THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1371/2018

In the matter between:

SYSTEMS APPLICATIONS CONSULTANTS (PTY) LTD

t/a SECURINFO **APPELLANT**

and

SYSTEMS APPLICATIONS PRODUCTS AG **FIRST RESPONDENT**

UNGANI INVESTMENTS (PTY) LTD **SECOND RESPONDENT**

VHONANI MUFAMADI **THIRD RESPONDENT**

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

Coram: WALLIS, MOLEMELA and MOKGOHLOA JJA and KOEN and MABINDLA-BOQWANA AJJA

Heard: 14 MAY 2020

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Summary: Security for costs – s 13 of the Companies Act 61 of 1973 - whether amount of security for costs ordered by court can subsequently be released on account of material change in legal position and factual circumstances.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Weiner J, sitting as court of first instance):

1. The respondent's application for the admission of new evidence on appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.
2. The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

JUDGMENT

Molemela JA (Wallis and Mokgohloa JJA and Koen and Mabindla-Boqwana AJJA concurring)

Introduction

[1] This appeal concerns an interlocutory order for security for costs in relation to an action instituted 12 years ago, presently enrolled to be heard from October to November 2020.

Background facts

[2] The appellant, Systems Applications Consultants (Pty) Limited trading as Securinfo, is a local software development company. The first respondent, Systems Applications Products AG, now renamed SAP SE, is a German global software company involved in the development and sale of software systems application products (SAP). Since this appeal relates only to the first respondent, it will, for the sake of convenience be referred to as 'the respondent'.

[3] Between 1997 and 2001, the appellant developed a software security product designed specifically to secure and manage the authorisation risks of users of SAP enterprise software (Securinfo for SAP). The appellant had marketed and sold the product in South Africa and internationally. The appellant's assertion, denied in general terms by the respondent, is that it concluded an exclusive distribution

agreement with a German IT Consulting company named SAP Systems Integration (SAPSI) in 2004. Subsequent thereto, the respondent acquired a controlling share in SAPSI and an interest in a competing security product known as VIRSA.

[4] In 2008, the appellant, as plaintiff, instituted action proceedings (the main action) against the respondent, as a second defendant, for damages in the amount of €609 803 145. The appellant averred that it had suffered damages as a result of the respondent's unlawful interference with the software distribution agreement it (the appellant) had concluded with SAPSI. The respondent filed several special pleas and a plea denying the alleged conclusion of the software distribution agreement between the appellant and SAPSI. It also denied having interfered with any software distribution agreement and disputed liability for the damages claimed.

[5] On 7 May 2010, the respondent launched an application (the 2010 application) to the Gauteng Division of the High Court, Johannesburg, on the strength of s 13 of the Companies Act 61 of 1973 (the 1973 Companies Act),[1] for an order compelling the appellant to furnish security for the respondent's costs in the main action. The application came before Satchwell J in February 2011. In the intervening period following the launch of the application, the 1973 Companies Act was repealed and replaced by the Companies Act 71 of 2008 (the 2008 Companies Act), which came into operation on 1 May 2011.[2] The application, however, fell to be determined in terms of the provisions of the 1973 Companies Act because of the transitional provisions contained in the 2008 Companies Act.[3] On 27 May 2011, Satchwell J dismissed the application for security for costs.

[6] 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

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[1] Section 13 (Security for costs in legal proceedings by companies and bodies corporate) of the 1973 Companies Act (now repealed) provided 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.'

[2] Notably, the 2008 Companies Act has no provision analogous to s 13 of the 1973 Companies Act.

[3] See paragraph 10 below.

respondent (the 2012 Order). The Full Court substituted the following order for that previously granted by Satchwell J:

'(1) The plaintiff … is ordered to provide security for the defendant's … costs of the action in the amount of R4 million within one month after the handing down of this judgment and/or such further amount or amounts as the registrar may direct;

(2) The plaintiff … is precluded from continuing with the action prior to the furnishing of the aforesaid security in a form to the satisfaction of the Registrar.'

[7] The appellant's application for leave to appeal against the 2012 Order was unsuccessful in both this Court and the Constitutional Court. As a result, the appellant eventually furnished security in the specified amount of R4 million as per the 2012 Order.

