THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case number: 055/07

In the matter between:

NASIONALE AARTAPPELKOöPERASIE

BEPERK Appellant

and

PRICEWATERHOUSECOOPERS INGELYF 1st Respondent

HOEK & WIEHAHN 2nd Respondent

WIEHAHN MEYERNEL 3rd Respondent

PRICE WATERHOUSE MEYERNEL 4th Respondent

PRICE WATERHOUSE 5th Respondent

CORAM: **HARMS ADP, LEWIS JA and HURT AJA**

HEARD: **21 NOVEMBER 2007**

DELIVERED: **29 NOVEMBER 2007**

Summary: Security for costs – exercise of discretion in the strict sense by trial court – appeal against – necessary to show material misdirection.

Neutral citation: This judgment may be cited as *Aartappel Koöperasie Bpk v Pricewaterhousecoopers* [2007] SCA 166 RSA.

HURT AJA:

[1] The parties are locked in litigation of marathon proportions. The appellant ('NAK') claims that the respondents ('PWC') failed to exercise proper care in the auditing of NAK's finances during the period between 1984 and 1998 and has claimed damages and interest which are said, currently, to amount to something of the order of R500 million. A special plea was filed, asserting that NAK's claim was champertous. The special plea was dismissed and an appeal to this court against its dismissal failed.[1] The trial was resumed in the Transvaal Provincial Division, but the presiding judge found it necessary to recuse himself. There was accordingly a fresh start, before Botha J, on 6 October 2005. The trial was adjourned in mid-March 2006, until 1 August. It continued from 1 August to 17 November 2006. On Monday 20 November, after approximately 105 court days and with NAK's first witness still in the stand, PWC delivered an application for security for costs. The application was opposed, but on 5 December 2006, Botha J granted an order directing NAK to provide security in an amount to be determined by the Registrar. On 31 January 2007, the learned judge granted leave to appeal to this court against his decision. In doing so, he mentioned two specific aspects of his judgment in regard to which he felt that there was a reasonable possibility that this court might come to a different conclusion, namely:

(a) the late stage in the proceedings at which the application for security was lodged by PWC; and

(b) whether the fact that PWC's own costs in the litigation were covered by insurance should be considered as a factor operating against the grant of security.

History

[2] It is necessary to set out the history of the dealings between the parties in relation to the question of security for costs. Of significance is the fact that the application lodged on 20 November 2006 was not PWC's first application for security. In 2000, before the trial had commenced, PWC lodged an application for

[1] *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA).

security based on the provisions of s 13 of the Companies Act 61 of 1973. NAK's then attorneys agreed to deliver security without conceding liability to do so. The Registrar fixed security in an amount of R80 000.

[3] Two years later, in July 2002, shortly before the trial was due to commence, PWC lodged a second application, supported by a draft bill of costs, for further security. Again NAK's then attorneys agreed to deliver security without a concession of liability to do so. The Registrar determined this further security, up to the first day of the trial, at R1.1 million and a further R22 000 per trial day thereafter. By the time the special plea had been dealt with, in August 2002, NAK had put up security in the sum of R1.4 million.

[4] The appeal against the dismissal of the special plea was disposed of in 2004 and, in September of that year, the parties agreed to set the matter down for trial in the fourth term of 2005 and the first term of 2006. On 26 October 2004, the attorney who was then representing NAK, Mr P P J Buitendag, addressed the following letter to Mr A J Chappel, PWC's attorney:

'Ons verwys na bogemelde aangeleentheid, en in die besonder na die onderwerp van sekuriteit vir koste.

Die bestaande toedrag van sake is dat u kliënt op verskeie geleenthede die stel van sekuriteit deur ons kliënt vereis het, en as 'n resultaat daarvan bestaan daar tans waarborge ten bedrae van R1,5 miljoen ten gunste van u kliënt as sekuriteit vir die kostes van u kliënt. Die gronde waarop u kliënt se versoeke gebaseer is, is ook gedokumenteer en blyk, onder andere, volledig uit die aansoek om sekerheidstelling.

Soos u bewus is, is hierdie saak weer vir verhoor geplaas gedurende die laaste termyn van 2005. Ons het opdrag om u reeds op hierdie vroeë tydstip te nader omtrent die kwessie van sekuriteit vir koste in 'n poging om so spoedig moontlik uitsluitsel daaromtrent te verkry, indien moontlik.

