'

could be compelled to provide security for costs but that provision wasn't included in the new Companies Act 71 of 2008.

Section 8 of the Close Corporations Act 69 of 1984 however contains a provision that Close Corporations may be ordered to provide security for costs as follows:
"8. 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, it if 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 is successful in his defence, require security to be given for those costs, and may stay all proceedings till the security is given".'

[14] Cognisant of the fact that an application of the nature with which it was seized entailed the exercise of a discretion, the high court continued:
'A court has a discretion to order security for costs. That discretion must be exercised after taking into consideration all the relevant facts as well as justice, equity and fairness.

Effectively the court has to embark on a weighing up exercise which involves weighing the need of an applicant to obtain certainty that a respondent would be capable of satisfying an adverse costs order against a respondent's need to have its case adjudicated upon without being prohibited from doing so as a consequence of its likely inability to pay costs in due course, if so ordered.

Under the common law, the inability of a plaintiff to satisfy a potential costs order is insufficient grounds to justify an order of security for costs. Something more is required, such as proof that the action was instituted vexatiously, recklessly or as an abuse of the court's process or that the respondent's prospects of success are not good.'

[15] Insofar as the delay point raised by Fusion is concerned, the high court stated:

'I remain cognisant of the fact that the main action was instituted in 2015, although applicant launched an application to cancel the agreement in 2008. The delay in bringing this application is adequately explained by applicant with reference to: a period of negotiations spanning the period 2009 to 2014 ; the pleadings; the Rule 37(8) minute dated 24 October 2018 where applicant reserved its right to bring this application after it had sight of documents requested in the Rule 35(3) Notice; the negotiations that took place between Mr Africa, the attorney of applicant and Mr Schoeman, the erstwhile attorney of respondent in 2016 and again between their respective attorneys in 2018 as recorded in the Rule 37(8) minute; as well as the Reply to the Rule 35 (3) Notice filed by respondent only in November 2018.

It is therefore fallacious for respondent to allege that because applicant knew of its impecuniosity since 2009. [I]t improperly waited from then until late 2018 to request security for costs.'

[16] The high court then concluded:

'Respondent is a special purpose vehicle that was incorporated with the specific intent of tendering and contracting with the applicant. Applicant was aware of the impecunious nature of the respondent when it negotiated and purported to contract with respondent.

Applicant knew from the inception of its dealings with respondent and on its own version, as early as 2009 and later in 2013, when it received the Price Waterhouse Cooper report ostensibly submitted after a due diligence investigation, that respondent had no assets and no income.

Applicant's knowledge at the inception of its dealings with respondent that at that stage it had no realisable assets and funds, doesn't mean that the financial standing of the respondent couldn't have improved subsequently.

. . .

The security for costs provision in section 8 exists to protect an opposing litigant against a corporation with no realisable assets and which is unable to pay its costs.

There is no dispute that the respondent is currently impecunious and unable to satisfy an adverse costs order against it.'

[17] Subsequently, on 31 July 2019, the high court dismissed Fusion's application for leave to appeal with costs. Undeterred by this setback, Fusion applied for leave to appeal to this Court in terms of s 17(2)*(b)* of the Superior Courts Act. As already indicated, this application was referred for oral argument, hence the present application now before us.

Discussion

[18] Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an applicant for leave to appeal in terms of ss 17(1)*(a)*(i) and 17(1)*(a)*(ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted 'where the judge or judges concerned are of the opinion that-

'*(a)* (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard. . . .'

It is manifest from the text of s 17(1)*(a)* that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success, or, alternatively, that 'there is some compelling reason why an appeal should be heard'. Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave. I shall revert to this aspect later.

[19] As already mentioned, that Fusion has no assets whatsoever and indeed is impecunious, is uncontentious in these proceedings. And this is precisely what prompted the municipality to demand security for costs from Fusion by invoking s 8 of the Close Corporations Act. Section 8 has already been quoted in paragraph 13 above.

[20] The procedure for security and the powers of the court are regulated by Uniform rules 47(1) and 47(4), which provide:

'(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

. . .

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

The high court rightly observed that rules 47(1) and 47(4) cater for the procedure to be adopted whenever security for costs is required and do not themselves deal with matters of substance.[5]

[21] Section 8 of the Close Corporations Act, in substance, mirrors s 13 of the Companies Act 61 of 1973.[6] Section 13 did not find its way into the 2008 Companies Act when the 1973 Companies Act was repealed and substituted

[5] See, in this regard: *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA); [2003] 3 All SA 1 (A) para 9.

