CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 65/05

TREVOR B GIDDEY NO Applicant

versus

J C BARNARD AND PARTNERS Respondent

Heard on : 16 May 2006

Decided on : 1 September 2006

JUDGMENT

O'REGAN J:

[1] This application concerns the correct constitutional approach to a court's decision whether to require a litigant to furnish security for costs. Section 13 of the Companies Act, 61 of 1973, vests a court with a discretion to order a company that institutes action to furnish security for costs if there is reason to believe that it will be unable to pay the costs of its opponent.[1] The procedure whereby an application for

[1] Section 13 provides as follows:

> "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."

security for costs is made is governed by Rule 47 of the Uniform Rules of Court.[2] If a company ordered to provide security for costs is unable to do so, it will, in the ordinary course, be prevented from proceeding with its action. The question in this case is how a court should approach the exercise of that discretion given section 34 of the Constitution which entrenches the right to have disputes resolved by courts.[3]

[2] The applicant in this case is the liquidator of Sadrema Explorations Ltd (in liquidation). He is referred to as the applicant throughout this judgment, although he was the respondent in the application for security for costs in the court below. The applicant instituted an action in the Johannesburg High Court against J C Barnard and Partners (the respondent in this Court, who is referred to throughout this judgment as the respondent) in which he claimed payment of US $100 million plus interest.

[2] Rule 47 provides as follows:

> "(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 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."

[3] Section 34 of the Constitution provides as follows:

> "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."

According to the applicant, the respondent received that sum of money on behalf of Sadrema Explorations and was to have held it in trust for Sadrema. The failure by the respondent to conserve these funds on behalf of Sadrema was allegedly one of the main causes of Sadrema's liquidation.

[3] In response to the applicant's combined summons, the respondent applied to the High Court for an order in terms of rule 47(3) of the Uniform Rules of Court[4] directing the applicant to furnish security for costs. The applicant lodged an affidavit opposing an order requiring it to pay security for costs. On 10 August 2005, the High Court ordered the applicant to furnish security in an amount to be fixed by the Registrar and ordered that the action be stayed pending the furnishing of security. The applicant unsuccessfully sought leave to appeal against the order of the High Court requiring the furnishing of security from both the High Court and the Supreme Court of Appeal. He now approaches this Court.

[4] The first question is whether the application for leave to appeal raises a constitutional matter. The respondent argues that it does not. However, the effect of an order requiring a company in liquidation to furnish security will, where the company is unable to furnish security for costs and therefore forced to abandon its action, affect the company's right of access to court in terms of section 34 of the Constitution. Accordingly, in determining whether an order for security should be made, a court needs to take into consideration the provisions of the Constitution and in

[4] The full text of Rule 47 is cited above n 2.

particular, section 34. In deciding whether it is appropriate to require security for costs to be paid, therefore, a court makes a decision on a constitutional matter. The respondent's argument to the contrary must therefore be rejected.

[5] The next question is whether it is in the interests of justice for the application for leave to appeal to be granted to this Court. This is the first occasion upon which this Court has considered the approach to the order of security for costs in the light of section 34 of the Constitution. This issue has been considered by other courts[5] and is an important one which arises for determination regularly in courts throughout the country. These considerations, in my view, are sufficient to warrant the grant of the application for leave to appeal without further consideration of prospects of success.

Section 13 of the Companies Act

[6] As stated above, section 13 of the Companies Act confers a discretion upon courts to order the payment of security for costs by a plaintiff company if there is reason to believe that the company will be unable to pay the costs of its opponent. It is a longstanding provision in our law, and indeed, mirrors provisions in other countries.[6]

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[5] See, in particular, *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (1)* 1997 (4) SA 908 (W) at 917 – 919; *Shepstone and Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045 – 1046; and *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W).

[6] Section 726(1) of the Companies Act, 1985 (UK) provides as follows:

> "(1) Where in England and Wales a limited company is plaintiff in an action or other legal proceedings, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

[7] The provision constitutes an exception to the ordinary common-law rule that plaintiffs who reside in South Africa may institute actions in our courts without furnishing security for costs.[7] To understand how the provision should be applied it is necessary to identify its purpose. The courts have held that the purpose of section 13 is to protect "persons against liability for costs in regard to any action instituted by bankrupt companies."[8] A salutary effect of the ordinary rule of costs – that unsuccessful litigants must pay the costs of their opponents – is to deter would-be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects of success are poor. Where a limited liability company will be unable to pay its debts, that salutary effect may well be attenuated. Thus the main purpose of section 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 expense.