[8] On 17 April 2018, the appellant applied to the Gauteng Division of the High Court for an order that the amount of R4 million held as security for the respondent's costs in the action be released. As an alternative prayer, the appellant sought an order declaring that the respondent is not entitled to any security in addition to the amount of R4 million. The appellant alleged that there was a material change in circumstances that had prevailed when the 2012 order was granted. It also averred that the respondent was abusing the court process with the aim of preventing the appellant from proceeding with its claim.

[9] 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 and joining a company known as Ungani[4] and its shareholder, Mr Vhonani Mufamadi[5] in his personal capacity in the main action. The appellant relied on the grounds set out above to resist the respondent's application. The two applications came before Weiner J (the court a quo) and were decided simultaneously.

[10] 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) of

[4] The second respondent in this appeal.
[5] The third respondent in this appeal.

Schedule 5 to the 2008 Companies Act[6] read with the Interpretation Act 33 of 1957 (the Interpretation Act), which the court a quo considered to be indicative of the intention of the legislature to preclude the retroactive application of the 2008 Companies Act. It found that the appellant's contention that it was in the interests of justice to discharge the 2012 Order was misplaced. As regards the assertion that the respondent was abusing the court process so as to stifle the main action, the court a quo held that the trial court would be in a better position to consider whether there was an ulterior motive underlying the manner in which the respondent had conducted the litigation. It dismissed the respondent's application to join Mr Mufamadi, as a party in the proceedings in his personal capacity. The joinder of Ungani, which was tendered, was granted by consent. The respondent's application seeking to assert the right to increase the amount of security for costs was granted.

[11] The relevant parts of the order made by the court a quo were couched as follows:

'1. . . .

2. SAC's [the appellant's] application that the amount of R 4 million lodged in terms of the 2012 order as security for SAP's [the respondent's] costs in the action be released, or alternatively, that it be declared that SAP [the respondent] is not entitled to any increase in the amount of security, is dismissed.

3. SAP's [the respondent's] application

3.1 …

3.2 for an order declaring that SAP [the appellant] is entitled to approach the registrar to increase the amount of security lodged in its favour in terms of the 2012 order is granted.

4. …'

(It is common cause that the order dismissing the relief sought in paragraph 2 of the appellant's notice motion is mirrored in paragraph 3.2 of the order granted by the court a quo.)

[12] Aggrieved by the order granted by the court a quo, the appellant unsuccessfully asked the court a quo for leave to appeal some of its orders. Its application for leave

[6] Item 10(1) reads: 'Any proceedings in any court in terms of the previous Act immediately before the effective date are continued in terms of that Act, as if it had not been repealed.'

having been dismissed by the court a quo, the appellant appeals with the leave of this Court.

Issues to be decided

[13] Despite the fact that the parties' written heads of argument evinced a dispute regarding the issues that required this Court's determination, the exchange between counsel and the bench at the commencement of the appeal hearing revealed that the parties accepted that leave to appeal was only sought and granted in relation to the order in paragraph 1 of the notice of application.[7] The upshot is that the sole issue that properly arises for determination in this appeal is 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. The consequences for the remainder of the 2012 Order of it being released do not concern us in this appeal.

[14] Three related issues that arise from the main issue are (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.

[15] It is common cause that the order granted by the court a quo is appealable. However, a substantial portion of the parties' written heads of argument was dedicated to the susceptibility of the 2012 Order, as a final order, for reconsideration by the court a quo; the nature of the discretion exercised by the court a quo in coming to its decision; and whether this Court can interfere in the exercise of the discretion of the court a quo. Oral argument before us followed the same trend.

Did the court a quo have the power to reconsider the 2012 Order on account of a change of circumstances?

[16] The parties referred us to various authorities in support of their submissions. They agreed that the issue in this appeal, namely whether the high court could vary the 2012 Order by reducing or releasing security, has not been decided by prior

[7] Paragraph 1 of the appellant's notice of application (before the court a quo) sought the following relief: '1. Ordering that the R 4 million held as security for the respondent's costs in the action ("the current amount") be released.'

authority. Relying on the following dictum of this Court in *Shepstone and Wylie and Others v Geyser NO*[8] (*Shepstone and Wylie*), the appellant submitted that a change in circumstances may entitle a court to reconsider an earlier order despite its finality:

'It may be that the court, having once refused an application, retains the power to entertain a subsequent one. But any subsequent application will obviously require new evidence. Even if such a power does exist, it does not affect the finality of the order in the first application.'