[6] Section 13 of the Companies Act 61 of 1973 provided:

'Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may 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, require sufficient security to be given for those costs and may stay all proceedings till the security is given.'

by the former. Nevertheless, counsel were agreed that the jurisprudence that had developed over the years in regard to the interpretation of s 13 still offers useful guidance and insights in ascertaining the object and purpose to which s 8 of the Close Corporations Act is directed.

[22] In *Giddey NO v J C Barnard and Others* 2007 (5) SA 525 (CC) the Constitutional Court noted that '. . . the main purpose of s 13 is to ensure that companies, who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expenses'.[7] In the same decision the Court stated that 'section 13 of the Companies Act confers a discretion upon courts to order the payment of security for costs by a plaintiff company if there is a reason to believe that the company will be unable to pay the costs of its opponent'.[8]

[23] It is by now well-established that a court considering an application for security exercises a narrow and unfettered discretion. In the words of Hefer JA in *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) ([1998] 3 All SA 349), the court 'must decide each case upon a consideration of all relevant features, without adopting a predisposition either in favour of or against granting security'.[9]

[7] *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) para 7.
[8] Paragraph 6.
[9] At 1045G-J. See too in this regard: *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) 620 (SCA) para 16.

[24] Accordingly, there are at least three principles to be derived from the excerpts from *Giddey* and *Shepstone & Wylie* quoted in paragraphs 8 and 9 above. 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'.[10] 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'.[11]

[25] In this application, Fusion in effect seeks leave to appeal against the high court's exercise of its unfettered discretion. It is trite that the power of an appellate court to interfere with the exercise of such discretion is circumscribed. The ambit of this limited power was explained by the Constitutional Court thus:

'The ordinary rule is that the approach of an appellate court to an appeal against the exercise of a discretion by another court will depend upon the nature of the discretion concerned. Where the discretion contemplates that the Court may choose from a range of options, it is a discretion in the strict sense. The ordinary approach on appeal to the exercise of a discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may

[10] *Giddey* para 8.
[11] Idem para 7.

still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above.'[12]

[26] In support of its reasoning in this regard, the Court went on to cite with approval the decision in *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W). There, Cloete J, in analysing the nature of a discretion conferred on a court by s 13,[13] emphasised four factors. These were:

'(1) Section 13 is essentially concerned with costs – a matter invariably held to involve the exercise of a discretion in a narrow sense.

(2) When s 13 is combined with the provisions of Rule 47, as it must be to give it practical effect, the court is regulating its own procedure by deciding not only whether a litigant should be ordered to provide security for costs – a decision which may be made, in terms of the section, "at any stage" of proceedings (and therefore *in medias res*) – but also, where it grants such an order, whether the litigant should be allowed to proceed until such security has been provided. The regulation by a court of its own procedure is also a matter usually held to involve a discretion in the narrow sense.

(3) The discretion requires in essence the exercise of a value judgment and there may well be a legitimate difference of opinion as to the appropriate conclusion.

(4) Appeals against the exercise of the discretion conferred by s 13 should be discouraged in the absence of some demonstrable blunder or unjustifiable conclusion on the part of the trial court, otherwise the decision on the merits of a matter before the court would be delayed by an appeal on an application which (to use the words of Innes CJ in [*Warner Reid and Others* 1907 TS 306 at 310]) "marks no stage in the progress of the case, but is quite outside and incidental to it".'[14]

[12] *Giddey* para 19. See also in this regard: *Benson v S A Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782B and the cases therein cited.
[13] Section 13 of the Companies Act 61 of 1973.
[14] At 807H-808C.

[27] Most significantly, the Court emphasised that the court of first instance is best placed to make the requisite assessment, noting that:

'. . . it would not be appropriate for an appellate court to interfere with [the decision of the court of first instance] as long as it is judicially made, on the basis of the correct facts and legal principles. If the court takes into account irrelevant considerations, or bases the exercise of its discretion on wrong legal principles, its judgment may be overturned on appeal. Beyond that, however, the decision of the court of first instance will be unassailable.'[15]

[28] In view of the fact that s 8 of the Close Corporations Act is, for all intents and purposes, the functional equivalent of the now repealed s 13 of the Companies Act, there is no rational basis in fact or principle why the principles discussed above in relation to s 13 should not apply with equal force to s 8.