Sedert u vorige versoeke om sekuriteit het ons kliënt se finansiële posisie 'n dramatiese omwenteling ondergaan. Ons heg hierby aan, 'n afskrif van die NAK se geouditeerde state vir die finansiële jaar wat op 28 Februarie 2003 geëindig het. Etlike wesentlike veranderde omstandighede, vergeleke met die feite wat bestaan het toe sekuriteit op vorige geleenthede gestel is, kom onmiddelik na vore. In hierdie opsig verwys ons na die volgende:

1. Op 28 Februarie 2003 het die aandeelhouersbelang (kapitaal en reserwe) R37 441 000,00 beloop in vergelyking met 'n negatiewe waarde van R29 983 966,00 soos op Februarie 1999;

2. Blykens paragraaf 6 van die direkteursverslag is die NAK se finansiële jaarstate opgestel op die lopende saakbegrip. Dit blyk duidelik uit gemelde verslag dat die NAK nie net solvent en 'n lopende saak is nie, maar ook uitstekende likiditeit aantoon, wat duidelik gereflekteer word in die bedryfsbates tot bedryfslaste verhoudings (bedryfsbates R13 165 000,00 en bedryfslaste R424 000,00). Die totale bates beloop R37 865 000,00 en totale laste beloop R424 000,00.

Die ouditmening van KPMG met betrekking tot die voormelde finansiële state is ongekwalifiseerd en gevolglik bestaan daar geen rede om nie te aanvaar dat die finansiële state 'n redelike weergawe van die finansiële stand van ons kliënt, soos op 28 Februarie 2003, verteenwoordig nie.

Uit die aangehegte state is dit ook duidelik dat die NAK geen aanspreeklikheid teenoor die Landbank van Suid Afrika gehad het soos op 28 Februarie 2003 nie. Daar bestaan gevolglik geen risiko van die likwidasie van ons kliënt deur die Landbank nie.

Die vorige bewering dat die NAK geamalgameer het met die NTK is eenvoudig onwaar. Die korrekte posisie met betrekking tot die beheer en bestuur van die NAK word trouens uiteengesit in die derde paragraaf van die direkteursverslag wat in bogemelde finansiële state verskyn.

Dit blyk ook uit paragrawe 1 tot 4 van die direkteursverslag dat die NAK voortgaan met sy besigheidsaktiwiteite en dat 'n wins vir die tersaaklike finansiële jaar van R9,3 miljoen behaal is. Die vorige spekulatiewe bewering dat die NAK nie met sy besigheidsaktiwiteite wil voortgaan nie, is gevolglik sonder enige meriete hoegenaamd.

Daarbenewens is dit ook van besondere belang om daarop ag te slaan dat die Noord-Transvaalse Koöperasie ("NTK") steeds 'n lopende saak is en dat, soos u terdeë bewus is, die voorlopige likwidasie bevel teen die NTK gedurende Oktober 2002 opgehef is. Die aandeelhouersbelang in die NTK het teen einde Februarie 2003 'n bedrag van R289 000 000,00 beloop. Die applikant in die likwidasie-aansoek, synde die Landbank se eise teen die NTK is in die geheel deur die NTK afgelos.

Dit is ons kliënt se beskeie mening dat hy (NAK) 'n gesonde besigheidsentiteit is met meer as voldoende finansiële vermoë om enige ongunstige kostebevel wat in hierdie saak teen hom gegee mag word, te ontmoet.

Beoordeel op die voormelde feite is dit met eerbied duidelik dat daar geen gronde bestaan vir die verskaffing van enige verdere sekuriteit vir koste nie. Trouens, blyk die bestaande sekuriteit ook onnodig te wees.

Dit blyk dat ons kliënt in die verlede kort voor die laaste verhoor gekonfronteer is met 'n aandrang op verhoogde sekuriteit ingevolge die bepalings van hofreël 47(6), klaarblyklik op sterkte van die feit dat sekuriteit reeds voorheen (nadat u gedurende Junie 2000 'n aansoek gebring het) gestel is. Na die beste van ons wete het ons kliënt op daardie tydstip toegestem om sekuriteit te verskaf en was dit

blykbaar nie nodig vir die hof om so 'n bevel te maak nie, en is dit ook nie gedoen nie. Indien ons enigsins fouteer in ons siening hieromtrent, word u uitgenooi om ons te korrigeer.

Indien u kliënt van voorneme is om desondanks die veranderde finansiële posisie van ons kliënt weereens aan te dring op adisionele sekuriteit, dan word u versoek om dit vroegtydig met ons op te neem – sê teen nie later as Februarie volgende jaar – sodat hierdie kwessie uitgepluis kan word sonder dat dit op die beskikbare tyd vir verhoorvoorbereiding inbreuk maak.

