THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 434/07

REPORTABLE

In the matter between:

KINI BAY VILLAGE ASSOCIATION **Appellant**

v

THE NELSON MANDELA METROPOLITAN MUNICIPALITY **First Respondent**
CHASE STREET PROPERTIES (PTY) LTD **Second Respondent**
PIERRE KOLESKY **Third Respondent**

Coram: Harms ADP, Cameron, Van Heerden, Ponnan et Maya JJA

Heard: 21 May 2008

Delivered: 29 May 2008

Summary: Appeal against order for payment of security for costs in terms of s 13 of the Companies Act 61 of 1973 by impecunious appellant representing residents of affluent seaside suburb – court of first instance exercising discretion in strict sense – appeal court entitled to interfere only where material misdirection established even in case involving a constitutional issue.

Neutral citation: This judgment may be referred to as *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* (434/2007) [2008] ZASCA 66 (29 May 2008).

JUDGMENT

MAYA JA:

MAYA JA:

[1] This is an appeal against the judgment of the Port Elizabeth High Court (Pakade J) ordering the appellant, inter alia, to furnish security for the second and third respondents' costs of suit in terms of s 13 of the Companies Act 61 of 1973 read with Uniform rule 47(3). The appeal against that order is with the leave of the court below.

[2] The litigation for which security for costs is sought was sparked by an application to the first respondent (the local authority) made by the second respondent, to have the latter's residential property, Erf 78 Kini Bay (the property), rezoned for purposes of operating a guesthouse and conference facility. The third respondent is a director and shareholder of the second respondent and resides on the property. Notwithstanding objections to the proposed rezoning lodged by the appellant, which represents a number of Kini Bay Village residents, the local authority's Housing and Land Committee recommended a grant of the rezoning application.

[3] Pursuant to the recommendation, the appellant launched application proceedings seeking, inter alia, to have the local authority

take the necessary steps to prevent the second respondent from operating and advertising the business (which was already trading as Sea Otters Lodge), to have the Housing and Land Committee's recommendation reviewed and set aside and the application referred back for reconsideration.[1] The second and third respondents (the respondents) were cited in the proceedings but no relief was directly sought against them and a costs order against them was sought only if they opposed the application.

[4] At the commencement of the proceedings, simultaneous with the issue of their notice to oppose, the respondents requested copies of the appellant's constitution and its financial statements to establish its financial position and whether or not it would be able to meet an adverse costs order. The constitution was duly furnished but the appellant declined to divulge its financial status on the grounds that it is a voluntary association[2] – in its constitution it describes itself as a *universitas* – acting in terms of s 38 of the Constitution,[3] seeking to invoke a constitutional

[1] The application was subsequently considered by the local authority's Mayoral Committee and finally approved by its full Council after the proceedings had been launched.
[2] In argument before us, the defence that the appellant is not 'a company or any body corporate' as contemplated in s 13 of the Companies Act was, correctly, not pursued although it was still contended that it is a non-profit entity.
[3] Section 38 of the Constitution of the Republic of South Africa Act 108 of 1996 provides:
'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;

right on behalf of its members, which relieves it of an obligation to provide costs. The appellant further contended that no relief was in any event sought against the respondents.

[5] This refusal prompted the respondents to institute proceedings for security in terms of Uniform rule 47(3)[4] and s 13 of the Companies Act. During the course of such proceedings, which were opposed, the respondents chanced upon a copy of the appellant's Annual General Meeting minutes which showed the following – its subscription levies and seeming main source of revenue amounted to R880 comprised of sums of R25 payable by each of its 44 members; its budget for the relevant year, 2005/2006, was R5 480 and made no provision for litigation; its banking account balance as at 30 September 2005 was R3 792,68 and it had no other assets. When confronted with this discovery, the appellant readily admitted that it would be unable to meet an adverse costs order but persisted with its argument that it sought to vindicate a constitutional right and could, thus, not be mulcted with costs.

(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) any association acting in the interest of its members.'

[4] Uniform rule 47(3), which regulates the procedure for applications for security, provides:
'If the party from whom security is demanded contests his liability to give security or if he fails or 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.'