Section 1335 of the Corporations Act, 2001 (Australia):

> "(1) Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.
> (2) The costs of any proceeding before a court under this Act are to be borne by such party to the proceedings as the court, in its discretion, directs."

[7] Section 29 of the Supreme Court Act, 59 of 1959 provides as follows:

> "Where a person residing in the Republic is a plaintiff in civil proceedings in the court of any division, the area of jurisdiction whereof does not extend to the place where he resides, he shall not by reason only of that fact be required to give security for costs in those proceedings."

[8] *Hudson and Son v London Trading Co Ltd 1930 WLD* 288 at 291 (Greenberg J); see also *Shepstone and Wylie and Others v Geyser NO* cited above n 5.

[8] The courts have accordingly recognised that in applying section 13, they need 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 own costs in the litigation.[9] To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An applicant for security will therefore need to show that there is a probability that the plaintiff company will be unable to pay costs. The respondent company, on the other hand, must establish that the order for costs might well result in its being unable to pursue the litigation[10] and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospects of success. Equipped with this information, a court will need to balance the interests of the plaintiff in pursuing the litigation against the risks to the defendant of an unrealisable costs order.

The relevant facts

[9] Before turning to a fuller consideration of the application of section 13, it will be helpful to set out in greater detail the facts alleged by both parties in their affidavits lodged in respect of the application for security for costs. In its founding application, the respondent alleged that because the applicant had been in liquidation since 16

[9] See *Shepstone and Wylie and Others v Geyser NO* cited above n 5 at 1046B, citing with approval the English case *Keary Developments v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 (CA) at 540a – b.

[10] See *Shepstone and Wylie and Others v Geyser NO* cited above n 5 at 1046G – I.

January 2001, there is reason to believe that it will be unable to pay costs should the respondent be successful in its defence to the action. It further alleged that the litigation appears complex and that the respondent would incur significant costs defending the claim and estimated them at R500 000.

[10] In his response, the applicant disputed that the respondent had established that the applicant would be unable to pay costs if the respondent's defence succeeded. He referred to a pending trial in which he was acting as plaintiff in his capacity as liquidator in which R90 million was being claimed. He set out the basis of the claim and alleged that it had reasonable prospects of success. He alleged that, if successful, the result would be that the applicant would be able to meet the respondent's costs in the instant claim. In the alternative, he argued that even if the respondent had shown that there was reason to believe that the company would not be able to pay costs, the court should nevertheless exercise its discretion in favour of the applicant and refuse the application for security.

[11] In support of this alternative argument, the applicant set out the facts of the present claim and emphasised that there was evidence which suggested that the plea filed by the respondent was unlikely to succeed. He also argued that it would be contrary to the public interest to award security, as the claim involved the integrity of an accounting firm which it was in the public interest to resolve. Finally, the applicant argued that the claim was based on conduct which, it was alleged, had led to the

impoverishment of the company and that in fact suggested that security should not be awarded.

[12] The applicant did not expressly say that if an award for security for costs is made, the company will not be able to furnish it. Towards the end of the answering affidavit, he states that "the injustice to the Plaintiff, if prevented from pursuing his claims by an order for security, far outweighs any injustice to the Defendant if no security is ordered". However, he does not expressly state that the Plaintiff would be prevented from pursuing the claim, nor does he set out any steps he has taken to acquire the necessary support from creditors and/or shareholders to enable him to furnish security.

[13] It should also be mentioned that the applicant opposes the quantum proposed by the respondent and requests that if security is ordered, the amount to be furnished be determined by the Registrar. When it made the order requiring security to be paid, the Court did so on the basis that the quantum of security would be determined by the Registrar.

[14] In its reply to this affidavit, the respondent pertinently points out that the applicant does not allege that the company will be unable to pursue this litigation if ordered to furnish security for costs.

