REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR SECURITY FOR COSTS

CASE NO. 2295/2015

In the matter between:

PATRICIA MARTUCCI	**1ST PLAINTIFF**
BEATRICE BARILLARO	**2ND PLAINTIFF**
ELENA MARIA RITA BARILLARO	**3RD PLAINTIFF**

and

MOUNTAIN VIEW GAME LODGE (PTY) LTD	**DEFENDANT**

Neutral citation: *Martucci v Mountain View Game Lodge (Pty) Ltd (I 2295-2015) [2016] NAHCMD 217 (22 July 2016)*

CORAM: MASUKU J;

Heard: 28 June 2016

Delivered: 22 July 2016

FLYNOTE: PRACTICE- RULES OF COURT- Rule 59- Security for costs- Liability to pay security for costs- Determination of quantum- whether it is proper for it to be done by a judge- Delay in filing a demand for security for costs.

SUMMARY: The defendant, an *incola* of this court filed an application for security for costs against the plaintiffs who are resident in Italy for an amount

of N$ 300 000. The plaintiffs contested their liability to furnish such security as well as the amount, claimed on the basis that there was a delay on the part of the defendant to file such an application , despite its' intention to do so at case management stage.

Held- that the issue of security for costs involves two aspects, firstly, of liability to pay such costs, which is within the purview of this court's determination. Secondly, that the matter of the nature, form and amount of security is ordinarily a matter exclusively for the decision of the Registrar. The court further held that Judges of this court, particularly in the judicial case management era, handle diverse, complex and multifarious responsibilities, legal and judicial tasks and it would be unfair and insensitive to have to burden them with determining the amount of security to the precision of the dollar and cent required in this matter unless special circumstances exist, in which case the court can pronounce itself.

Held further- that delay in filing the demand for security is not in itself is not an automatic bar to an application for security. Furthermore, where an intimation is made of the desire to bring such an application in the case plan, the party against whom security is intimated to be demanded is thereby placed on the *qui vive* and may not just wish or 'silence' the intimated demand away. They should enquire if the other party still intends to pursue the said step and put them on notice that if they do not do so, they may waive their right to do so.

The court found that the plaintiffs are liable to furnish security for costs to the defendant and that the amount payable is to be determined by the Registrar of this court. *Held further*- that plaintiffs are liable for the costs of opposing this application. Lastly, the court held that should the plaintiff fail to furnish such security, the proceedings will automatically be stayed.

ORDER

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1. The plaintiffs are hereby adjudged to be liable to furnish security for costs to the defendant.
2. The nature, form and amount of security for costs to be paid by the plaintiffs shall be determined by the Registrar of this Court, together with the time within which such payment shall be made.
3. The Registrar of this Court shall, within seven (7) days from the date of this order arrange a meeting for the parties to determine the nature, form, and amount of security for costs to be furnished by the Plaintiffs, jointly and severally, alternatively by the 1st plaintiff.
4. Should the plaintiffs not furnish security as determined by the Registrar above and within the time frame given, the proceedings herein shall be automatically stayed.
5. Each party is ordered to pay its own costs.
6. The matter is postponed to 14 September 2016 at 15h15 for status hearing.

RULING

MASUKU J;

Introduction

[1] At the heart of this ruling, and primarily presented for the court's determination, is an application for security for costs at two different levels. First, the court is required to determine the issue of the plaintiffs' liability to pay security for the defendant's costs. Second, and if the court finds that the plaintiffs are so liable, the court is required to determine the amount of security for costs to be paid by the plaintiffs.

The parties and the claim

[2] The plaintiffs are persons of Italian extraction and who are domiciled at a given address in Pistoia Italy. The 1st plaintiff is a Judge who institutes action on her own behalf as well as on the behalf of her two minor daughters, the 2nd and 3rd plaintiff.

[3] The defendant is a company with limited liability duly incorporated in terms of the Company Laws of this Republic, with its registered office in Windhoek.

[4] The plaintiffs claim for Euro 307 125, from the defendant as a result of an automobile accident, which occurred in Namibia between Okahandja and Otjiwarongo on 23 July 2012 along the B1 Road. In that accident, it is averred, a vehicle bearing registration number N 61673 W and the defendant's vehicle registered N 125860 W collided and in that process killing the plaintiffs' breadwinner, who was in law obliged to and did provide support and maintenance to the plaintiffs.