[17] *Shepstone and Wylie* and all the other cases to which we were referred in the heads of argument did not deal with the question that is central to the present appeal, namely whether a court can reconsider an earlier order and reduce or release the security previously ordered where there has been a material change in circumstances. Since those cases are distinguishable and not dispositive of the issue raised in this appeal, a discussion thereof has been omitted so as to avoid unnecessarily burdening this judgment.

[18] 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. It was held in *Swadif (Pty) Ltd v Dyke NO*[9] 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.' No ground sought to be advanced by the appellant as justifying the setting aside of the 2012 order existed at the time that order was issued. That left only section 173 of the Constitution to consider. It provides:

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[19] The appellant asserted that Rule 47[10] of the Uniform Rules of Court does not make express provision for the reconsideration by the court of an earlier order on costs

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[8] *Shepstone and Wylie and Others v Geyser NO* [1998] ZASCA 48; 1998 (3) SA 1036 (SCA).
[9] 1978 (1) SA 928 (A) at 939E.
[10] 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

in materially changed circumstances, nor does it empower the court or the registrar to decrease the amount of security.[11] The appellant argued that where there is a lacuna in the Rules of Court, s 173 of the Constitution should be invoked so as to ensure that proceedings are fair.

[20] The respondent, on the other hand, submitted that s 173 of the Constitution, on a proper interpretation, does not contemplate the regulation by the superior courts of their own process in a manner which undermines the finality of its final orders, beyond the recognised remedies of appeal and review. Relying on the judgment of the Constitutional Court in *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others*,[12] the respondent submitted that in terms of the common law, a judge has no authority to amend his or her own final order. It contended that allowing a generalized revisiting of final orders simply because their underlying basis has supposedly changed was not in the interests of justice.

[21] Section 173 recognises the inherent power that superior courts have to regulate their own processes. The Constitutional Court in *Molaudzi v The State*[13] stated as follows in relation to the application of s 173 of the Constitution:

'. . . This inherent power to regulate process does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties. . . .'

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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."

[11] In *Boost*, this Court confirmed, at para 15, that Rule 47 of the Uniform Rules of Court, which deals with the procedure to be followed and applies to all cases where security is sought in the high court, deals with procedure and not with substantive law.

[12] See *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* [2005] ZACC 18**;** 2006 (3) SA 1 (CC) paras 28-30.

[13] *Molaudzi v The State* [2015] ZACC 20; 2015 (2) SACR 341 (CC) para 33.

Although the foregoing dicta were expressed in a criminal law context, they are unquestionably equally apposite in the context of civil proceedings,[14] given that the Constitution, as the supreme law, applies to all areas of the law.[15]

[22] It is of significance that the Constitutional Court in *Giddey NO v JC Barnard and Partners* (*Giddey*)[16] made an illuminating observation that ordering security for costs is a procedural matter incidental to civil proceedings and that when a court makes an order for costs it exercises its power to regulate its own process.[17] In *Boost Sports Africa (Pty) Ltd v South African Breweries*[18] (*Boost*) this Court was called upon to consider, among others, whether the court below had correctly ordered *Boost* to furnish security for costs based on the court's discretion to regulate its own proceedings as envisaged in s 173 of the Constitution. Relying on *SABC Ltd v National Director of Public Prosecutions*,[19] this Court recognised that a matter pertaining to a consideration of whether or not security for costs should be granted against a vexatious litigant fell within the court's discretion to regulate their own proceedings.[20]

[23] Inasmuch as s 13 of the 1973 Companies Act granted a substantive right, this does not detract from the fact that granting an order for security for costs has been held to be a procedural matter.[21] Notably, s 13 also vested a court with a discretion to order security for costs[22] and did not, as a matter of course, entitle the plaintiff to the furnishing of security.