The scope and meaning of section 34 of the Constitution

[15] Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. This important right finds its normative base in the rule of law. As Mokgoro J stated in *Chief Lesapo v North West Agricultural Bank and Another* –

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance." [Footnotes omitted][11]

[16] But for courts to function fairly, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence. A common example is the rule regulating the notice of bar in terms of which defendants may be called upon to lodge their plea within a certain time failing which they will lose the right to raise their defence. Many of the rules of court require compliance with fixed time limits, and a failure to observe those time limits may result, in the absence of good cause shown, in a plaintiff or defendant being prevented from pursuing their claim or defence. Of course, all these rules must be compliant with the Constitution. To the extent that they do constitute a limitation on a right of access to court, that limitation must be justifiable in terms of section 36 of the Constitution. If the limitation caused

[11] 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 22. See also *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others as* Amici Curiae*)* 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at para 40.

by the rule is justifiable, then as long as the rules are properly applied, there can be no cause for constitutional complaint. The rules may well contemplate that at times the right of access to court will be limited. A challenge to the legitimacy of that effect, however, would require a challenge to the rule itself. In the absence of such a challenge, a litigant's only complaint can be that the rule was not properly applied by the court. Very often the interpretation and application of the rule will require consideration of the provisions of the Constitution, as section 39(2) of the Constitution instructs.[12] A court that fails to adequately consider the relevant constitutional provisions will not have properly applied the rules at all.

[17] The applicant argued that any material bar or impediment to a litigant's access to court constitutes a limitation of the right protected under section 34. He relied on the following dictum in *Beinash and Another v Ernst and Young and Others*:

> "The effect of section 2(1)(b) of the [Vexatious Proceedings] Act is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants. This serves to restrict the access of such persons to courts. That is its very purpose. In so doing, it is inconsistent with section 34 of the Constitution, which protects the right of access for everyone and does not contain any internal limitation of the right. The barrier which may be imposed under section 2(1)(b) therefore does limit the right of access to court protected in section 34 of the Constitution. But, in my view, such a limitation is reasonable and justifiable."[13]

[12] Section 39(2) of the Constitution provides as follows:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[13] 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) at para 16.

He argued that on the facts of this case, the order of security for costs constituted such a barrier and that therefore it must be justified as a limitation in terms of section 36 of the Constitution.

[18] This argument is misconceived. The applicant did not challenge section 13 of the Companies Act on the basis that it constitutes an unjustifiable limitation of section 34. Nor did the applicant argue that section 13 was unconstitutional on the basis that it conferred an inappropriate discretion on the courts. Accordingly, we must proceed on the basis that section 13 is constitutional. Section 36 would only arise if section 13 were directly challenged and found to limit a constitutional right. The question that would have to be asked is whether, as a law of general application,[14] section 13 constitutes a reasonable and justifiable limitation of section 34. There is no such challenge in this case. The only constitutional question that then arises is whether the court's exercise of its section 13 discretion should be set aside on appeal. Because, as stated earlier, section 13 implicates constitutional rights, it must be interpreted and applied with appropriate regard to the spirit, purport and objects of the Bill of

[14] Section 36 provides as follows:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

Rights.[15] It is necessary to start by considering the proper approach by an appellate court to appeals against the exercise of the section 13 discretion.

Appeals against an award of security for costs

[19] 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.[16] Where the discretion contemplates that the Court may choose from a range of options, it is a discretion in the strict sense.[17] 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 still be considerations which would

[15] Section 39(2) cited above n 12.

[16] *S v Basson* 2005 (12) BCLR 1192 (CC) at para 110; *Mabaso v Law Society of Northern Provinces and Another* 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 20, fn 21 and cases cited therein.

[17] Various terms are used by the courts to define this type of discretion. Sometimes it is referred to as a "strong" discretion (see, for example, *S v Basson* cited above n 16 at para 110), sometimes as a discretion "in the narrow sense" (see, for example, *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800G – H and *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 804I; sometimes as a "true" discretion (see, for example, *Media Workers Association*, cited above, at 800D). Throughout this judgment I shall refer to it as a discretion "in the strict sense" as used in *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361H; and *S v Basson* cited above n 16 at para 111. It is not that the other terms are incorrect, but for consistency and clarity I prefer to use the one term.

result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above.[18]

[20] The issue that arises is the proper approach on appeal to the exercise of discretion under section 13. That question was left open in *Shepstone and Wylie and Others v Geyser NO*.[19] A discretion in the strict sense would require that, legally speaking, a court could properly come to different decisions as to whether to award security or not.[20] In *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another*, Cloete J, after a comprehensive discussion of the issue, concluded that the discretion conferred by section 13 is properly construed a discretion in the strict sense which may only be interfered with upon appeal in narrow circumstances. In reaching this conclusion, he emphasised four factors:

> "(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

[18] See *S v Basson* cited above n 16 at paras 112 – 114. In that case, the court considered the exclusion of evidence from a criminal trial on the basis that it may render the trial unfair and concluded that an appellate court should only interfere with the exercise of that discretion in narrow circumstances.