Na ons mening sal dit in die omstandighede vir u kliënt nodig wees om weereens die hof by wyse van aansoek te nader indien verdere sekuriteit vereis word. Uiteraard sal so 'n aansoek teengestaan word.'

[5] Chappel responded to this letter in a letter dated 9 November 2004, the relevant portion of which read:

'We agree to your request and undertake to give you adequate notice should client decide to bring an application for increased security.

Concerning the query raised in the third paragraph on page 3 of your letter, it is also the writer's recollection that your client agreed to provide increased security at that time and that it was not necessary to argue the matter and obtain a court order.

We look forward to receiving a copy of your client's financial statements for the period ended 29 February 2004, when they are available.'

[6] NAK's financial statements for the year ending February 2004 were furnished to PWC on 5 August 2005. On 30 September 2005, on the eve of the commencement of the trial, Chappel wrote to Buitendag in the following terms:

'We address the issue of security for costs in this communication.

You wrote to us in late October 2004 advising us that, as your client's financial circumstances have improved, you will resist any application by our client to increase the security for costs presently held by our client. We advised you in our response of 9 November 2004 that we will give you adequate notice should our client require further security for costs. We repeat this undertaking.

We record that, at the time of the July/August 2002 trial, our agreement with MacRoberts was that your client would provide security for costs of R22,000 per day for each day that the trial continued. Obviously, if our client is to insist that further security be provided, the daily amount of security provided will need to be increased -- we say drastically.

It goes without saying that your client's annual financial statements are relevant to a consideration of whether your client is obliged to provide security for costs to our client. In this regard, your client's 2004 financial statements were provided to us on 5 August this year. We write to enquire whether your client's 2005 financial statements are now finalised, as they will provide the most up-to-date information concerning your client's financial circumstances. In the event that they are not, please advise when your client expects them to be finalised.

We look forward to hearing from you as soon as possible in regard to the aforegoing. In the meantime, all our clients' rights in regard to the issue of security for costs are reserved.'

[7] Buitendag's response, dated 3 October 2005, was:

'Dankie vir die herhaling van u onderneming om ons vroegtydig kennis te gee ingeval u kliënt van voorneme is om weer aansoek te doen vir verdere sekuriteit,

Ons let op die inhoud van paragraaf 2 van u skrywe en is nou nie van voorneme om daarop kommentaar te lewer nie, behalwe om te herhaal dat ons van mening is dat daar huidiglik geen regverdiging of gronde bestaan vir enige verdere sekerheidstelling nie. Dit dien vermeld te word dat die sekerheid wat reeds gestel is vir alle praktiese doeleindes nog steeds ongeskonde is en 'n aansienlike bedrag verteenwoordig.

Wat ons kliënt se 2005 finansiële state aanbetref moet ons meld dat hierdie state nog nie voorberei is nie. In hierdie opsig moet ons meld dat ons kliënt se finansiële jaareinde verander het na 31 Augustus 2005. Ons kliënt het ook van ouditeure verander en gevolglik sal die "nuwe" ouditeur verantwoordelik wees vir die oudit ten aansien van die 2005 state. Ons verstaan dat die blote verandering van ouditeure, om verstaanbare redes, op sigself 'n mate van vertraging met betrekking tot die oudit en finalisering van hierdie jaarstate meebring.

Na verwagting sal die 2005 jaarstate in alle waarskynlikheid nie voor die einde van Februarie 2006 gefinaliseer word nie.'

[8] The trial ran from mid-October 2005 to mid-March 2006, when it was adjourned to 1 August 2006. After it had recommenced, Chappel addressed a further request, dated 24 August, to Buitendag pointing out that the last financial statements which had been received were those for the year ending 29 February 2004 and asking for a copy of those for the year ending February 2006. It is common cause that, in referring to this date, Chappel was in error and had meant to refer to the statements for the altered year-end of August 2005. He was informed, in

a reply dated 15 September 2006, that because of the changes to NAK's financial year and the change of auditors, the August 2005 statements had not yet been prepared. On 26 October 2006 Chappel wrote the following letter to Buitendag:

'Despite repeated demand, you have failed to provide us with your client's audited financial statements after 2004.

In the circumstances, we are instructed to advise you that our clients require your client to furnish further security for our clients' costs of this action.

The amount of the security required by our client will be provided to you in due course. The purpose of this notification is to place your client on notice you will recall that we undertook to provide your client with adequate notice.'

