



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 432/2022

In the matter between:

MYSTIC RIVER INVESTMENTS 45 (PTY) LTD

FIRST APPELLANT

KARIM ISSA MAWJI

SECOND APPELLANT

and

ZAYEED PARUK INCORPORATED

FIRST RESPONDENT

NAUSHAD MAHOMED ISMAIL (GORA) ABDOOLA

SECOND RESPONDENT

SHAUKAT ALI MOOSA

THIRD RESPONDENT

SALIM MAHOMED MOOSA

FOURTH RESPONDENT

GOOLAM HOUSEN MOOSA

FIFTH RESPONDENT

Neutral citation: *Mystic River Investments 45 (Pty) Ltd & Another v Zayeed Paruk Incorporated & Others* (Case no 432/2022) [2023] ZASCA 54 (19 April 2023)

Coram: VAN DER MERWE, SCHIPPERS, GORVEN and MATOJANE JJA and KATHREE-SETILOANE AJA

Heard: 6 March 2023

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 11h00 on 19 April 2023.

Summary: Practice – application that *peregrinus* provide security for costs under rule 47 of Uniform Rules of Court – exercise of true discretion – powers of the appellate court to interfere strictly circumscribed – court *a quo* exercised discretion on wrong principle – court at large to consider application afresh – proper case for provision of security for costs.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Vahed J, sitting as court of first instance):

- 1 Save to the extent set out below, the appeal is dismissed with costs to be paid by the second appellant.
- 2 Paragraph d of the order of the High Court is set aside and replaced with the following:
‘The second applicant is directed to pay the costs of the applications, including the costs of 14 May 2021.’

JUDGMENT

Van der Merwe and Matojane JJA (Schippers and Gorven JJA and Kathree-Setiloane AJA concurring):

Introduction

[1] The first appellant, Mystic River Investments 45 (Pty) Ltd (Mystic River) and the second appellant, Mr Karim Issa Mawji, instituted an application against the respondents in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court). The first respondent is Zayeed Paruk Incorporated, and the second respondent is Mr Naushad Mahomed Ismail Abdoola. The third, fourth and fifth respondents are Mr Shaukat Ali Moosa, Mr Salim Mahomed Moosa and Mr Goolam Hoosen Moosa, respectively (the Moosa brothers). On the back of allegations that the respondents had ‘hijacked’ and were ‘looting’ Mystic River, the appellants sought an order: preventing the respondents from continuing to unlawfully represent and make decisions purportedly on behalf of, or in the name of Mystic River; ordering the respondents to return funds belonging to Mystic River, which were misappropriated or

diverted from it; compelling the respondents to provide full and proper accounts in respect of the affairs of Mystic River; for those accounts to be debated; and for Mystic River to be paid any amounts due to it pursuant to such statement and debatement of account.

[2] The respondents served the second appellant with notices in terms of rule 47(1) of the Uniform Rules of Court, calling upon him to furnish security for costs in the main application. They contended that he is a *peregrinus* of the court, has no assets in the Republic of South Africa (the Republic) and would be unable to pay their costs should they be successful in the main application. Security for costs was ordered by Vahed J. The appeal against that order is with the leave of the high court. The first respondent abides the outcome of the appeal.

Factual background

[3] The second appellant is the sole director of Mystic River. He brought the main application in his representative capacity and in his personal capacity. It is common cause that he is a *peregrinus* and owns no assets in the Republic. He had a temporary presence in the United Kingdom (the UK) and stated that he had moved to Portugal in 2018 and intended to reside in Portugal permanently.

[4] Because the second appellant declined to furnish security for costs, the second to fifth respondents delivered separate applications seeking to stay the main application and ordering security for costs. These applications were set down for hearing on 14 May 2021. However, the parties, by agreement following the suggestion of Vahed J, elected to forego a hearing on 14 May 2021, permitting the matter to be decided without oral argument.

[5] On 4 January 2022, the high court handed down judgment ordering the second appellant to provide security for costs in an amount to be fixed by the registrar. The appellants were ordered to pay the costs of the applications, including the wasted costs of the opposed hearing intended for 14 May 2021.

[6] The primary issue for determination is whether the high court correctly exercised its discretion by ordering the second appellant to furnish security for costs. A secondary issue pertains to the order directing the appellants to pay the wasted costs of 14 May 2021.