[6] The court below took the view that the relief sought by the appellant, which it decided is a body corporate, has a direct impact on the respondents' rights, thus entitling them to oppose the application. I must say at the outset that this finding is, in my view, correct as the appellant's primary objective was to prevent the rezoning of the respondents' property and the operation of a guesthouse on it.

[7] In rejecting the appellant's constitutional defence, the court below discussed the implications of the rights claimed by the appellant on the basis of s 38 of the Constitution and the considerations to be observed by a court in an application of that nature. It then concluded, on the authority of the dictum in *Ferreira v Levin NO and others;*[5] regarding the manner in which the principles relating to the award of costs in constitutional litigation are to be applied, that it would be unfair to deprive the respondents of their costs in the event that they successfully opposed the application.

[8] In argument before us, counsel for the appellant submitted that the legal principles relating to s 13 of the Companies Act relied upon by the respondents were not disputed. What was being challenged, it was

[5] 1996 (2) SA 621 (CC) para 3. There, the court said that 'the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation … [which] if the need arises … may have to be substantially adapted … on a case by case basis'.

contended, was only the manner in which the court below exercised its discretion, ie failing to have sufficient regard to the fact that the appellant sought constitutional relief, as its order would have a 'chilling effect' on non-profit, impecunious parties such as the appellant seeking to enforce their constitutional rights against public authorities.[6] This, therefore, is the sole issue in this appeal.

[9] Section 13 provides:

'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.'

[10] These provisions are intended to protect persons against liability for costs relating to litigation instituted by impecunious companies[7] by deterring such companies from litigating vexatiously or in circumstances where they have poor prospects of success, thus exposing their opponents

[6] In this regard, reference was made to the provisions of s 152(1)(e) of the Constitution in terms of which one of the objects of local government is 'to encourage the involvement of communities and community organisations in the matters of local government.'
[7] *Hudson & Son v London Trading Co Ltd* 1930 WLD 288 at 291; *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1044E.

to unnecessary and irrecoverable legal expenses.[8] The party seeking security must, however, first establish, by credible testimony, that its opponent, if unsuccessful, will be unable to meet an adverse costs order.

[11] To succeed on appeal, a litigant must satisfy the court that the discretion exercised by the court of first instance in terms of s 13 – which is a discretion 'in the strict sense' ie a discretion exercised on a judicial evaluation of the facts and circumstances before the court – was not judicially exercised or was based upon a wrong principle of law or wrong facts.[9]

[12] Whilst the court is enjoined to exercise its discretion with the litigants' constitutional right to access to courts[10] in mind, the mere possibility that an order for security will effectively put an end to the litigation, which seemingly is the intended and inevitable result of s 13, does not constitute sufficient reason for its refusal – this is but one of the factors (there is no closed list) a court will consider in the exercise, which involves weighing the potential injustice to the plaintiff or applicant if it

[8] *Giddey NO v JC Barnard & Partners* 2007 (5) SA 525 (CC) para 7.
[9] *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council & another* 1999 (4) SA 799 (W) at 807G-808B (per Cloete J)*; Giddey NO* paras 20-22; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) para 11; *Aartappel Koöperasie Bpk v Pricewaterhousecoopers* [2007] SCA 166 RSA, unreported judgment delivered on 29 November 2007, para 15.
[10] Section 34 of the Constitution grants '[e]veryone … the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

is prevented from pursuing a legitimate claim, against the potential injustice to the opposing party if it succeeds in its defence but cannot recover its costs.[11]

[13] Turning back to the facts of the present case, save to allege that it would be unable to meet an adverse costs order, the appellant was otherwise extremely reticent about its financial status. It offered no explanation at all as to the source of funds for its litigation, which has seen it come all the way to this court. What was clear from its minutes mentioned above, however, was that it had not been doing so from its own resources but nevertheless has access to substantial funds. Its counsel was constrained to disclose in argument the rather obvious fact that its members, who are wealthy (Kini Bay Village itself being an affluent seaside neighbourhood), are footing its legal bills.