[19] Cited above n 5 at 1045B – F. But see *Beaton v SA Mining Supplies (Pty) Ltd* 1957 (2) SA 436 (W) at 442 where the court held that the discretion to award security could only be interfered with on a limited basis by an appellate court; see also *Magida v Minister of Police* 1987 (1) SA 1 (A) at 15D – H where the Court interfered with the award of security on the grounds that the court that had ordered the security had misdirected itself.

[20] See *Knox D'Arcy* cited above n 17 at 362D.

> of its own procedure is also a matter usually held to involve a discretion in the narrow sense.
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> (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.
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> (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's* case *supra* at 310)[21] 'marks no stage in the progress of the case but is quite outside and incidental to it'."[22]

[21] In my view, this reasoning is persuasive, particularly the considerations mentioned by Cloete J in sub-paragraphs (1) – (3). Moreover, there are other considerations which indicate that it is a decision with which an appellate court should interfere only where the discretion has not been exercised judicially or on the basis of incorrect facts or principles of law. In *S v Basson*, one of the issues considered by the Court was the proper approach on appeal to a decision by a trial court in criminal proceedings to exclude evidence on the basis that it might render the trial unfair. The Court held that the assessment of whether the evidence would render the trial unfair "is inevitably hypothetical and difficult to assess in the relatively rarefied atmosphere of an appellate court".[23] Accordingly the Court held that it was a question which should only be interfered with on appeal on narrow grounds, and not on the basis of whether the decision was correct or not.

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[21] *Warner v Reid and Others* 1907 TS 306.

[22] 1999 (4) SA 799 (W) at 807H – 808C. See also the consideration of this case by the Namibian Supreme Court in *Northbank Diamonds Ltd v FTK Holland BV and Others* 2003 (1) SA 189 (NmS) at 195 – 196 (per Strydom CJ).

[23] Cited above n 16 at para 113.

[22] Similar considerations apply to the decision whether to award security. Ordering security for costs is a procedural matter incidental to the civil proceedings. If it could be appealed on the standard of correctness each time, it might well result in lengthy delays and considerable costs. Moreover it is clear that the statute itself contemplates a discretion which vests in the court of first instance to determine whether security should be payable in a particular case. The court at first instance must consider all the relevant facts placed before it and then perform the balancing exercise described at para 8 above. It is best placed to make an assessment on 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.

[23] I conclude therefore that an appeal against an award of security based on section 13 of the Companies Act may only succeed if it can be shown that the award was made in circumstances where the court a quo did not act judicially, or on a misapprehension of the facts, or on wrong principles.[24] Two questions remain to be considered: the correct legal principles that govern the exercise of the discretion, and

[24] The Namibian Supreme Court reached the same conclusion in the *Northbank Diamonds Ltd* case, cited above n 22 at 196H – I.

whether the discretion was judicially exercised in this case. It is to these questions that I now turn.

Proper approach to section 13

[24] The proper approach to section 13 has been the subject of some controversy in our courts and different approaches have been taken at different times. In *Lappeman*'s case, the court helpfully reviewed the existing law applied by the courts in Johannesburg and Pretoria. It observed that the general rule was that a court in exercising the section 13 discretion would lean in favour of granting security and not deprive an applicant of that security "unless special circumstances exist."[25] The court held that that approach could not survive the enactment of the Constitution. Joffe J reasoned as follows:

> "The object of s 13 is to protect the public in litigation by bankrupt companies (*Hudson & Son v London Trading Co Ltd* 1930 WLD 288). The bankrupt company is not excluded from the courts but only prevented if it cannot find security from dragging its opponent from one court to another (*Cowell v Taylor* (1885) 31 ChD 34 (CA) at 38). In my view this object can be achieved and the values of the Constitution referred to above can be respected if the discretion contained in s 13 is approached, neither with a predisposition to granting security, as is the present approach in this Division, nor with the predisposition not to grant security. The wide discretion favoured by the English cases, pursuant to which the discretion is