The relevant legal principles

[7] We now turn to consider the legal position regarding security for costs. Security for costs is a discretionary remedy that a court may grant to a defendant who has a reasonable apprehension that the plaintiff will not be able to pay the costs of litigation if the plaintiff's claim fails. An *incola* is not, as a matter of course, entitled to demand security from a *peregrinus* claimant. It is at the discretion of the court to make such an order after an investigation of the circumstances and if equity and fairness to both litigants dictate that such an order be made.¹ There is no justification for requiring the court to exercise its discretion in favour of a *peregrinus* only sparingly.²

[8] In *Shepstone & Wylie & Others v Geyser NO (Shepstone & Wylie)*,³ Hefer JA further explained the applicable test. He said that a court should not fetter its own discretion, particularly not by adopting an approach which brooks of no departure except in special circumstances. It must decide each case upon consideration of all the circumstances without adopting a predisposition either in favour or against granting security. 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 is unable to recover the costs incurred in defence of the claim.

[9] In *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig*,⁴ this Court referred to a general rule of practice that a *peregrinus* should provide security for an *incola*'s costs. However, a reading of the judgment as a whole makes

¹ *Magida v Minister of Police* [1987] 1 All SA 218 (A) at 226 (*Magida*); see also *Blastrite (Pty) Ltd v Genpaco Ltd; In re: Genpaco Ltd v Blastrite (Pty) Ltd* [2015] ZAWCHC 76; 2016 (2) SA 622 (WCC) para 10 (*Blastrite*).

² *Ibid Magida* at 226; see also *Ibid Blastrite* para 28.

³ *Shepstone & Wylie & Others v Geyser NO* [1998] 3 All SA 349 (A); 1998 (3) SA 1036 (SCA) at 1045I-1045C.

⁴ Fn 3 above paras 18-19.

it clear that the court did not intend to depart from the settled principles in *Magida v Minister of Police (Magida)*⁵ and *Shepstone & Wylie*.

[10] The extent of this Court's power to interfere with the high court exercise of discretion depends on the nature of the discretion concerned. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*, Khampepe J held that:

'In order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. That distinction is now deeply rooted in the law governing the relationship between appeal courts and courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or whether it was a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply.'⁶

[11] In *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')*,⁷ EM Grosskopf JA explained that the restraint on the appellate court's power of interference only applies to discretion in the strict or narrow sense. He explained that discretion in the strict sense involves a choice between different but equally permissible alternatives, whilst discretion in the broad sense means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.

[12] The court in *Shepstone & Wylie*,⁸ left open the question as to how a discretion to order security for costs should be classified. This question has since been settled by the Constitutional Court in *Giddey NO v JC Barnard & Partners (Giddey NO)*,⁹ where it set out the following guidelines to determine the extent of the appellate court's power to substitute its own determination for that of the high court. The court held that:

⁵ *Magida* fn 1 above.

⁶ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 83.

⁷ *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* [1992] 2 All SA 453 (A); 1992 (4) SA 791 at 796H-I and 800E-G.

⁸ *Shepstone & Wylie & Others v Geyser NO* [1998] 3 All SA 349 (A); 1998 (3) SA 1036 (SCA) at 1044-1045G.

⁹ *Giddey NO v JC Barnard & Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) paras 8 and 30.

‘...The court of first instance... is best placed to make an assessment of the relevant facts and correct legal principles, and it would not be appropriate for an appellate court to interfere with that decision 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.’¹⁰

Analysis

[13] In its judgment, the high court fully quoted the relevant passages from *Magida* and *Shepstone & Wylie*. Nevertheless, the high court adopted a predisposition that a *peregrinus* is obliged to furnish security for costs when demanded by an *incola*. The high court, therefore, did what *Shepstone & Wylie* said it should not do. In the circumstances, the high court erred by applying a wrong principle.

[14] Furthermore, the high court appears to have misread the judgment in *Blastrite (Pty) Ltd v Genpaco Ltd; In re: Genpaco Ltd v Blastrite (Pty) Ltd (Blastrite)*.¹¹ It stated that *Blastrite* affirmed the existence of a general, but not inflexible, rule that a *peregrinus* must furnish security for costs. This was quite incorrect. In *Blastrite*, the court asked whether, in terms of the practice, security for costs was required purely because the litigant was a *peregrinus* who owned no immovable property in this country.¹² The court answered the question in the negative, holding that a court had the discretion to order security and had to take into account the particular circumstances of the case and consideration of fairness and equity for both parties.¹³ Following the approach articulated in *Magida*, the court stated that there was no justification for the principle that a court should exercise its discretion in favour of a *peregrinus* only sparingly.¹⁴

¹⁰ Fn 10 above para 22.