[14] Another factor which a court will take into account in its balancing exercise is the plaintiff's attempt to find financial assistance from its shareholders and creditors or other affiliates, backers or interested persons.[12] This must be so considering that they are the ultimate

[11] *Shepstone & Wylie* at 1046G-I; *Keary Developments Ltd v Tarmac Construction Ltd & another* [1995] 3 All ER 534 (CA) at 539j-540a; *Giddey NO* para 29.
[12] *Shepstone & Wylie* at 1047A-B,-540a *Giddey NO* paras 30, 33 and 34.

beneficiaries of a successful action. Making this point in *MTN Service Provider*, Brand JA said:[13]

'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'.

[15] Needless to say in the circumstances of this case, in the absence of any evidence relating to the appellant's source of funds and whether it solicited its members' financial assistance or made any other attempts to raise funds to continue the litigation, the appellant dismally failed to establish that a security order will halt its case. Its reticence, which is clearly deliberate, inexonerably leads to an inference that its wealthy members who authorised it to conduct the litigation in the first place impecunious as it was, are using it merely as a front and are shielding behind an empty shell simply to avoid liability for costs.

[16] As regards the appellant's constitutional point, I must say first that to my mind, the real dispute stripped to its bare essentials, is no more than

[13] Para 20.

a skirmish concerning property rights between neighbours. The 'constitutional issue' in the form of a judicial review between the appellant and the local authority, is ancillary to that. Be that as it may, the matter does bear some constitutional character and that must be given credence which the court below did.

[17] Whilst the Constitutional Court has sometimes found it inappropriate to make costs awards lest they have a chilling effect on members of society wishing to vindicate their constitutional rights,[14] there is nonetheless no rule of thumb that a costs order will not be made in constitutional litigation. In *Affordable Medicines Trust v Minister of Health*,[15] Ngcobo J reiterated this position as follows:

'[T]he general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs … is not an inflexible rule … There may be circumstances that justify departure from this rule ... The ultimate goal is to do that which is just having regard to the facts and circumstances of the case'.

Indeed, authorities abound in which both this court and the Constitutional Court, in keeping with the trite principle that costs should ordinarily follow the result, have made costs awards in matters in which the parties sought to invoke constitutional rights.[16] Significantly, in a number of

[14] See, for example, *Mkontwana v Nelson Mandela Metropolitan Municipality & Another* 2005 (1) SA 530 (CC) para 74; *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 62.
[15] 2006 (3) SA 247 (CC) para 138.
[16] See, for example, *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and*

those cases private individuals were ordered to pay the costs of public authorities. Having due regard to the facts of this case and the principles of equity and fairness, there seems to me no reason justifying a departure from the usual rule. The appellant should not escape liability for costs.

[18] There is another issue that merits mention. As indicated, leave to appeal to this court was granted by the court below. There being no demonstrable misdirection in its reasoning, such leave should never have been granted. In the event that leave was warranted, there still is no reason why the matter could not have been dealt with by the Full Court in terms of s 20(2) of the Supreme Court Act 59 of 1959. The principles governing applications of this nature, which present no complexities, are by now settled as evidenced by the cases cited above. This court has previously remonstrated against appeals against security orders being brought to it, at great expense for the litigants and to the detriment of

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Others 2007 (6) SA 4 (CC); *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC); *MEC for Education : KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA); *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); *Chairperson : Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA); *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* 2006 (8) BCLR 901 (CC); *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC); *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA).

difficult cases more deserving of its attention.[17] It is hoped that litigants and the high courts will heed this concern.

[19] Finally, we were asked on the respondents' behalf to vary the order granted by the court below by substituting the amount of security specified in the order of the court below, in terms of their notice of motion, with the words 'an amount to be determined by the Registrar'. However, there being no cross-appeal in this regard, our hands are tied and we cannot accede to the request.

[20] For all these reasons, I can find no reason to interfere with the judgment of the court below. The appeal must, therefore, fail.

[21] Accordingly, the appeal is dismissed with costs.

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MML MAYA

JUDGE OF APPEAL

[17] *MTN Service Provider (Pty) Ltd* para 24; *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* 2003 (5) SA 354 (SCA) para 23.

CONCUR:

HARMS ADP

CAMERON JA

VAN HEERDEN JA

PONNAN JA