[25] *Lappeman* cited above n 5 at 914B – G, citing *Fraser v Lampert NO* 1951 (4) SA 110 (T) at 115A; and *Trust Bank van Afrika Bpk v Lief and Another* 1963 (4) SA 752 (T) at 754H. See also *Beaton v SA Mining Supplies* cited above n 19 at 439; *Kruger Stores (Pty) Ltd and Another v Kopman and Another* 1957 (1) SA 645 (W) at 647; *Cometal-Mometal SARL v Corliana Enterprises* 1981 (4) SA 662 (W). On the other hand, at least one judge preferred to approach section 13 as an untrammelled discretion, see *Wallace NO v Rooibos Tea Control Board* 1989 (1) SA 137 (C) at 142 – 144. But see also *Henry v RE Designs* 1998 (2) SA 502 (C) at 508 – 510 which preferred the approach in *Fraser v Lampert.*

> approached without any commitment in advance as to how the discretion is to be exercised, will achieve the desired result."[26]

[25] Joffe J then applied the approach to the facts of the case before him. He noted that the plaintiff in that matter had alleged that furnishing security would require the plaintiff to use working capital which would result in either the plaintiff having to cease trading or abandoning its action. In response to this the Court reasoned as follows:

> "It is clear that, in the event of its being successful, defendant will not recover its costs from the plaintiff. It is common cause that these costs will be substantial. It is noteworthy that whilst not litigating on as lavish a scale as the defendant (the defendant has engaged the services of three counsel) plaintiff has none the less engaged the services of an attorney and two counsel. Plaintiff must have made arrangements for the payment of its own legal costs. The inevitable inference that arises, is that those who stand to benefit from the litigation in the event of an award being made in favour of the plaintiff, are financing the plaintiff's litigation whilst shielding behind the plaintiff's corporate identity insofar as the defendant's costs are concerned. This consideration must weight in favour of ordering security."[27]

[26] In *Shepstone & Wylie and Others v Geyser NO*, Hefer JA also rejected the earlier approach of South African courts that would order security for costs once it was established that there was reason to believe that a company might not be able to pay the costs of a successful defendant unless special circumstances existed. He reasoned as follows:

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[26] Cited above n 5 at 919F – H.

[27] Id at 920G – I.

> "In my judgment, this is not how an application for security should be approached. Because a Court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of the relevant features, without adopting a predisposition either in favour of or against granting security."[28]

[27] In his consideration of the relevance of the fact that the effect of the order to pay security would put an end to the litigation, the court reasoned as follows:

> "Let me say at the outset that the fact that an order of security will put an end to the litigation does not by itself provide sufficient reason for refusing it. It is a possibility inherent in the very concept of a provision like s 13 which comes into operation whenever it appears to the Court that the plaintiff or applicant will not be able to pay the defendant or respondent's costs in the event of the latter being successful in his defence. If there is no evidence either way, the mere possibility that the order will effectively terminate the litigation can plainly not affect the Court's decision. It only becomes a factor once it is established as a probability by the plaintiff or applicant. And, even if it is established, it remains no more than a factor to be taken into account; by itself it does not provide sufficient reason for refusing an order."[29]

[28] The applicant criticised this aspect of the judgment of the Supreme Court of Appeal on the basis that it did not give sufficient protection to the rights entrenched in section 34 of the Constitution. Counsel argued that if the effect of an order for security would be to put an end to litigation, it would be unconstitutional for such an order to be made. In my view, this argument cannot be upheld.

[28] Cited above n 5 at 1045I – 1046A.

[29] Id at 1046G – I.

[29] Section 13 contemplates that an order for security for costs will be made where a plaintiff or applicant company is in financial difficulties. The sharp commercial reality of such an order is that at times where the plaintiff or applicant cannot find security for costs it will not be able to pursue its action. This seems an inevitable and intended result of section 13. In my view, the section is not reasonably capable of being read as contended for by the applicant. The applicant did not challenge the constitutionality of the section, and in my view, it is not capable of being read, in light of the Constitution or otherwise, to mean that a court has no discretion to order security to be furnished where the effect of that order will be to terminate the litigation. The provision states the contrary quite clearly and the applicant's submissions in this regard must be rejected.