[5] It is further averred that the defendant's vehicle was then driven by one Roberto Colcellini, acting within the scope of his employment and in the course of duty with the defendant. It is alleged that he was negligent in driving the said vehicle in respects that need not be canvassed herein for present purposes and that his negligence was the cause of the death of the plaintiffs' breadwinner.

The relief sought

[6] I shall refer to the parties as they appear in the combined summons. By notice of motion, dated 6 May 2016, the defendants moved the court for an order in the following terms:

1. 'That the Plaintiffs jointly and severally, alternatively the First Plaintiff, be ordered to provide security for costs in favour of the Defendant in the amount of N$300 000 within 30 court days from the date of this order.
2. That this action (High Court case I 2141/2015) be stayed until such time as the full security is provided.

Alternatively to prayers 1 and 2 above,

3. That the Plaintiffs jointly and severally, alternatively the First Plaintiff, are hereby ordered to furnish security for costs in favour of the Defendant.
4. That the Registrar of the above Honourable Court be directed to determine security for costs in favour of the Defendant and that this action (High Court case I 2141/2015) be stayed until such time that full security is provided.

In any event,

5. Costs of suit.'

[7] I have deliberately quoted the entire contents of the notice of motion for reasons that will become apparent as the ruling unfolds. The affidavit, filed in support of the relief sought, is deposed to by the defendant's attorney of record, Mr. Stephen Vlieghe.

[8] The propriety of the said founding affidavit had initially been challenged by the plaintiffs and this challenge was later abandoned. I shall for that reason say nothing more of that issue. Needless to say, the plaintiffs oppose the application for liability to pay costs and also the amount demanded by the defendant as security and which the court is urged by the defendant to endorse.

[9] The opposing affidavit is deposed to by the 1st plaintiff. In it, the plaintiffs deny liability to pay costs and as a fall-back position, they offer an amount the court may order if it finds the plaintiffs are, after all is said and done, liable to pay security for costs.

[10] I do not find it necessary, at this stage to delve in any great length into the contents of the various sets of affidavits. I find it necessary, for present purposes, to deal with the relevant law to the issues at hand. The proper starting point, obviously, are the relevant provisions of the rules of court and to which I presently turn.

The relevant legal provisions on security for costs

[11] Questions related to the issue of security for costs, are governed by the provisions of rule 59 of this court's rules. The relevant parts of the rule read as follows:

> '(1) A party entitled to demand security for costs from another must, if he or she so desires, as soon as is practicable after the commencement of proceedings, deliver a notice setting out the grounds upon which the security is demanded and the amount claimed.
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> (2) If a party contests the amount of security only that party so objecting must, within three days after the notice contemplated in subrule (1) is received, give notice to the requesting party to meet the objecting party at the office of the registrar on a date pre-arranged with the registrar and that notice must state the date of the meeting and the date must not be more than three days after the notice of objection to the amount of security is delivered to the party requesting the security.
>
> (3) The registrar must determine the amount of security.
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> (4) If the party from whom security is demanded contests his or her liability to give security or if he or she fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within 10 days of the demand or the registrar's decision, the other party may apply to the managing judge on notice for an order that such security be given and that the proceedings be stayed until the order is complied with.
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> * * *
>
> (6) Security for costs is, unless the managing judge otherwise directs or the parties agree, be given in the form, amount and manner directed by the registrar.'

[10] A reading and proper consideration of the architecture of the parts of the rule quoted above suggests that there are normally two aspects to an application for security for costs. The first is the question of liability to pay

security for costs. The second, if the other party admits liability or if liability is contested, and the court has determined that security is payable, is the amount of security payable.

[11] I am of the considered view that the first enquiry, *viz* of liability to pay security, if contested, rests with the court alone. This is so because properly considered, this is a legal issue for determination in line with case law and particularly whether the party claiming security for costs is 'entitled to demand' security with the meaning of the rule.[1] Once the court determines the liability to pay security for costs by the party so required to pay, then the issue of the amount of security for costs arises.

[12] From a reading of the relevant subrules, I am of the view that the matter of the nature, form and amount of security is ordinarily a matter exclusively for the decision of the registrar. That this is the case is plain from reading subrule (3). This suggests that it is only in exceptional circumstances, probably envisaged in subrule (6) that the managing judge would prescribe the form, amount and manner of giving security to be furnished.

