THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Not reportable
Case no: 071/04

In the matter between:

STOREGATE AFRICA (PTY) LIMITED **Appellant**

and

AIRLINK CARGO INTERNATIONAL (PTY) LTD **Respondent**

Coram : **SCOTT, FARLAM, CONRADIE, CLOETE *et* HEHER JJA**

Date of Hearing : **17 MARCH 2005**

Date of delivery : **30 MARCH 2005**

Summary: **Application for security for costs – appealability of order granting application – jurisdictional facts to be established before court empowered to exercise discretion conferred in terms of s 13 of the Companies Act**

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] This is an appeal against the judgment of Willis J in the High Court, Johannesburg, directing the appellant to provide security for the respondent's costs. The learned judge refused leave to appeal but leave was subsequently granted by this court.

[2] A preliminary question that arises is whether an order granting security for costs is appealable. In *Shepstone & Wylie v Geyser NO* 1998 (3) SA 1036 (SCA) this court held that an order refusing an application for security is appealable, but left open the question of appealability where the application is granted. In the latter event, as pointed out by Hefer JA, the rules make provision for the registrar to increase the amount of security so ordered. Nothing like this can occur if security is refused. In coming to the conclusion he did, the learned judge rejected a view previously upheld in the Cape Provincial Division that an order granted in pursuance of an application for security was not appealable as any order made would not be final and would not dispose of any portion of the relief claimed. He relied, instead, on a dictum of Van den Heever J in *Ecker v Dean* 1937 SWA 3 at 4 in which the latter pointed out that –

'. . . the claim for security was a separate and ancillary issue between the parties, collateral to and not directly affecting the main dispute between the litigants . . .' .

But whether an order for security is granted or refused, the issue is the same, ie the entitlement of the defendant to security. In either event, the order will be final. See *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (4) SA 799 (W) at 804C-E. The fact that the registrar, or for that matter the court, may increase the amount of security does not affect the finality of that issue. I can therefore see no reason in principle for distinguishing between the two situations. It follows that in my view an order granting security for costs is appealable.

[3] I turn to the merits of the appeal. The facts are relatively straightforward. I shall refer to the parties respectively as the plaintiff and the defendant. The plaintiff (now the appellant) instituted action against the defendant (now the respondent) for damages arising out of the loss of certain computer equipment which it was alleged the former had entrusted to the latter for storage. The defendant opposed the action and filed a plea denying liability. It thereafter delivered a notice in terms of rule 47 (1) requesting security for its costs from the plaintiff in the sum of R30 000. The notice recorded that the defendant claimed security

on the basis that the plaintiff was a company with limited liability which in terms of s 13 of the Companies Act 61 of 1973 was obliged to furnish security for the defendant's costs as the latter 'believes that the plaintiff will be unable to pay the . . . defendant's taxed costs if the . . . defendant is successful in its defence'. The plaintiff ignored the notice and the defendant some eight months later approached the court *a quo* in terms of rule 47 (3) for an order directing that the security be furnished.

[4] In the affidavit filed in support of the application the attorney acting on behalf of the defendant stated that the latter was in possession of a document headed 'Subrogation Form', a copy of which was annexed. In terms of this document, which was signed on behalf of the plaintiff and addressed to the Mutual & Federal Insurance Company Limited, it was agreed that the latter was subrogated to all the rights and remedies of the plaintiff in respect of the lost goods and that the insurance company was authorised to make use of the plaintiff's name for the purpose of any proceedings to enforce those rights or remedies. The deponent noted that in terms of the subrogation, all costs and charges incurred by the insurance company in the proceedings and the use of the plaintiff's name were to be borne and paid for by the former, but pointed out that as the defendant had no contractual nexus

with the insurance company it would not be entitled to recover its taxed costs from that company in the event of the defendant being successful in its defence. The affidavit contained a passing reference to the notice in terms of rule 47(1) but nothing at all to substantiate the statement in the notice that the defendant believed that the plaintiff would be unable to pay the defendant's costs. The plaintiff filed no answering affidavit but sought to resist the application on the basis of the defendant's own papers.