[30] In my view, there can be no doubt that in exercising its discretion in terms of section 13, a court must bear in mind the provisions of section 34 and weigh them in the light of other factors laid before it. The balancing exercise proposed by the Supreme Court of Appeal in *Shepstone & Wylie*'s case (adopted from the English case *Keary Developments Ltd v Tarmac Construction Ltd and Another*[30]) acknowledges this (albeit without express reference to the Constitution). On one side of the scale must be weighed the potential injustice to the plaintiff or applicant if it is prevented from pursuing a legitimate claim. This incorporates a recognition of the importance of the right of access to courts. On the other side of the scale must be placed the potential injustice to the defendant if it succeeds in its defence but cannot recover its

[30] Cited above n 9 at 540a – b.

costs. Relevant considerations in performing this balancing exercise will include the likelihood that the effect of an order to furnish security will be to terminate the plaintiff's action; the attempts the plaintiff has made to find financial assistance from its shareholders or creditors; the question whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff; as well as the nature of the plaintiff's action.

The approach by the High Court in this case

[31] In this case, the information before the High Court was scant. The applicant did not clearly allege that an order to furnish security would result in his being unable to pursue his action. In fact, he argued on the contrary that as liquidator he would probably have the means to meet the defendant's costs should he be ordered to pay them. The applicant was not candid with the Court as to the source of the funds to retain attorneys and counsel in this case (or in the other litigation mentioned), nor did he indicate what attempts he had made to secure the support of creditors or shareholders to assist him to furnish security for costs in order to proceed with the litigation.

[32] In reaching his conclusion that it would be appropriate to require security for costs to be furnished, Joffe J accepted that there was reason to believe that the applicant would not be able to pay the defendant's costs if it were successful. He then turned to consider whether he should exercise his discretion in favour of the grant of costs. He considered the arguments raised by the applicant that it would be in the

public interest because of the nature of the trust between the respondent as a firm of accountants and the applicant as its client. Particularly weighty to his conclusion that security for costs should be paid were the following considerations:

> "[11] It must be noted that the ordering of security will not necessarily lead to the termination of the action. If there is such a good claim against the applicant, it is not inconceivable that Sadrema's creditors, who must have authorised respondent to institute the action, will provide the means for respondent to fund the action. After all, they will be the ultimate beneficiaries of a successful action against the applicant.
>
> [12] Having regard to all these factors it would appear that security should be furnished. It would be unjust and unfair for the applicant to litigate at risk of not recovering costs while those who stand to benefit from the litigation are not put to the risk of an adverse costs order."[31]

[33] The most powerful factor gainsaying the grant of security is the allegation by the applicant that it is the alleged fraudulent conduct of the respondent that caused the liquidation of Sadrema Explorations. This is an important consideration as the court held in *Shepstone and Wylie*.[32] The judge did not ignore this consideration but weighed it in the balance. He concluded that on balance the applicant had not established that the grant of security would necessarily lead to the termination of action, and that it may well be that creditors or shareholders apprised of the prospects of success of the action would furnish the necessary security to assist the applicant in pursuing the claim.

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[31] *JC Barnard & Partners v Trevor B Giddey*, Case no 05/10006, 10 August 2005, as yet unreported.

[32] Cited above n 5 at 1047B – C.

[34] It cannot be said that the High Court in exercising its discretion did not act in a judicial manner, nor that it based its decision on incorrect facts or wrong legal principles. There was no clear evidence before the High Court as to the effect of an order for security on the applicant's ability to pursue the action should it be required to furnish security. Nor was there any evidence as to the attempts the applicant had made to seek assistance from creditors or shareholders in furnishing security. Indeed, the applicant launched the application for leave to appeal against the order of the High Court even before the Registrar had determined the amount of security that needed to be paid.

[35] In all these circumstances, the appeal must fail. Given that the applicant has raised a constitutional issue of some importance, it is not an appropriate matter in which a costs order should be made.

Order

[36] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, Sachs J, Skweyiya J, Van der Westhuizen J, and Yacoob J concur in the judgment of O'Regan J.

For the applicant: W Trengrove SC and M Chaskalson instructed by Arthur Kruger Attorneys.

For the respondents: V Soni SC and GB Rome instructed by Werksmans Inc Attorneys