[24] In this matter, the appellants asserted that Rule 47 of the Uniform Rules of Court is inadequate as it does not make express provision for the reconsideration by

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[14] *Phillips and Others v National Director of Public Prosecutions* [14] [2005] ZACC 15; 2006 (1) SA 505 (CC) para 52.
[15] Compare *Firstrand Bank Ltd t/a First National Bank v Fondse and Another* [2017] ZAGPJHC 184.
[16] [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC).
[17] *Giddey* para 22. In that paragraph, the court approved the dictum in *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W), where Cloete J said: '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 … but also, where it grants such an order, whether the litigant should be allowed to proceed until such security has been provided.' (Own emphasis.)
[18] *Boost Sports Africa (Pty) Limited v South Africa Breweries (ty) Limited* [2015] ZASCA 93; 2015 (5) SA 38 (SCA); [2015] 3 All SA 255 (SCA).
[19] [2006] ZACC 15; 2007 (1) SA 523 (CC) PARA 35-36.
[20] *Boost* para 16.
[21] *Giddey* para 22.
[22] *Giddey* para 1.

the court of an earlier order on costs in materially changed circumstances, nor does it empower the court or the registrar to decrease the amount of security.[23] It is worth noting that in *Phillips and Others v National Director of Public Prosecutions*,[24] the Constitutional Court recognised the possibility that the high court could legitimately claim the inherent power of holding the scales of justice where no specific law provides for a given situation 'or where there is a need to supplement an otherwise limited statutory procedure'. In *Molaudzi*, the same court held that a court may regulate its own process when faced with inadequate procedure and rules. That court also cautioned that courts should not impose inflexible requirements for the application of s 173 of the Constitution.

[25] Given the fact that the primary purpose for the exercise of the power in s 173 is to ensure that proceedings before courts are fair,[25] I am of the view that it is conceivable that in appropriate circumstances, s 173 of the Constitution can be invoked in respect of an order relating to security for costs. What must be borne in mind is 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 only in exceptional circumstances to avoid legal uncertainty and potential chaos.[26] A fact-specific casuistic approach must therefore be adopted.

[26] Before considering the crucial question whether the appellant showed that there were material changes that warranted releasing the security that was furnished, it is necessary to deal with another submission made on behalf of the appellant. The appellant asserted in general terms and without presenting any plausible supporting facts, that it would suffer greater injustice than the respondent if the security furnished was not released. The appellant contended, somewhat obliquely, that its rights of access to the courts, entrenched in s 34 of the Constitution, would be adversely affected. Section 34 of the Constitution guarantees everyone 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.

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[23] See para 19 of this judgment.
[24] *Phillips and Others v National Director of Public Prosecutions* para 49.
[25] *SABC Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC).
[26] *Molaudzi para 34.* Compare *Phillips and Others v National Director of Public Prosecutions* para 52.

[27] In *Giddey*, the court pointed out that courts considering an application for security for costs are required 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.[27] It emphasised that courts must bear in mind the provisions of s 34 of the Constitution and weigh them in the light of other factors laid before it.[28]

[28] This Court in *Boost* confirmed the applicability of the same approach notwithstanding that the 2008 Companies Act does not have a provision which is analogous to s 13 of the 1973 Act. It considered it appropriate for a court to shield a defendant from the risk of litigation that results in it facing an irrecoverable costs order, when this was in the interests of justice.[29] Notably, in this case, the appellant averred that its funder, Ungani, has sufficient assets to satisfy an adverse costs order. Thus, on the appellant's own version, there was no impecuniosity that posed a threat to the continuation of its litigation. Therefore, its right of access to courts has accordingly not been impacted. As stated before, the crisp question is whether the appellant showed that there were material changes that warranted releasing the security that was furnished.

Material change in circumstances

[29] The appellant's case is that there has been a material change in the circumstances since the order for security for costs was granted, as a result of which there was no longer any need for the security lodged by the appellant to remain in place. It described the material changes as being of a legal and factual nature. According to the appellant, the repeal of the 1973 Companies Act and the joinder of Ungani as a party to the main action constituted a material change in the circumstances warranting the release of the money held as security. I deal with these in turn.

Change in the law

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[27] *Giddey* para 8.
[28] Ibid para 30.
[29] *Boost* para 13.

