THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 370/2006

In the matter between :

MTN SERVICE PROVIDER (PTY) LTD **APPELLANT**

and

AFRO CALL (PTY) LTD **RESPONDENT**

CORAM : **BRAND, COMBRINCK JJA *et* KGOMO AJA**

HEARD : **29 AUGUST 2007**

DELIVERED : **12 SEPTEMBER 2007**

Summary: Application for security for costs under s 13 of Companies Act 61 of 1973 – refused by court *a quo* in exercise of its discretion – powers of appellate court to interfere strictly circumscribed – finding on facts that court *a quo* exercised discretion for no substantial reason – comment on when leave to appeal should be granted to SCA as opposed to full court.

Neutral citation: This judgment may be referred to as *MTN Service Provider v Afro Call* [2007] SCA 97 (RSA)

JUDGMENT

BRAND JA/

BRAND JA:

[1] The respondent company ('Afro Call') instituted action against the appellant ('MTN') in the Pretoria High Court. After close of pleadings MTN brought an application for security for costs under the provisions of s 13 of the Companies Act 61 of 1973 read with Rule 47 of the Uniform Rules of Court. The application was dismissed by Prinsloo J. The appeal against that order is with the leave of the court *a quo*.

[2] For present purposes the facts can be restricted to bare essentials. The parties are both involved in the cellular telephone industry. In terms of a written agreement between them, MTN undertook to provide Afro Call with specified equipment and services. In the main proceedings Afro Call claimed payment of damages in an amount exceeding R4m, allegedly arising from MTN's repudiation of its contractual obligations, under the agreement. MTN filed both a plea and a counter-claim. The plea essentially denied the fundamental elements of Afro Call's claim. The counter-claim was for two amounts exceeding R15m in aggregate, based on the contention that it was Afro Call's repudiation that caused the termination of their contractual relationship.

[3] Pleadings closed towards the end of 2004. During the discovery process that followed, Afro Call provided MTN with its financial statements for the period ending 30 April 2004. From these statements two things appeared. Firstly, that, as at the end of that period, Afro Call's liabilities exceeded its assets by an amount of R605 257.33 and, secondly, that during the last two months of the period, Afro Call ran its business at a substantial nett loss.

[4] In the light of this information, MTN became concerned that Afro Call would not be able to make payment of any costs order against it in the main proceedings. In consequence, MTN's attorneys, in a letter to the attorneys acting for Afro Call, requested security for costs in an amount of R400 000. The letter ended with the postscript that, if Afro Call should deny its inability to meet an adverse costs order, it was invited to furnish MTN's attorneys with its

most recent audited financial statements and its management account for the succeeding period.

[5] This letter was met by a bald denial on behalf of Afro Call that it was under any obligation to furnish security for costs. The invitation to provide MTN with more recent financial information was simply ignored. This gave rise to the formal application by MTN for security under Uniform Rule 47(3) in the court *a quo,* which eventually led to the present appeal. The pertinent facts thus far referred to, were set out in MTN's founding affidavit. Though the application was opposed, Afro Call filed no answering affidavit, notwithstanding that at the first hearing, the matter had been specifically postponed for two months to enable Afro Call to do so.

[6] Uniform Rule 47 only governs the procedure for the application. For its basis in substantive law, MTN relied on s 13 of the Companies Act. It provides as follows:

'Where a company or other body corporate is the 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.'

[7] The section plainly requires a two stage enquiry. At the initial stage, the question is whether the applicant for security had established, by credible testimony, that the body corporate, if unsuccessful, will not be able to pay the applicant's costs in the main proceedings. If the applicant fails to meet this threshold requirement, that is the end of the matter. The application is bound to be refused. If, on the other hand, the court is satisfied that such reason to believe exists, it must, at the second stage, decide, in the exercise of the discretion conferred on it by the section, whether or not to compel security (see eg *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 (W) para 8).

[8] The court *a quo* appears to have found for MTN on the first leg, because it proceeded to the second stage where it decided, in the exercise of its discretion, not to award security. On appeal it was conceded on behalf of Afro Call that, in all the circumstances and, particularly, in the absence of an answering affidavit, the conclusion, that it would not be able to meet a costs order in favour of MTN in the main proceedings, cannot be avoided. I believe that that concession was rightly and fairly made.

[9] In accordance with the well-settled principles of our law, courts of appeal are reluctant to interfere with the exercise of a discretion by the court of first instance. For reasons that are equally well-settled, the appellate court will not substitute its own discretion for that of the trial court simply because it would have preferred a different result. It will only do so if the court of first instance had failed, through misdirection or otherwise, to exercise its discretion properly (see eg *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 781G-J; *S v Basson* 2005 (12) BCLR 1192 (CC) para 110).