[9] Buitendag's response, dated 3 November, read:

'Ons verwys na u skrywe gedateer 26 Oktober 2006 met betrekking tot u kliënt se aandrang op verdere sekuriteit vir koste.

. . .

Hierdie aangeleentheid het weer in Oktober 2004 ter sprake gekom toe ons u daarop gewys het dat daar na ons mening geen gronde vir die verskaffing van verdere sekuriteit bestaan het nie. Daar is breedvoerig gehandel met die hele basis waarop die bestaande sekuriteit, wat destyds gestel is soos voormeld, berus en hoe dit intussen alles verander het. Ons kliënt se mening daaromtrent bly tot vandag onveranderd.

Dit blyk dat die enigste grond waarop u kliënt se huidige aandrang gegrond is, die feit is dat u tot op hede nog nie voorsien is van die NAK se geouditeerde state vir die finansiële jaar wat in 2005 verstryk het nie. Ons kliënt is van mening dat dit op sigself nie 'n grondige rede vir die aandrang daarstel nie. Die rede vir die "versuim" om u van die 2005 state te voorsien is reeds voorheen gedokumenteer, onlangs herhaal, en verg nie verdere vermelding hierin nie.

Die inhoud en trant van u skrywe onder beantwoording bring nou onvermydelik die gedagte by ons tuis dat u kliënt moontlik van voorneme is om weldra sy aandrang te prober afdwing deur die prosedure wat deur hofreël 47(6) bepaal word in te span.

Soos u terdeë bewus is, is u kliënt se reg op sekuriteit, en, omgekeerd, ons kliënt se aanspreeklikheid om dit te verskaf, reeds nou etlike jare op welbekende gronde in geskil. In die omstandighede is ons van mening dat u kliënt nie geregtig is om bloot die griffier vir 'n verhoging te nader nie, maar 'n aansoek soos bedoel in hofreël 47(3) sal moet bring.

Tot aanvangs van u skrywe onder beantwoording het ons op sterkte van die inhoud van vorige korrespondensie onder die indruk verkeer dat u onderneming om ons vroegtydige kennis van 'n aansoek om verhoogde sekuriteit te gee sal behels dat u dan die hof, in teenstelling met die griffier, sou nader. Ons sal dit gevolglik waardeer indien u so spoedig doenlik sal laat weet presies welke prosedure u kliënt van voornemens is om te volg.

Ten slotte mag ons tog meld dat ons kliënt aangedui het dat die tersaaklike finansiële state (2005) na alle verwagting teen die einde van die huidige maand gefinaliseer behoort te wees. Sodra die state beskikbaar is sal u van 'n afskrif daarvan voorsien word.'

[10] Chappel responded on 7 November, the relevant portions of his letter being as follows:

' You are correct that the primary reason for our client's decision to insist on further security is that your client has failed to make available its 2005 (and latterly its 2006) annual financial statements, despite your client's undertaking to do so, and the passage of more than 20 months since the 2005 year-end. We would have thought that it is self evident that our clients cannot test your assertions, regarding your client's financial health, without access to not only the 2005, but also now the 2006 annual financial statements.

. . . .

Our client's agreement not to insist on further security was conditional upon your client providing us, on an ongoing basis, with current information concerning its financial circumstances. This is of particular relevance in the present circumstances in which your client is conducting only very limited business, other than the prosecution of this litigation. We consider that the stance adopted by our clients was sensible and business-like in the circumstances. Your client's failure to provide us with the further information described leaves our clients no choice but to require further security for costs. For you to criticize us, in circumstances when your client is in default of its obligations in terms of the aforesaid agreement, is baseless.

Your client's 2005 financial statements are now out of date. We require sight of your client's 2006 financial statements too, whether audited or unaudited as a matter of urgency. Clients consider it necessary and opportune to deal with the matter before the end of this term. Should an application to court be necessary, we intend moving it during the last week of this term.

We record that, in 2000 and 2002, your client conceded its obligation to provide security for our client's costs. In these circumstances and notwithstanding your assertions to the contrary, we consider that we are entitled to approach the Registrar to increase the amount of security in terms of Rule 47(6). However, in view of the stance your client has adopted (and as your client will clearly refuse to provide any further security ordered by the Registrar in terms of Rule 47(6)), our instructions

are to launch a formal application in terms of Rule 47(3). Our clients will do so, however, subject to a full reservation of their rights concerning the necessity for doing so and the resultant costs which will inevitably be incurred.'