[30] Section 13 of the 1973 Companies Act empowered a Court to order a plaintiff company to lodge sufficient security for a defendant's costs where the Court was persuaded that there was reason to believe that the plaintiff company would be unable to meet an adverse costs order. The relief granted in the 2012 Order was based on that provision. The 1973 Companies Act was repealed by the 2008 Companies Act.[30] The latter has no provision analogous to s 13 of the 1973 Act. The appellant stressed that while the 2010 application constituted proceedings in terms of the 1973 Companies Act, its application before the court a quo was governed by the 2008 Companies Act.

[31] Relying on this Court's judgment in *Boost*, the appellant submitted that a basis for granting an order for security exists only if it has been shown that the proceedings instituted are vexatious or reckless, or amount to an abuse of court process.[31] It contended that this new context ought to be taken into account in applications determined after the coming into operation of the 2008 Companies Act. The appellant contended that in so far as the court a quo had found that s 13 continued to apply to the application that served before it, it erred. It pointed out that the respondent had not, in any of its papers, suggested that the claim pursued by the appellant was 'vexatious or reckless or otherwise amounts to an abuse of process'. The appellant also submitted that the artificial preservation of the 1973 Companies Act by virtue of the transitional provisions did not prevent it from invoking s 173 of the Constitution by applying to the court for a reconsideration of the 2012 Order on the basis of the material change in the law pertaining to liability for security for costs

[32] I am alive to the fact that the appellant brought its application before the court a quo in a context, post the 1973 Companies Act, in which the law only requires a plaintiff to provide security for costs where it is shown that the proceedings are vexatious or an abuse of processes. As correctly cautioned by this Court in *Boost*,

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[30] The 2008 Companies Act came into operation on 1 May 2011.

[31] This court in *Boost* stated the following at para 15: 'Absent s 13, there can no longer be any legitimate basis for differentiating between an *incola* company and an *incola* natural person. And as our superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings, it must follow that the former can at common law be compelled to furnish security for costs. Accordingly, even though there may be poor prospects of recovering costs, a court, in its discretion should only order the furnishing of security for such costs by an *incola* company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse.'

courts must be mindful of the altered position of the law and ought not, when considering issues pertaining to security for costs after the coming into operation of the 2008 Companies Act, approach the relevant enquiry as if s 13 is still part of our law.[32]

[33] However, sight must not be lost of the fact that the remarks in *Boost* were made in relation to applications considered after the coming into operation of the 2008 Companies Act. Although the 2010 application which culminated in the 2012 Order was argued prior to the coming into operation of the provisions of the 2008 Companies Act, by the time the judgment was handed down, the 2008 Companies Act had already come into operation. The question that arises is whether the coming into operation of the 2008 Companies Act had any impact on the matter. Item 10(1) of the transitional provisions embodied in Schedule 5 of the 2008 Companies Act provides unequivocally that any proceedings instituted in any court in terms of the 1973 Companies Act before the coming into operation of the 2008 Companies Act on 1 May 2011 were to continue in terms of the provisions of the 1973 Companies Act as if it had not been repealed. Inevitably, the provisions of item 10(1) of Schedule 5 to the 2008 Companies Act rendered the provisions of the 2008 Companies Act inapplicable to the 2010 application.

[34] I am not oblivious that the injunction in item 10(1) of Schedule 5 to the 2008 Companies Act has the effect that two applications for security for costs, two days apart might result in the one being adjudicated in the light of the provisions of s 13, and the other without regard to that provision. Of significance is that the constitutionality of item 10(1) was not raised as an issue before the court a quo. Accordingly, I must proceed on the acceptance that item 10(1) of Schedule 5 to the 2008 Companies Act is constitutional.[33] For that matter, the Constitutional Court dismissed the appellant's application for leave to appeal against the 2012 Order despite the change in the statutory regime.

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[32] Ibid para 15.
[33] Compare *Giddey* para 18.

[35] The provisions of s 12(2)*(e)* of the Interpretation Act, pertaining to the effect of the repeal of laws, are also self-explanatory and require no elaboration. That section provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not 'affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment . . . and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.'

