THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM	The Registrar, Supreme Court of Appeal
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STATUS	Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Systems Applications Consultants (Pty) Ltd t/a Securinfo v Systems Applications Products AG and Others (1371/2018) [2020] ZASCA 81 (2 July 2020)

Today the Supreme Court of Appeal (SCA) dismissed an appeal with costs, including the costs occasioned by the employment of two counsel from Gauteng Local Division of the High Court, Johannesburg (high court).

The appeal concerned an interlocutory order for security for costs. In an action instituted in 2008 (the main action), the appellant claimed damages from the second respondent. The appellant asserted that it had, between 1997 and 2001, developed a software security product designed specifically to secure and manage the authorisation risks of users of SAP enterprise software (Securinfo for SAP), which was marketed and sold in South Africa and abroad. The appellant further claimed to have concluded an exclusive distribution agreement with a German IT consulting company named SAP Systems Integration (SAPSI) in 2004. According to the appellant, the respondent acquired a controlling share in SAPSI and also acquired shares in a competing security product known as VERSI. The appellant contended that upon its acquisition of the shares in VERSI, the respondent thwarted the sale and marketing of Securinfo for SAP and unlawfully interfered with the software distribution agreement, as a result of which it suffered patrimonial loss in the amount

of €609 803 145. The respondent defended the action, essentially denying the conclusion of the appellant's software distribution agreement with SAPSI and its interference therewith.

The respondent subsequently brought an application to the high court for an order compelling the appellant to furnish security for the respondent's costs in the main action, alleging that if it were to be successful in the main action, the appellant would be unable to meet an adverse costs order. That application was brought in terms of s 13 of the Companies Act 63 of 1973 (the 1973 Companies Act). Satchwell J dismissed that application on 27 May 2011. However, on 26 July 2012, the full court of the Gauteng Division of the High Court (per Claassen J) set aside the order of Satchwell J and granted an order in favour of the respondent (the 2012 Order). The appellant's application for leave to appeal against the 2012 Order was unsuccessful in both the SCA and the Constitutional Court. As a result, the appellant eventually furnished security in the specified amount of R4 million as per the 2012 Order.

On 17 April 2018, the appellant brought an application to the Gauteng Division of the High Court (Weiner J) (court a quo) seeking an order releasing the amount of R4 million held as security. As an alternative prayer to that order, the appellant sought an order 'declaring that the respondent is not entitled to any security in addition to the current amount.' On the same day and by prior arrangement, the respondent launched a related application for orders confirming its entitlement to approach the Registrar to increase the amount of security lodged in terms of the 2012 Order, and joining a company known as Ungani and its shareholder, Mr Vhonani Mufamadi in his personal capacity in the main action. The appellant relied on both a material change in circumstances and the respondent's alleged abuse of court process, as constituting grounds justifying the relief sought in its application. The court a quo dismissed the appellant's application on the basis that the release of security would ignore the transitional provisions embodied in item 10(1) to Schedule 5 of the 2008 Companies Act read with the Interpretation Act 33 of 1957. It found that the appellant's contention that it was in the interests of justice to discharge the 2012 Order was misplaced. It also dismissed the respondent's application to join Mr Mufamadi, the shareholder of Ungani, as a party in the proceedings in his personal capacity but granted the joinder of Ungani by consent of both parties.

Before the SCA, the only issue arising for determination was whether the security furnished, in the amount of R4 million, should be released on the grounds set out in the papers the appellant filed in the court a quo. Related issues were (1) whether the court a quo had the power to reconsider the 2012 Order by ordering the release of the security; (2) assuming that the power existed, whether the security should have been released and (3) whether there is an abuse of court process by the respondent.

Before the SCA, the appellant relied on the common law and s 173 of the Constitution for its proposition that a court can reconsider and discharge an order that granted security for costs. The respondent, for its part, asserted that an order granting security is a final order and cannot be affected by a change in circumstances. The SCA reaffirmed that at common law, any cause of action which is relied on as a ground for setting aside a final judgment, must have existed at the date of the final judgment. It found that the appellant's reliance on the common law could not prevail because the ground it sought to advance as a justification for the setting aside of the 2012 Order did not exist at the time when that order was issued. Following an analysis of authorities dealing with the provisions of s 173 of the Constitution, the SCA found that it was conceivable that s 173 of the Constitution could be invoked in respect of an order relating to security for costs, in the interests of ensuring fairness of proceedings. It cautioned that the invocation of s 173 must be determined on the peculiar facts of each case, mindful of the fact that the power granted by that provision should be exercised sparingly.

The SCA pointed out that the crisp question was whether the appellant had shown that there were material changes of a legal and factual nature since the granting of the 2012 Order, as per its assertions. The SCA held that the change in the statutory regime in the context which had occurred in this matter had expressly been catered for in the transitional provision stipulated in item 10(1) of Schedule 5 to the 2008 Companies Act. It accordingly found that the coming into operation of the 2008 Companies Act could not rightly constitute a material change in the law. It opined that holding that the 2008 Companies Act was applicable to the 2012 Order would be contrary to the rule against retrospectivity as enunciated in s 12(2)*(e)* of the Interpretation Act of 1957. It consequently held that the appellant's submissions pertaining to the change in the law could not prevail.

As regards the alleged material factual change, the SCA held that the mere existence of a funding agreement between the appellant and Ungani did not, without more, amount to a material change in the facts warranting the reconsideration of the 2012 Order. It found that, on the papers, there was a clear dispute of fact over Ungani's ability to meet any costs order and Ungani had failed to produce evidence that would enable the court to determine that dispute in its favour in accordance with the *Plascon-Evans* rule. It also held that there was no basis for concluding that the respondent's interlocutory applications and the bill of costs it had submitted for assessment amounted to an abuse of court processes, as alleged by the appellant.

The appeal was dismissed with costs, including the costs of two counsel.