[11] Buitendag's response was that it was physically impossible for meaningful statements to be prepared as a matter of urgency. The result was that the application which has led to this appeal was launched on 20 November 2006. It was opposed on grounds to which I shall refer shortly, and the trial was adjourned pending the determination of the security issue.

[12] Broadly speaking, the grounds upon which PWC applied for security were that it was to be inferred from an analysis of such information as NAK had provided and from NAK's failure to furnish up-to-date financial statements or data, that NAK was not in a position to satisfy an adverse costs order in the event of its claim being unsuccessful.

[13] In its opposition, NAK (in an answering affidavit deposed to by Buitendag) did not challenge PWC's inference as to NAK's inability to meet an adverse costs order. On the contrary, Buitendag acknowledged that NAK was in a parlous financial situation due to various adverse occurrences during 2005 and 2006. It is not necessary to detail all of these here. It will suffice to say that the company, Noord-Transvaalse Koöperasie Beperk ('NTK'), which had undertaken to provide financial assistance for the litigation and which was a 49 percent shareholder in NAK, suffered an unexpected loss of R30 million in the early part of 2005, which had all but drained its cash reserves. This had left NAK with no choice but to dispose of assets to fund the litigation. There is no explanation in the answering affidavit as to how NAK dealt with the cost of the trial from October 2005 to mid-March 2006, but, during that month, NAK sold its shareholding in NTK's affiliate, NTK Limpopo Agric Ltd[2] and its loan account with an entity called the Limpopo Agricultural Trust[3] to NTK for a total price of R8 million. It is not stated how NTK funded this purchase. Part of the

[2] Reflected in the February 2004 financial statements as having a value of approximately R18 million.
[3] Valued at R4 million in the 2004 statements.

property on which NAK's offices were situated, which had been valued at R4,5 million in 1996, was also disposed of at a price of R1 million. It is not stated to whom this property was sold. These 'forced sales', according to Buitendag, had the effect of substantially reducing NAK's nett asset value during 2006. Attempts to collect the book debt of NAK, which had been reflected as standing at R12,6 million in 2004, had yielded only R4,9 million at a cost of R2,8 million, resulting in a cash inflow of only R2,1 million. NAK had made an unsuccessful call on its shareholders to pay the balance due on their shares, on pain of being excluded from any share in 'future profits', by which was plainly meant the proceeds of the pending litigation against PWC. In these circumstances, according to Buitendag, NAK would hardly be able to bear its own costs of the litigation after 2006, let alone satisfy an adverse costs order if PWC's defence were to succeed. However, all of this does not explain how a dormant company with nett assets of more than R37 million in 2003 has found itself in this parlous state. Significantly, no financial statements bearing this out have been provided.

[14] Despite the circumstances referred to in paragraph 9, NAK nevertheless opposed the grant of an order for security without stating how it intends to finance its own costs of the litigation. The grounds of opposition can broadly be summarized as follows:

(a) PWC's delay in bringing the application for security was unreasonable and oppressive. PWC was in possession of sufficient information to enable it to make an application on or before 1 August 2006, but it had delayed for nearly 4 months with the result that enormous costs had been incurred by NAK while the trial ran on between 1 August and 20 November 2006;

(b) The parlous financial state in which NAK found itself in 2005 and 2006 was directly attributable to the culpable conduct of PWC during the years in which PWC was responsible for the auditing of NAK's finances;

(c) Given NAK's financial plight, the grant of an order for security would (obviously assuming that the order was coupled with the stay of proceedings

pending the delivery of the security) effectively close the doors of the court to NAK and stifle its claim;

(d) An order for security would be inequitable, given that PWC's costs of litigation were being funded by an insurance company up to an amount of US$ 45 million;

(e) PWC was unnecessarily dragging out the trial proceedings by failing to co-operate insofar as narrowing of issues was concerned and by unduly prolonging cross-examination of NAK's witnesses.

[15] It will be convenient, before considering the manner in which Botha J dealt with the issues before him, to deal briefly with the legal requirements for the proper exercise of the discretion required of a judge in applications of this sort. As is indicated in the correspondence, both parties appear to have been *ad idem* that PWC should proceed by way of an application to court, rather than an approach to the Registrar in terms of Rule 47(6) for an increase in the existing security.[4] The application was therefore one in terms of s 13 of the Companies Act.[5] There has, during the past ten years, been a modification and clarification of the law in this regard. The concept that it was necessary for the respondent company in such an application to show 'special circumstances' excusing it from the obligation to secure its opponent in respect of a costs order which might be granted if the defence was successful, has been jettisoned. Instead, the court approaches the application without a predisposition to grant or to refuse it. The applicant must establish that there is reason to believe that the respondent will not be able to satisfy an adverse costs order, but once that is done

'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

[4] It should be noted that, as is to be inferred from the correspondence, PWC did not insist on the delivery of security at the rate of R22 000 per day when the trial before Botha J commenced in October 2005.