[5] In his judgment, Willis J, after observing that the application was based 'essentially' on the subrogation, said the following:

> 'That [the subrogation] in itself does not indicate that there is reason to believe that the plaintiff would not be able to pay the security called for. On the other hand, notwithstanding the fact of subrogation alluded to, no facts have been put before me to indicate that the plaintiff would be able to meet a costs order granted against it. There is not even a bald allegation that it would be able to do so, never mind any reference to its assets or its balance sheet.
>
> Taking everything into account it seems to me that the applicant has indeed made out a case that there are reasonable grounds to believe that the plaintiff would not be able to meet a costs order in this action in the event of it being unsuccessful.'

(The reference to 'the security called for' in the first sentence was presumably intended to be a reference to the defendant's costs in the event of it being successful.)

[6] The obligation of a company to provide security for costs is governed by s 13 of the Companies Act 61 of 1973. It reads:

'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'.

The section affords a court a discretion to order a company to provide security for costs only if certain jurisdictional facts are established. The most important of these for present purposes is that there must appear to be 'reason to believe' based on 'credible testimony' that the company will be unable to pay the costs. Until this requirement has been satisfied the court has no power to order security and the question of how it is to exercise its discretion does not arise: *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990 (4) SA 196 (C) at 204B-E; *Shepstone & Wylie v Geyser NO, supra,* at 1041I; see also *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 (W) para 8 at 1071E.

[7] It appears from the passage quoted above that the court *a quo* acknowledged that the subrogation itself did not constitute a

reason for believing that the plaintiff would be unable to pay the defendant's costs. This is clearly correct. Subrogation is a matter between the insurer and the insured. It does not affect the position of a defendant (or respondent) one way or the other. Should the claim be dismissed with costs the defendant (or respondent) would be entitled to look to the plaintiff (or applicant) for its costs regardless of whether there had been a subrogation or not.

[8] It appears, however, that the court *a quo* ultimately based its decision on the failure on the part of the plaintiff to place facts before the court 'to indicate that the plaintiff would be able to meet a costs order granted against it'. This approach is clearly wrong. The defendant bears the onus of satisfying the requirements of s 13. The bald statement as to its belief in the rule 47(1) notice was clearly insufficient; it was not 'credible testimony' within the meaning of the section. Indeed, that statement was not even confirmed under oath in the subsequent application. Instead, as I have said, reliance was placed exclusively on the subrogation. Once the requirements of s 13 have been satisfied, the party against whom security is sought will run the risk of an adverse order should it fail to place information before the court as to its financial position. But until then it has no obligation to do so. (See in this regard the comments of Cloete J, in the context of s 8 of the

Close Corporations Act 69 of 84, in *Vumba Intertrade CC v Geometric Intertrade CC, supra*, paras 8 and 9.)

[9] In this court the respondent sought to justify the order in its favour on slightly different grounds. Counsel argued, first, that the failure on the part of the plaintiff to respond to the rule 47(1) notice notwithstanding the delay of some eight months before the application was launched and the failure to file an opposing affidavit, justified on inference of acquiescence on the part of the plaintiff to the relief sought; in other words, it amounted to an admission. The argument is without merit. On receipt of the rule 47(1) notice, the plaintiff was under no obligation to respond; it was entitled to wait and see if the defendant would pursue its demand. On receipt of the application, which did not satisfy the jurisdictional requirements of s 13 of the Companies Act, it was entitled to elect to argue the matter on the defendant's papers without filing affidavits. The second contention advanced was that the fact of the subrogation somehow gave rise to an inference that the plaintiff would be unable to pay the defendant's costs if successful. This, too, is clearly without substance. The wealthiest of companies insure themselves against claims and sign subrogation forms.

[10] The appeal is upheld with costs. The judgment of the court *a quo* is set aside and the following is substituted in its place:

'The application is dismissed with costs.'

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D G SCOTT
JUDGE OF APPEAL

CONCUR:

FARLAM JA
CONRADIE JA
CLOETE JA
HEHER JA