[10] But, in *Media Workers Association of South Africa v Press Corporation of South Africa ('Perskor')* 1992 (4) SA 791 (A) at 796H-I and 800E-G, E M Grosskopf JA arrived at the conclusion that, in the present context, the term 'discretion' has more than one meaning. On a proper analysis of earlier cases, he said, the restraint on the appellate court's powers of interference only applies to a discretion in the strict or narrow sense and not to a 'discretion' in the broad sense, also described as a 'discretion loosely so called'. A discretion in the strict sense, Grosskopf JA explained, involves a choice between different but equally admissible alternatives, while a 'discretion' in the broad sense – or loosely so called – means no more than a mandate to have regard to a number of disparate and incommensurable features in arriving at a conclusion. When used in the broad sense, Grosskopf JA found, there is no reason why the appellate court should not exercise its own discretion by deciding the matter according to its own view of the merits. It is only with regard to discretion in the strict sense that the appellate court's powers of interference are to be circumscribed (see also eg *Knox D'Arcy v*

Jamieson 1996 (4) SA 348 (A) at 361G-I; *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) para 17).

[11] With reference to s 13 of the Companies Act, this gave rise to the debate as to how the discretion conferred by the section should be classified on appeal. Should it be regarded as a discretion in the strict sense or in the broad sense of the term? In *Shepstone & Wylie v Geyser NO* 1998 (3) SA 1037 (SCA) at 1044I-1045G, the question was specifically left open. In this light, the preliminary contention raised in MTN's heads of argument, was that the discretion exercised by the court *a quo* was not a strict one and that a wider scope thus existed for the matter to be reconsidered on its merits by this court. Before the hearing of the matter, however, there was the decision of the Constitutional Court in *Giddey NO v J C Barnard & Partners* 2007 (2) BCLR 125 (CC) where the debate was resolved in favour of a discretion in the strict sense. Thus the court held (in para 22, of its judgment by O'Regan J):

'It [ie the court of first instance] 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.'

[12] Succinctly stated, the issue in the present appeal is therefore whether MTN has made out a case for interference with the exercise of the court *a quo*'s discretion, in accordance with the *Giddey*-principles. This requires an evaluation of the reasons given by the court *a quo* as to why it exercised its discretion against granting a security order. The first consideration that seems to have weighed with the court *a quo,* was that the financial statements of Afro Call, which were relied upon by MTN, showed a gross profit of R950 014.51 for the period ending 30 April 2004 and that, bearing in mind that this was a trading company, there was insufficient evidence to justify a conclusion that Afro Call was indeed in a state of insolvency.

[13] This consideration appears to be more appropriate to the first stage enquiry, aimed at establishing whether Afro Call would be unable to meet an adverse cost order, which the court *a quo* had already decided, rightly, in my view, in favour of MTN. In any event, the consideration amounts to a fallacy in reasoning. The reality was that, despite the gross profit, Afro Call was shown by the same financial statements to have made a substantial nett loss, which resulted in its insolvency at the end of the period. From that reality, the fact that it was a trading company cannot detract. The further reality was that, as long as Afro Call remained insolvent, it would *prima facie* be unable to meet any costs order in favour of MTN. Of course, it is true that, as a trading company, its financial position could in the meantime have improved. But the point is that Afro Call has failed to show this by producing more recent financial information, despite MTN's express invitation to do so.

[14] Another consideration which appears to have influenced the court *a quo,* was that the litigation in the main proceedings arose from a contractual relationship between two commercial entities. Thus, the court reasoned, it is fair to assume that the action instituted by Afro Call could not be described as vexatious. This is of relevance, so the court held, because 'even where an insolvent launches an action, a court will be slow to order security unless the action is vexatious'. As authority for the proposition, the court relied on a statement by Erasmus, *Superior Court Practice* at B1-342 where the learned author specifically deals with applications for security against insolvent natural persons, as opposed to applications against companies under s 13 of the Companies Act.

[15] To my way of thinking this line of approach is indicative of a fundamental misdirection, because it fails to recognise the crucial dissimilarity in the legal substructures on which the two different applications are based. Against an insolvent natural person, who is an *incola*, so it has been held, security will only be granted if his or her action can be found to be reckless and vexatious (see *Ecker v Dean* 1938 AD 102 at 110). The reason for this limitation, so it was explained in *Ecker* (at 111), is that the court's power to order security against an *incola* is derived from its inherent jurisdiction to

prevent abuse of its own process in certain circumstances. And this jurisdiction, said Solomon JA in *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 274, 'is a power which . . . ought to be sparingly exercised and only in very exceptional circumstances'. (See also eg *Ramsamy NO v Maarman NO* 2002 (6) SA 159 (C) 173F-I.)

[16] In the exercise of its discretion under s 13 of the Companies Act, on the other hand, there is no reason why the court should order security only in the exceptional case. On the contrary, as was stated in *Shepstone & Wylie (supra)* 1045I-J, since the section presents the court with an unfettered discretion, there is no reason to lean towards either granting or refusing a security order. It follows, in my view, that although *bona fides* of the company's claim is a consideration that may legitimately be taken into account in the exercise of the court's discretion, as one of many factors, mere *bona fides* in itself cannot serve as a basis to refuse security when applied for under s 13.