[13] I am of the considered opinion that there is a policy reason behind primarily giving the licence to determine the form, amount and manner of the security for costs should assume, to the registrar. The registrar is the hands and feet of the court and in a sense, an expert when it comes to matters of costs, the tariffs and other related technical matters. For that reason, it would seem to me, it is on that basis that the ordinary office fitting to determine the amount, form and manner of the security to be furnished, once liability to pay costs has been established, is that of the registrar.

[14] Judges of this court, particularly in the judicial case management era, handle diverse, complex and multifarious responsibilities, legal and judicial tasks and it would be unfair and insensitive to have to burden them with determining the amount of security to the precision of the dollar and cent

[1] *Martucci & Others v Colcellini & Another (I 2259/2015) [2016] NAHCMD 149 (18 May 2016).*

required in this matter. It is for that reason, if one has regard to surule (7), that the rule-maker stated that where the registrar has determined the amount of security payable, and a need arises to have same increased for whatever reason, “his or her decision is final’.

[15] In the premises, a holistic reading of the rule in question suggests that the only office, save where the managing judge ‘otherwise’ determines, and I must add, for sound reasons, is that of the registrar of this court. There does not appear, from the rules of court as presently drafted, to be any route of appeal or review of the registrar’s decision in this regard, suggesting inexorably, that in the normal cause, it is the office of the registrar that has the only and ultimate responsibility for determining the amount of security for costs.

[16] I am aware of a judgment by Ndauendapo J. in *Atlantic Meat Market (Pty) Ltd and Another v L J Karstens* ***N.O.*** *and Another*[2] in which a decision of the registrar regarding the amount of security for costs, amongst others, was reviewed and set aside. This application was brought during the operation of the old rules of court. It is not clear from the judgment whether the said application was brought in terms of any rule of court then in operation. The court, having set aside the registrar’s decision on the amount to be provided as security, further ordered the issue of security for costs to be determined *de novo.* It is important to note that the court did not substitute the said decision with its own, a fact which reinforces my view that the determination of the amount, is primarily that of the registrar.

[17] In the instant case, a detailed affidavit has been filed, with numerous attachments, including the proposed bill of costs to serve as a guide to this court in determining the proper amount to be paid by the plaintiffs as security for costs. Furthermore, it is common cause that the plaintiffs are resident in Italy and for the court to make a proper determination of the amount, it may have to indulge in other exercises that go beyond its normal responsibility, like determining the standard of living in Italy, the amount earned by the 1st plaintiff,

[2] (I 2460/2004) [2012] NAHCMD 66 (12 November 2012)

the exchange rate of the Euro to the Namibian Dollar, etc. This is what the defendant has asked the court to consider, when it has no primary responsibility to do so, let alone the wherewithal to determine matters of finance to mathematical accuracy of the dollar and cent in issue.

[18] I accordingly decline the invitations and entreaties extended to the court by Mr. Vlieghe, namely, to determine the amount and manner of providing the security payable and the form it should assume. The court was asked, in argument, to consider ordering the plaintiffs, if all else fail, to order the plaintiffs to pay the amount in instalments.

[19] I am of the view that to incline to this invitation would be tantamount to the court usurping what clearly appears to be legitimate powers and responsibilities reposed by the rule-maker, in the office of the registrar. There is no allegation that that office is unable to perform that task and I am of the considered view that prayers 1 and 2 of the notice of motion are incompetent at this stage and are, for that reason dismissed.

[20] For the foregoing reasons, I will regrettably not make use of the otherwise very detailed information that Mr. Vlieghe may have conscientiously made available to the court, including some illumination on the vexed questions of law applicable in the instant case from relevant experts in Italian law. I am, however, fortified in the knowledge that this information has not become stale solely because of the court's declinature to use it in this judgment. I say so because it may prove useful and may actually assist the registrar of this court in dealing with what appears to this court to be a rather unusual matter. It may not be so unusual to the office of the registrar though.

[21] I should mention that by the same token, the 1st plaintiff took a serious verbal beating from Mr. Vlieghe, both in his affidavit and in argument. He punched holes in the affidavit filed by the 1st plaintiff and declared 'mysteries' he saw about the plaintiffs' claim and related matters. This attack was mainly targeted at the information supplied or not supplied, in his view by the plaintiffs

and the role same may play in the determination of the amount of security payable.

[22] I will not nor am I called upon to deal with that information at all, nor with the criticisms levelled, although some legitimately attach, I may add. The ball is now in the right court – that of the registrar of this court and which court is competent and has the necessary expertise and wherewithal to untie the proverbial Gordian Knot in this case. I should pertinently mention that this is strictly so in the event the court takes the view that the plaintiffs are liable in this case to pay security for the defendant's costs, a question I proceed to deal with immediately below.