[36] It is thus self-evident from the provisions of item 10(1) of Schedule 5 to the 2008 Companies Act, read with s 12(2)*(e)* of the Interpretation Act, that the 2012 Order was correctly granted on the basis of the 1973 Companies Act. Court orders, as a matter of legal policy, stand and remain valid and enforceable unless and until successfully challenged and set aside. To my mind, to hold that the 2008 Companies Act was applicable to the 2012 Order would be contrary to the rule against retrospectivity and to the transitional provisions of the 2008 Companies Act. Since the change in the statutory regime in the context which had occurred in this matter has expressly been catered for in the aforesaid statutory provisions, the coming into operation of the 2008 Companies Act cannot, in the same breath, rightly constitute a material change in circumstances. It follows that the appellant's submissions pertaining to the change in the law cannot prevail.

Change in the facts (Joinder of Ungani)

[37] The material factual change contended for by the appellant was that Ungani, had, by consent, been joined as a party in the main action and agreed to be held liable, jointly and severally with the appellant for any adverse costs order that may be made in the main action. With the advent of the joinder of Ungani, the appellant contended, the cumulative financial position of the two entities (the appellant and Ungani) was such that there were sufficient assets to cover an adverse order of costs. Thus, it was submitted, the need for the respondent's security for costs no longer existed.[34]

[34] The appellant relied on *Northbank Diamonds Ltd v FTK Holland BV* 2003 (1) SA 189 (NmS), for its proposition.

[38] In *MTN Service Provider v Afro Call (Pty) Ltd*,[35] Brand JA pointed out that one of the very mischiefs s 13 was intended to curb, was 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. Applying that dictum, this court in *Boost* held that despite the obsolescence of s 13, that mischief remains.[36] That means that the financial position of Ungani still had to be factored into the equation when deciding whether there was any justification to keep the security previously furnished, in place. Thus, the question whether the appellant had, as a matter of fact, demonstrated that Ungani's financial standing was indeed sufficiently sound, remained valid.

[39] The onus was on the appellant to establish with reference to credible evidence that its own net worth, combined with that of Ungani, would be sufficient to meet a potential adverse costs order. All that the appellant annexed to its application was an unsubstantiated letter, purporting to be from the auditors of Ungani, which set forth the latter's assets and liabilities. This was despite the fact that the respondent in its papers, had pertinently raised an issue about the fact that no independent valuation of Ungani's net worth in the form of a properly audited balance sheet had been furnished.

[40] While accepting that Ungani was a newly formed company which, at that stage, had no audited financial statements, one would have expected the appellant, in the face of the dispute around Ungani's financial standing, to procure objective proof of its net worth, or, in the absence thereof, to request its auditor to depose to a confirmatory affidavit. Despite the queries raised, no objective evidence relating to Ungani's financial status was submitted. The result was that there was no objective evidence demonstrating Ungani's alleged ability to meet an adverse costs order. Under the circumstances, I agree with the submission that in the absence of objective proof of Ungani's net worth, the contents of the unsubstantiated letter could not be given much weight. The mere existence of a funding agreement between the appellant and Ungani cannot, without more, amount to a new fact that warrants the release of the security that has already been furnished. On the papers, there was a clear dispute of fact over

[35] *MTN Service Provider v Afro Call (Pty) Ltd* [2007] ZASCA 97; [2008] 1 ALL SA 329 (SCA) para 20.
[36] *Boost* para 26.

Ungani's ability to meet any costs order and Ungani failed to produce evidence that would enable the court to determine that dispute in its favour in accordance with the *Plascon-Evans* rule.

[41] To sum up, I am of the view that the appellant has failed to show that there were any new circumstances warranting the release of the amount lodged as security. Ordinarily, this finding would be dispositive of the appeal. However, the appellant contended that even if this Court was not inclined to uphold the appeal on the basis that there is a material change in circumstances warranting the release of the security lodged, it ought to uphold the appeal because of the respondent's abuse of court processes.

Whether the respondent was abusing the court process

[42] According to the appellant, the respondent ought to be deprived of the benefit of the 2012 order because it had used that order (and all subsequent interlocutory applications), with the aim of exhausting the appellant financially so as to stifle the finalisation of the main action. As authority for that proposition, the appellant relied on the judgment of the Constitutional Court in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions*,[37] in which it was stated that the power in s 173 of the Constitution vests in the judiciary the authority to prevent any possible abuse of process.