[17] What also seems to have been of concern to the court *a quo,* was the possibility that a security order could effectively deprive Afro Call of the opportunity to proceed with its claim. Had that possibility been established, it would indeed have constituted a valid consideration. In fact, it is part of the balancing act expected from the court when deciding whether or not to grant a security order. This is borne out, for example, in the following statement by O'Regan J in *Giddey NO* (para 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.'

[18] What the court *a quo* seems to have lost sight of, however, is the consideration which appears from the immediately following further statement in *Giddey NO* (para 8) that:

'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 . . ..'

[19] In the present case, as we know, Afro Call filed no answering affidavit. Whether or not it will be able to furnish security, is therefore not known. What is more, the probability that Afro Call will be unable to meet an adverse costs order – which had been established by MTN – does not justify the inference that it will not be able to furnish security. As was pointed out in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 (CA) at 542a-b, there are two different issues involved. A shareholder or creditor might be quite prepared to put up security to assist a company to pursue its claim, while the same shareholder or creditor would be extremely unlikely to pay the costs of the other party once the company had lost the case.

[20] 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 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 (see eg *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)* 1997 (4) SA 908 (W) 920G-J; *Keary Developments* at 540f-j; *Shepstone & Wylie* at 1047A-B; *Giddey NO* at paras 30, 33 and 34).

[21] In the circumstances, the court *a quo* erred, in my view, when it allowed the consideration to weigh with it that an order for security could prevent Afro Call from continuing with its claim. The further consideration which seemingly also weighed with the court, namely, that MTN would in any event be able to continue with its substantial counter-claims was, in my view,

equally inappropriate. The essential difference, I think, is that MTN could decide about the financial wisdom of incurring further costs in pursuing a claim (substantial or otherwise) against an insolvent company, whereas it had no control over whether or not that company should persist in its claim.

[22] Having regard to the court *a quo*'s reasoning as a whole, the conclusion is, in my view, inevitable that it misdirected itself in taking irrelevant considerations into account and that, in the end, it exercised its discretion against MTN's application for no substantial reason. In the result, the court's ultimate conclusion cannot be justified and its order should therefore, in my view, be set aside.

[23] What remains are issues relating to costs. First among these are the costs incurred by MTN in submitting an affidavit in opposition to Afro Call's condonation application, which was necessitated by the filing of Afro Call's heads of argument more than one month out of time. Afro Call rightly tendered the costs of the condonation application on an unopposed basis. The dispute is, therefore, restricted to the costs of the opposition. In considering the latter, I agree with MTN's argument that Afro Call appears not to have been entirely forthcoming in explaining its default. On the other hand, MTN conceded that it suffered no prejudice whatsoever as a result of Afro Call's failure to act in strict compliance with the rules of this court. I do not believe that technical squabbles of this kind should be encouraged. They do not contribute to the resolution of the dispute and thus only result in wasteful and time consuming exercises. In consequence I propose that, as to MTN's opposition of the condonation application, there should be no order as to costs. The further costs issue arose from MTN's request that a costs order in its favour on appeal should include the costs of two counsel. Since I do not believe that the employment of two counsel in this relatively simple matter was justified, I do not believe we can accede to this request.

[24], Finally, there is the decision of the court *a quo* that the appeal should be heard by this court – and not by the full court – that I need to refer to, lest it be thought that we agree with that decision. Section 20(2) of the Supreme Court

Act 59 of 1959 makes it clear that the primary court of appeal from a single judge of the high court lies to the full court, unless questions of law or fact or other considerations involved dictate that the matter should be decided by this court. On the face of it, there is no reason why the full court could not have dealt with the present appeal. Since the order granting leave to this court was not accompanied by any judgment, it is not possible to discern why the court *a quo* found it necessary to deviate from the norm. In the circumstances I can only reiterate the concerns expressed by Marais JA in *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC* 2003 (5) SA 354 (SCA) para 23, when he said:

'The inappropriate granting of leave to appeal to this court increases the litigants' costs and results in cases involving greater difficulty and which are truly deserving of the attention of this court having to compete for a place on the court's roll with a case which is not.'

[25] In the event:

1. The respondent's application for condonation is granted with costs against the respondent on an unopposed basis. As to the opposition of the condonation application by the appellant, there will be no order as to costs.
2. The appeal is upheld with costs.
3. The order of the court *a quo* is set aside and substituted with the following:
   '(a) The respondent is directed to furnish the applicant with security for costs in an amount to be determined by the Registrar.
   (b) The respondent's claim under case no 2003/1597 is stayed until such time as the respondent has furnished the aforesaid security for costs.
   (c) The applicant is granted leave to approach this court on the same papers, duly supplemented where necessary to seek a dismissal of the respondent's aforesaid claim, with costs, in the event that the respondent does not furnish the required security

within 30 days of the Registrar's determining the quantum of that security.

(d) The respondent is directed to pay the costs of this application.'

…….
F D J BRAND
JUDGE OF APPEAL

CONCUR:

COMBRINCK JA
KGOMO AJA