[5] The section 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 until the security is given.'

defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in the defence of the claim.'[6]

In performing this exercise and coming to its conclusion, the court exercises what has become known as a discretion 'in the strict sense',[7] ie a discretion which is exercised on a judicial evaluation of the facts and circumstances before the court and which will not be interfered with by another court in the absence of any misdirection as to the facts or the law. It would be an idle exercise to try to compile a list of the considerations relevant to the decision of an application in terms of s 13. To specify requirements in that way would, of necessity, limit the court's discretion. But there is one particular consideration which, since the enactment of the Bill of Rights in the Constitution, must have more weight attached to it than was the situation in pre-Constitution days. It is the entrenchment of the right of access to the court under s 34. An order for delivery of security in terms of s 13, coupled with the stay of proceedings until the security is furnished, may effectively close the doors of the court to an indigent plaintiff company. This aspect was fully dealt with in *Giddey*. The constitutional court rejected a contention that an order which had the effect of closing the court doors to the plaintiff could not be made because it would be unconstitutional. It held that, in performing the 'balancing exercise', the possibility that a right of access to court might be limited by an order for security had to be weighed in the hypothetical scale.[8] The likelihood of the order having this effect must be judged on the basis of all the evidence before the court.[9]

[16] Botha J summarised the evidence before him in considerable detail. Since he had been steeped in the atmosphere of the trial for 105 court days, he was able to make reference to certain events which had occurred in the course of the trial, such as the conduct of the parties and the problems encountered in attempts to restrict the ambit of the issues. He made specific reference, in considering the various

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[6] Per Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction and Another* [1995] 3 All ER 534 at p 540*a – b*, cited with approval and adopted in *Shepstone and Wylie and Others v Geyser NO* 1998 (3) SA 1036 at p 1046. Hefer JA mentioned, *loc. cit.,* that these considerations are probably the 'considerations of equity and fairness' referred to in *Magida v Minister of Police* 1987 (1) SA 1 (A) at p14D-F.

[7] *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council & Another* 1999 (4) SA 799 (W) at p 804; *Giddey NO v J C Barnard and Partners* 2007 (2) BCLR 125 (CC).

[8] *Giddey* para 30.

[9] *Giddey* paras 31 and 32

factors in this case, to the legal principles set out in *Shepstone and Wylie*, *Keary* and *Giddey.*

[17] In regard to the question of delay in bringing the application for security, he concluded that, in the light of the correspondence, Chappel, and thus PWC, could not be blamed for delaying the decision to bring the application.

[18] He took the view that the contention that NAK's financial predicament was attributable to the culpable conduct of PWC was not clearly established on the evidence before him. He mentioned Buitendag's evidence to the effect that NAK had been financially healthy in 2003. In any event, he pointed out, there was no suggestion that PWC had acted fraudulently. Such a circumstance would, on the authority of *Giddey*,[10] have weighed heavily against PWC. On the contrary, he said, part of the claim against PWC was based on a contention that it had culpably failed to detect, and expose, the negligence of, and mismanagement of NAK's affairs by, NAK's own directors.

[19] As to whether the grant of security would infringe upon NAK's right of access to the court, he referred to the finding in *Giddey*[11] to the effect that, in appropriate circumstances, this right must yield to the right of the defendant to recover the costs of unsuccessful proceedings against it. This, he said, was particularly so in a situation such as the present, where the plaintiff was being assisted by shareholders, affiliates or third parties, in the funding of the litigation.

[20] In regard to the suggestion that the application should be refused because, in fact, PWC was not bearing the costs of its defence being funded to the tune of US$45 million by its insurer Botha J expressed the view that this could not be a relevant consideration. He pointed out that PWC had procured insurance 'at a price'.

[10] Para 33.
[11] Paras 28 to 30.

By the principle of subrogation, the insurer would stand in the shoes of PWC to recover what it could from the litigation. He considered that it would be inimical to the concept of insurance if a third party, such as NAK, could benefit from a prudent decision by PWC to insure itself against this type of risk.