[43] The appellant cited four incidents as the basis for its contention that the respondent had abused the court processes in order to stifle the finalisation of the main application. First, the appellant brought an application for dismissal of the main action within 14 days of the Constitutional Court dismissing the appellant's application for leave to appeal, the basis being that the appellant had not complied with the 2012 Order. Although the respondent's application was successful, in 2014, a full court set aside that order and reinstated the main action on the basis that the application had been brought prematurely.

[37] *SABC Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC) para 90.

[44] The second incident which the appellant relied on was the respondent's refusal to accept the tender of security on the basis that it was paid late. Based on that stance, it had once again tried to apply for the dismissal of the main action but was unsuccessful. The third incident cited by the appellant was that the respondent had approached the registrar seeking an increase in the amount of security for costs on the basis of a grossly inflated bill of costs. What the appellant considered as the fourth instance of abuse of process was the fact that the respondent had insisted that the shareholder of Ungani, Mr Mufamadi, be joined as a party in the main action in his personal capacity even though the appellant had furnished documentation that showed that Ungani's assets could satisfy an adverse costs order.

[45] It has been held that an abuse of process occurs when provisions of the Uniform Rules of Court are used to achieve an outcome that is tangential to the pursuit of the truth.[38] In *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* this Court held that the exploitation, in an improper manner or for an improper purpose, of a particular Rule of Court which relates to the termination of the case, could qualify as an abuse of the court process.[39]

[46] In my opinion, there is no basis for concluding that the interlocutory applications brought by the respondent constituted an abuse of court processes. The very fact that one of the courts of first instance was prepared to dismiss the main action shows that it was persuaded by the respondent's arguments, albeit wrongly, and therefore dispels any notion of an abuse of process. It must be borne in mind that Rule 47(4) of the Uniform Rules of Court specifically sanctions the dismissal of the relevant proceedings where security is not furnished within a reasonable time. Given that the respondent's rights arose from a court order (the 2012 Order), the exercise of the rights emanating from that order could not amount to an abuse of process.

[47] As regards the allegedly inflated bill of costs, it bears noting that the 2012 Order expressly stipulated that the appellant pay security of R4 million '*and/or such further*

[38] See *Ramsamy NO and Others v Maarman NO and Another* 2002 (6) SA 159 (C).
[39] [1999] 2 All SA 127 (A); 1999 (3) SA 389 (SCA) at 416D-E.

amount or amounts as the registrar may direct'.[40] Notably, Rule 47(6) of the Uniform Rules of Court enunciates that the Registrar may increase the amount lodged as security if he or she is satisfied that the amount furnished is no longer sufficient. The disputed bill of costs was merely submitted for assessment within the ambit of that particular Rule of Court and within the contemplation of the 2012 Order. Moreover, Rule 70 of the Uniform Rules of Court, entitled 'Taxation and Tariff of Fees of Attorneys', stipulates that the submission of a bill of costs departing from the tariff is an aspect that is subject to approval by the taxing master within his or her powers. The Registrar is thus the officer of court whose function it is to determine the amount, if any, of any further security to be furnished. It is thus open to the appellant to bring any queries pertaining to the disputed bill of costs to the attention of the Registrar.

[48] Lastly, it was contended that the respondent's failed attempt in the court a quo to join Ungani's shareholder, Mr Mufamadi, to the litigation was a further attestation to the respondent's abuse of court processes. I have already alluded to the reasons advanced by the respondent for its dissatisfaction with the documents the appellant provided as proof of Ungani's financial position. A relevant consideration is the common cause fact that Ungani was a newly formed company with no audited financial statements. Under the circumstances, I am of the view that there is no clear evidence suggesting that the application for the joinder of Mr Mufamadi as a party to the proceedings constituted an abuse of process.[41]

[49] It is evident from the foregoing paragraphs that the evidence placed before the Court a quo did not justify the release of security that had already been furnished on the strength of the 2012 Order. *Boost*[42] confirmed that Superior Courts have a residual discretion arising from their power, derived from s 173 of the Constitution, to regulate their own proceedings. This remark was made in the context of an application that was being considered on the strength of the 2008 Companies Act. This means that, regardless of the statutory lens from which the appellant's application was being considered by the court a quo, there can be no question that in coming to its decision,