¹¹ Fn 1 above.

¹² Ibid para 28.

¹³ Ibid para 28.

¹⁴ Ibid para 28.

[15] Thus, the high court erred in holding that, as a general rule, a *peregrinus* is obliged to furnish security for costs. This misdirection justifies interference by this Court. That being so, this Court is at large to consider the application afresh.

[16] The second applicant submits that it is unreasonable and unnecessary to require security for costs from him as, first, Mystic River, an *incola*, has the means to and thus could effectively cover any adverse costs awarded. Second, he argues that the application is that of Mystic River, that the application is for its benefit, and that it should accordingly pay the costs if they arise. Third, he states that his involvement does not expand the case or create additional costs exposure for the respondents as they would have to answer essentially the same case as if Mystic River is the sole litigant, and the relief sought would be identical.

[17] These contentions are unacceptable. The second appellant alleges that a funding and profit share agreement exists between him in his personal capacity and entities under his control, on the one hand, and the Moosa brothers, on the other, in terms of which the second appellant and his entities would be entitled to 50 per cent profit in respect of the development of any property by Mystic River. On his own showing, one of the main purposes of the main application is to retain funds in, or return funds to, Mystic River for the second appellant and the entities under his control to claim 50 per cent profit in respect of the development of property by Mystic River. However, the Moosa brothers claim to be the ultimate shareholders or beneficial owners of Mystic River. The second appellant did not dispute this under oath. Therefore, should the second appellant not be ordered to furnish security for costs and should the main application fail, the effect might well be that the Moosa brothers would (through Mystic River) bear the costs of unsuccessful litigation brought against the respondents by and for the benefit of the second appellant.

[18] The second appellant states that the respondents may recover their costs from him in the UK or Portugal as the legal systems in those countries would allow enforcement of South African cost orders. This implies that he can afford any costs order that may be ordered. Whilst it would not be impossible for the respondents to enforce any costs order against the second appellant abroad, the respondents will have to incur increased expenses and be subjected to uncertainty and inconvenience,

which has been found by this Court to be one of the fundamental reasons why a *peregrinus* should provide security.¹⁵

[19] In the final analysis, the balancing exercise referred to in *Shepstone & Wylie* amounts to this. The second appellant does not plead poverty. He does not complain that an order of security would cause an injustice in the sense that it would prevent him from pursuing the main application. There is, thus, nothing really on his side of the scale. But if no security is ordered and there is a cost order against the second appellant (whether jointly or severally with Mystic River or not), the respondents would suffer the inconvenience, delay and additional costs involved in enforcing a cost order in a foreign jurisdiction.

[20] Fairness and equity dictate that the second appellant should be ordered to provide security for costs as he involved himself in the matter in his personal capacity so that when the monies due to Mystic River are returned to it, he could claim his 50 per cent share of the profit. He could have simply withdrawn from the matter in order to defeat the application for security if he was indeed litigating solely for the benefit of Mystic River. We are satisfied that it is fair and equitable to all the parties involved to require the second appellant to furnish security for the respondents' costs in the main application.

[21] The high court erred in directing that the appellants pay the costs of the applications to provide security jointly and severally. There was no basis for a costs order against Mystic River. The second appellant should have been ordered to pay the costs of these applications. We consider it fair and just that these costs should include the costs of 14 May 2021. Being the unsuccessful party, the second appellant should pay the costs of the appeal. The respondents did not ask for the costs of two counsel on appeal.

[22] In the result, the following order is made:

- 1 Save to the extent set out below, the appeal is dismissed with costs to be paid by the second appellant.

¹⁵ Op cit fn 3 para 19.

- 2 Paragraph d of the order of the High Court is set aside and replaced with the following:

‘The second applicant is directed to pay the costs of the applications, including the costs of 14 May 2021.’

C H G VAN DER MERWE

JUDGE OF APPEAL

K E MATOJANE
JUDGE OF APPEAL

APPEARANCES

For appellant: M Du Plessis SC

Instructed by: Webber Wentzel, Johannesburg
Symington & De Kok, Bloemfontein

For first respondent: M Jooste

Instructed by: Amod's Attorneys, Durban
Matsepes, Bloemfontein.

For second respondent: M C Tucker (with N L Nickel)

Instructed by: Nourse Incorporated, Durban
Matsepes, Bloemfontein.

For third to fifth respondents: I Veerasamy (with E Mizrachi)

Instructed by: Sameera Cassimjee Attorneys, Pietermaritzburg
Honey Incorporated, Bloemfontein.