[21] Finally, as to the contention that the costs of the trial had been unnecessarily increased by the conduct of PWC, Botha J pointed out that actions involving claims for professional negligence are invariably complicated. The claims covered a period of 14 years from about 1984 to 1998. Even though the trial had already run for a period of more than 100 court days, it was not possible for him to express a view on whether PWC should have been more co-operative in the conduct of its defence. On the matter as it stood before him, he said, he felt that PWC could not be blamed for declining to assist NAK, eg by agreeing to the latter's proposals as to how the evidence should be presented.

[22] Having thus formed a view as to the weight, or validity, of the specific grounds of opposition dealt with in paragraphs 13 to 17, above, Botha J stated that one of the considerations that weighed most heavily in favour of the grant of security was the circumstance that NTK (and possibly a few speculative shareholders in NAK) had in fact furnished NAK with financial support and might well be in a position to continue to do so. He emphasised the circumstance that, apart from some general and unsubstantiated comments to the effect that NTK had sustained crippling losses, there was no evidence whatsoever as to the current financial position of NTK. This, he said, was crucial, having regard to the question whether it was within NAK's power to furnish security if ordered to do so. He emphasised the fact that Buitendag had stated, in the letter of 26 October 2004, that NTK's shareholders' interest had amounted, at the end of February 2003, to R289 million. In the absence of any satisfactory evidence that this net asset value had been wiped out, it could be inferred that if the delivery of security became necessary, it would be obtained from a realisation of some of NTK's assets. In this regard he pointed to a material omission in the evidence.

'Dit help nie om te sê dat NAK sou nie probeer het om help by ander oorde te soek as hy dit nie by die NTK kan kry nie. Die feit is dat die NTK nooit gekonfronteer was met die opsie om in sy kapitaal reserwes te delf ten einde hierdie saak te finansier nie. Daardie tyd het nou aangebreek. Na my mening is dit niks minder as reg dat iemand wat wil deel in die wins van 'n belegging ook die kapitaal moet uitlê wat nodig is om dit te verwesenlik.'

This comment is, in my view, all the more apposite if one bears in mind the fact that NTK acquired its shareholding in NAK on the basis of a contractual obligation to assist NAK with the financing of the litigation.

[23] In the result, the learned judge a quo took the view that the balance of equity and justice favoured the grant of security. The appellant has challenged that finding on the basis, particularly, that the learned judge's conclusions in relation to the question of delay and of NTK's role, or potential role, in the financing of the litigation, were based on wrong findings of fact. It is also suggested that the learned judge erred in taking the view that the circumstance that PWC's costs were being borne by an insurer was not a relevant consideration in deciding whether security should be granted. The submission in this regard was that this constituted a material misdirection both of fact and of law.

[24] The approach of the court to an appeal of this nature was carefully considered in *Bookworks*[12] and the decision in that case was approved and adopted by the Constitutional Court in *Giddey.*[13] Both of those cases involved applications in terms of s 13. Given that the court of first instance exercises a 'discretion in the strict sense', to succeed on appeal an appellant must satisfy the court that the discretion was not judicially exercised or was based upon a wrong principle of law or wrong facts.

[25] Accepting that this was the correct approach, counsel for NAK submitted, in the first place, that Botha J had reached his conclusion as to the weight to be

[12] pp 804 to 808
[13] Para 21, referring also to *S v Basson* 2005 (12) BCLR 1192, paras 112 to 114.

attributed to PWCs delay in bringing the application, on a wrong factual finding. In doing this, so the submission ran, Botha J had overlooked the palpable prejudice suffered by NAK in the form of expenses incurred in running the trial for the period between 1 August and 20 November 2006. NAK contended that Botha J had erred in finding that Chappel had been misled by Buitendag's correspondence concerning the question of security. He submitted that there was no evidence to support such a finding and that Chappel himself had not stated anywhere that he had been misled. That might be true in regard to the founding affidavits, but at that stage the complaint of undue delay had not been mentioned nor were the facts relevant to NAK's actual financial situation known to him. When the answering affidavit was delivered, Chappel's response was that it presented a picture so drastically different from that painted in the correspondence that there must be serious doubt about NAK's (and Buitendag's) veracity. Chappel opted for the contention that the picture painted in the correspondence was probably closer to the truth than that in the affidavits. It is plain that counsel's submission that Botha J had found, as a fact, that Chappel had been misled, is not accurate. In fact, what Botha J said was that Chappel could not be blamed for only taking the decision to move the application in November. He *did* find that some of the letters written by Buitendag had been misleading. That this was so is perfectly clear from a comparison of the content of the letters, especially those of 26 October 2004 and 3 November 2006, with the evidence in Buitendag's affidavit. In the result, the contention that there was a material factual error in the findings by the learned judge is stillborn.