[29] I revert now to what lies at the heart of this application. It raises the question whether, as already mentioned, it can justifiably be said that the high court did not exercise its discretion judicially. Here, there is no dispute that the nature of the discretion that the high court enjoyed 'contemplated that it was open to the high court to choose from a range of options' in arriving at its decision having regard to all the relevant facts before it. This is commonly known as a discretion in the strict sense.[16] I have already dealt above with the proper approach that an appellate court is enjoined to adopt to an appeal against the exercise of a discretion of that kind. In this regard, it bears emphasis that we are not here called upon to decide as to whether 'the decision

[15] *Giddey* para 22. See also: *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council: Johannesburg Administration and Another* 1999 (1) SA 104 (SCA) at 109A-B.

[16] It is sometimes referred to as a discretion in the narrow sense. See in this regard: *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800G-H.

reached by the court at first instance was correct’. Rather, our task is to determine whether the high court exercised its discretion judicially or the exercise was based on a wrong appreciation of the facts or wrong principles of the law.

[30] Before us, Fusion's principal attack on the decision of the high court was essentially four-pronged. First, it was contended that the municipality’s application for security should have been refused because the municipality failed to demand security for costs 'as soon as practicable after the commencement of proceedings' as required by rule 47(1). Secondly, it was submitted in Fusion's heads of argument that having regard to the fact that s 13 of the Companies Act 1973, was repealed by the 2008 Companies Act 'self-evidently because the Legislature was mindful of the provisions of s 34 of the Constitution, 1996, under which access to courts is entrenched,' Close Corporations too ought to be treated in the same way as all other corporate plaintiffs in relation to applications for security for costs. Third, bearing in mind that Fusion's impecuniosity was brought about by the municipality, it would be a grave injustice to require Fusion to furnish security for costs. In elaboration, it was submitted that as Fusion would not be able to provide security at all, its claim would, in consequence, be dealt a death knell. Lastly, that Fusion's underlying action is neither abusive nor vexatious, and to the extent that the prospects of success are relevant, such prospects are not unfavourable.

[31] I deal with these contentions in turn. Let it be said at the outset that, in my view, none of them is sustainable. First, whilst it may be desirable that a party entitled to demand security for costs must do so as soon as is reasonably

practicable, failure to do so is not necessarily fatal. Whether a delay should constitute a bar to the demand entails a fact-based enquiry in the light of the facts of a given case. Thus, a court faced with an application to compel will, in exercising its discretion, undoubtedly have regard to this factor and weigh it up together with other relevant factors. Therefore, delay in itself will rarely be an overriding and decisive consideration. It is as well to remember that in this case the municipality derived its right to demand security from s 8 of the Close Corporations Act. Notably, s 8 provides in explicit terms that the court seized with an application for security 'may at any time during the proceedings' require security to be given. The words 'at any time during the proceedings' could not be clearer. This must then mean that when the municipality demanded security at discovery stage, it did so within the ambit of s 8.

[32] Insofar as s 34[17] of the Constitution is concerned, it is true that the right of access to court 'is a bulwark against vigilantism, and the chaos and anarchy which it causes'.[18] However, it must not be lost from sight that in this case the constitutional validity of s 8 was not challenged, be it frontally or otherwise as required by the jurisprudence of our courts.[19] Nevertheless, cognisant of the fact that s 8 implicates the constitutional right of access to court, it must be interpreted in the manner decreed by s 39(2)[20] of the Constitution.

[17] Section 34 of the Constitution which is headed: '**Access to courts**' provides:
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
[18] See in this regard: *Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 para 22.
[19] See, for example, *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others*1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) paras 60-61. This decision was most recently affirmed in *Public Protector v Commissioner for the South African Revenue Service and Others* [2020] ZACC 28.
[20] Section 39(2) provides in material part:

[33] In *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* [2015] ZASCA 93; 2015 (5) SA 38 (SCA)[21] a similar argument was advanced and rejected by this Court. In rejecting the argument, this Court stated that the argument '[ignored] 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, as against that it must weigh the injustice to the defendant if no security is ordered and the plaintiff's claim fails and the former finds himself or herself unable to recover costs'.[22] Fusion's contention that s 8 should in effect be treated as *pro non scripto*[23] simply because its former counterpart in s 13 of the Companies Act was repealed by the 2008 Companies Act offends two fundamental principles of our law. First, it pays no regard to an enduring principle of statutory interpretation that the legislature is presumed to be aware of the existing law when it passes new legislation. Thus, if the legislature was minded to bring about parity amongst corporate plaintiffs, whether companies or close corporations, as contended by Fusion, no doubt the legislature would have also repealed s 8. Yet, it elected not to do so. That s 8 was not excised from the Close Corporations Act but, instead, allowed to remain part of the Close Corporations Act to this very day must therefore be taken to have been a deliberate decision by the legislature. Secondly, and even most importantly, to uphold Fusion's submission in this regard would, in effect, be encroaching on the exclusive

'When interpreting any legislation, . . ., every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[21] Paragraph 13.

[22] Idem para 13.

[23] Loosely translated '*pro non scripto*' means treating something 'as though it is not written' and therefore does not exist or form part of the Close Corporations Act.

domain of the legislature against which the Constitutional Court has sternly cautioned.[24]

[34] Furthermore, it must be stated that Fusion has failed to demonstrate that the order directing it to furnish security dealt a death blow to its action. In any event, that an order for security might or will put an end to the litigation is not in itself an overriding consideration or even a sufficient reason to refuse an application for security.[25] Fusion's demonstrable lack of candour to enlighten the high court as to why those who had hitherto been funding its litigation were unwilling to continue doing so cannot redound to its benefit. Fusion contented itself with a bald assertion that its previous funders were no longer willing to undertake risks associated with the pursuit of its claim.

[35] There is, to my mind, much to be said for the counter argument of the municipality that Fusion 'seeks to have a free pass to litigate luxuriously without the risks of indemnifying the municipality' in the event that the latter is ultimately successful and awarded costs. On this score, the pointed remarks of Brand JA in *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) with reference to s 13 of the Companies Act that: 'One of the very mischiefs s 13 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

[24] See for example: *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC) para 50-53; *Doctors for Life International v Speaker of the National Assembly and Others* [2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) paras 37-38; *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) paras 44 and 72.
[25] *Shepstone & Wylie* paragraph 23 above at 1046 G-I.

seeks to rely on the probability that a security order will exclude it from the court, must therefore 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' [26] resonate with what obtains in this case. Accordingly, failure to give due weight to this critical consideration is bound to lead to a warped decision that unduly favours Fusion without regard for the interests of the municipality.

[36] Insofar as the prospects of success of Fusion's action are concerned, it must be said that in assessing the merits of the plaintiff's case, a court is not required nor expected to undertake an in-depth analysis as a trial court would at the end of a trial. It is sufficient that a court has a fair sense of the strength and weakness of the antagonists' respective cases. For as Streicher JA explained in *Zietsman v Electronic Media Network Ltd and Others* [2008] ZASCA 4; 2008 (4) SA 1 (SCA) it is not expected that a court 'should in an application for security attempt to resolve the dispute between the parties. Such a requirement 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'.[27]

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

[26] Paragraph 20.
[27] Paragraph 21.

court held that 'the prospects of success do not favour [Fusion]' on the pleadings as they then stood.

[38] Accordingly, Fusion has not shown that the high court failed to exercise its discretion judicially. That being so, the conclusion to which the high court came is immune from interference by this Court. This Court, sitting as an appellate court, is not at liberty to decide the matter according to its own views of the merits of the case.[28] This is because, as Cloete J aptly observed in *Bookworks (Pty) Ltd* above, a discretion of the kind under consideration in this case, 'requires in essence the exercise of a value judgment and there may well be a legitimate difference of opinion as to the appropriate conclusion'. Thus, as the requirements of s 17(1)*(a)* have not been satisfied, leave to appeal can not be granted.

[39] In the result the following order is made:

The application for leave to appeal is dismissed with costs, including the costs of two counsel.

X M PETSE
DEPUTY PRESIDENT
SUPREME COURT OF APPEAL

[28] Compare: *HLX Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) at 401G-402C.

Appearances

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For Respondent:	I Jamie SC (with him P S Van Zyl and A Nacerodien)
Instructed by:	Webber Wentzel, Cape Town
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