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[40] The issue initially raised before the court a quo pertaining to the interpretation of the 2012 Order in relation to the respondent's entitlement to an increase in the amount of security was abandoned in the court a quo and is not an issue for this court's determination.
[41] Compare *Boost* para 25.
[42] *Boost* para 16.

it had exercised its residual discretion as contemplated in s 173 of the Constitution. 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.[43]

The standard of interference to be adopted by this Court on appeal

[50] It is well-established that matters pertaining to costs are invariably held to involve the exercise of a discretion in a narrow sense.[44] Equally trite is that when a lower court exercises a discretion in the narrow sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[45] It follows that the appellant was required to demonstrate on appeal to this Court that the court a quo did not act judicially, or that it acted on a misapprehension of the facts or on wrong principles.

[51] The appellant's submission that the court a quo exercised its discretion on a wrong principle insofar as it found that the appellant's reliance on s 173 of the Constitution was 'misplaced', is without merit. It is clear from the whole tenor of the judgment of the court a quo that it was alive to the fact that the provisions of s 173 of the Constitution empower superior courts to address an injustice. However, based on what was alleged in the appellant's papers, it was simply not persuaded that there was a just cause for reconsidering the 2012 order, and rightly so. Its finding that there was no change in circumstances warranting a variation of the 2012 Order to release the security furnished, cannot, on the facts placed before it, be faulted. In the result, there is no justification for interfering on appeal with the discretion exercised by the court a quo.

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[43] *Giddey* para 19.
[44] *Giddey* para 20-21; *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 85.
[45] Ibid para 88.

[52] Before I conclude, I must briefly mention that a few days before the date of the hearing of the appeal, the respondent filed an application, in terms of s 19*(b)* of the Superior Courts Act 10 of 2013, urging this court to accept new evidence on appeal[46] regarding the expected duration of the trial, among others. This application was launched too late, added nothing to the matter and the evidence was, in any event, not incontrovertible. It therefore falls to be dismissed with costs.

Costs

[53] The Court a quo did not make an order of costs, save in relation to the dismissal of the respondent's application for the joinder of Mr Mufamadi. There was no cross-appeal directed at that costs order. In this court, the respondent urged us to order the unsuccessful party to pay the costs of the appeal, including the costs occasioned by the employment of two counsel. In considering an appropriate order of costs, this Court must be mindful of the fact that a court determining whether an order for security should be made is essentially making a decision on a constitutional matter.[47]

[54] As regards this appeal, it must be borne in mind that the appellant repeatedly stated that its litigation funder, Ungani, has more than sufficient assets with which to satisfy any adverse costs made against it and that there was no risk that the respondent's costs in the action would not be covered. Thus, its ability to pursue the main action was not at risk. In *Giddey*, the Constitutional Court observed that if an order pertaining to security for costs could be appealed on the standard of correctness each time, it might result in lengthy delays and considerable costs.[48] It is thus ironic that having bemoaned the delay in the finalisation of the main action, which has been pending for 12 years, the appellant ultimately decided to pursue the appeal only in relation to the release of security that it had already furnished. Having considered all the circumstances of this case, I find that it is not in the interests of justice to depart from the general rule that costs should follow the result.[49]

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[46] See *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others* 2005 (2) SA 359 (CC) para 41-43.
[47] *Giddey* para 4.
[48] Ibid para 22.
[49] Compare *Lawyers for Human Rights v Minister in the Presidency and Others* 2017 (1) SA 645 CC.

Order

[55] The following order is made:

1. The respondent's application for the admission of new evidence on appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

2. The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

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MOLEMELA JA

JUDGE OF APPEAL

Appearances:

For appellant:	C D A Loxton SC (with him A J D'Oliveira)
Instructed by:	Robin Twaddle & Associates Inc, Midrand
	c/o Honey Attorneys, Bloemfontein
For first respondent:	C H J Badenhorst SC (with him K Spottiswoode)
Instructed by:	Werksmans Attorneys, Johannesburg
	c/o Symington & De Kok Attorneys, Bloemfontein