[26] Nor am I able to understand the complaint that the delay in bringing the application for security resulted in substantial prejudice to NAK. In the first place, there was no evidence in the affidavits to the effect that such prejudice had been suffered – the contention found its origin in counsel's heads of argument. If the application had been brought on 1 August 2006, NAK may have been put to a decision whether to deliver security or end the litigation there and then. But there was also no evidence as to what its decision would have been at that stage. What is clear is that, until that date, Buitendag had been maintaining, in terms bordering on the strident, that security was no longer necessary and that any application for it would be opposed. Prejudice in this context must relate to the future conduct of the

case. In other words, did the late application impact on the future conduct of the case? On counsel's argument an earlier application would have brought the proceedings to a halt at an earlier stage. But that does not amount to the kind of prejudice referred to. According to counsel for NAK, if Chappel had been diligent, he would have come to the conclusion, by 1 August 2006 at the latest, that there was no substance in Buitendag's posturing and would have moved the application. On this basis, counsel endeavoured to suggest that Chappel had consciously deferred the lodging of the application so as to use it as a weapon of oppression at a convenient stage. Such a contention is not borne out by a consideration of the evidence and, more particularly, the correspondence. As was found by Botha J, Chappel was kept in the dark about the actual situation with regard to NAK's and NTK's finances and, on the assumption that the excuses and explanations given to him from time to time by Buitendag were given in good faith, there was no reason for Chappel to become suspicious. Indeed, the appellant's argument in this regard amounts to a contention that Chappell should have disbelieved the appellant's attorney and saved the appellant from itself by bringing the application for security on 1 August 2006, which is absurd.

[27] Concerning the contention that Botha J misdirected himself by finding that NTK (which is contractually bound to finance the litigation and is the main beneficiary of it) was probably still in a position to assist in funding the litigation, little need be said. As Botha J pointed out, there was no evidence concerning NTK's current financial status. He referred to *Giddey,* paras 31 and 32, where O'Regan J had endorsed the following statements by Joffe J in the court a quo:

'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 authorized 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.'

The similar approach by Botha J cannot be faulted on any basis. His conclusion was plainly justified on the facts, and also having regard to the absence of evidence before him. Furthermore, unless NAK obtains outside finance it cannot pursue this

litigation to its ultimate conclusion. Unless NTK provides the finance, NAK will only litigate until its funds have been exhausted which, on Buitendag's evidence will be in the near future. Also on Buitendag's evidence it is clear that there is no real prospect of NAK obtaining funding from any outside source.[14]

[28] That leaves the challenge to the learned judge's finding on the irrelevance of PWCs insurance. As he stated, counsel was not able to refer him to any authority for the proposition that a matter which is *res inter alios acta*, such as insurance, can be weighed in the balance in deciding whether security for costs should be ordered. Indeed, I would be surprised if there was any such authority. The learned judge's reasoning in coming to his conclusion is persuasive. In this case, as submitted by counsel for PWC, the scale on which the trial was being run and the amount of costs which would ultimately hang in the balance were cogent considerations in deciding that PWC, as well as its insurer, should be given the protection of security for costs. There may well be situations in which the fact that a defendant is covered against the costs of the litigation by a contract of insurance may be weighed in the balance in this type of application. On that, I do not think it would be appropriate to express a view. But I consider that there is no valid basis for this court to hold that the reasoning of Botha J in this particular instance constitutes any form of 'reviewable misdirection'. The appellant's contention in this regard must also be rejected.

[29] To sum up: so far from having misdirected himself in any respect in coming to his conclusion, I consider the Botha J properly considered all of the material facts and circumstances before him and came to a justifiable conclusion. If there *was* any misdirection on his part, it was in the suggestion, in his judgment on leave to appeal, that this court might take a different view on the two issues of which he made specific mention. What he should have done was to adopt a different approach to the application for leave to appeal. That application comprised a series of contentions that Botha J had erred in each of the conclusions he had drawn on the basis of the evidence before him. He should, in my view, only have granted leave if

[14] Cf. *MTN Service Provider v Afro Call* [2007] SCA 97 (RSA)

he considered that there was a prospect that this court could find that he did not exercise a judicial discretion, or of some other misdirection which had the effect of vitiating his decision. If he had approached the application for leave to appeal on that basis, he must surely have refused it.

[30] The appeal is dismissed with costs, such costs to include those occasioned by the employment by the respondents of two counsel.

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N V HURT AJA

CONCUR:

HARMS ADP

LEWIS JA