The plaintiffs' liability to pay security for costs

[23] I inevitably have to turn to consider the only remaining question, barring the one relating to the lateness of lodging the claim for security, which the plaintiffs raise in their papers and with which I shall deal with in due course.

[24] In *Hepute and Others v Minister of Mines and Energy and Another,*[3] this court dealt with the issue of security for costs in the following terms:

> 'It is trite that in an application for security for costs,
>
> (a) the court has a discretion to grant or refuse such security;
> (b) the question of security for costs is not one of substantive law, but one of practice; and
> (c) the court does not enquire into the merits of the dispute, but may have regard to the nature of the case.'

[25] In the related case of *Martucci*[4] this court, after considering the meaning and application of the words, 'entitled to demand security' in the rule in question, came to the view that a *peregrini* plaintiff is normally one of the classes of

[3] 2007 (1) NR 124 (HC) at para [10].
[4] *Ibid* footnote 1 at para [20].

persons from whom security may be demanded, particularly by an *incola* defendant. The court held that the court may not order security if the said plaintiff has immovable property within the jurisdiction of the court, sufficient to meet a bill of costs.

[26] The court, after reviewing the ancestry of the issue of security for costs stated the following in *Martucci:* [5]

'The upshot of this decision, and what is inevitably deducible from the foregoing, is that the issue of security for costs is one primarily designed to protect an *incola* from being put to the expense of defending a claim in his or her jurisdiction for a claim at that instance of a *peregrinus* of the said court. Though not stated in the quotation above, this is so for the reason that should the defendant successfully defend or deflect the said law suit and a favourable order for costs is granted in that party's favour, that party can only be able to satisfy the judgment in its favour by having to pursue the said *peregrinus* in his or her country of domicile as he or she will ordinarily not have any property against which to satisfy the judgment in the *incola's* jurisdiction where the proceedings will have been instituted.'

[27] It will be plain, from the foregoing, that all other indications point to the need to order the plaintiffs to pay security in the instant case. I say so in view of the nature of the relationship between the parties, particularly the plaintiffs' avowed place of domicile and the fact that they do not own any immovable property within this court's jurisdiction.

[28] It was, the foregoing notwithstanding, stated in the *Hepute* judgment at para [30]:

'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 the trial the plaintiff claims fails and the defendant finds himself unable to

[5] *Ibid* at para [7].

recover from the plaintiffs the costs which have been incurred by him in defence of the claim.'

[29] In *Martucci,* the court dealt with this aspect in the following terms:[6]

'What is plain, from the foregoing, is that such applications were primarily moved as the instance of *incola* defendants who were being sued in their jurisdictions by *peregrini* plaintiffs. In this regard, the courts sought to be fair to both parties by not seeking to overly protect the litigant domiciled within the jurisdiction by placing an unduly heavy burden of security on the foreigner so as to induce him or her to abandon the claim.'

[13] By the same token, it would seem the court had to evenly balance the scales, in line with the demands of justice and fairness by not having a litigant domiciled within its jurisdiction being dragged to court by a foreigner who on the face of it does not have the wherewithal within the jurisdiction to pay the costs of the local litigant should the latter be successful. On the other hand, the court had to be on the *qui vive,* as stated above, to ensure that the foreign litigants are not pushed out of the court's portals by being required to furnish security that would break their backs financially speaking. It was thus a delicate balancing exercise and in respect of which the discretion had to be exercised judicially and judiciously.'

[30] In the premises, I am of the view that the preponderance of legal opinion to which I have referred above, points to the fact that this is a proper and condign case in which security for costs should ordered of the plaintiffs. I say so for reasons that I have previously referred to, including the very clear line of authority that has been referred to earlier in this judgment. No less important, in this regard, is the fact that the plaintiffs are *peregrine* of this court and own no immovable property in this jurisdiction. It must be recalled that such orders are mainly geared to protecting an *incola* defendant from being dragged to court without the assurance that if they become successful in their defence, they may have no recourse in the local jurisdiction for purposes of levying execution

[6] *Ibid* at para 12 and 13.

against the plaintiffs' property within the jurisdiction in which the suit has been launched.

[31] Having said the foregoing, I must also mention that there are factors that weigh quite heavily in the plaintiffs' favour in this case. First, they have offered an amount of security in the Euro currency, should the court be inclined, as it has, to order security for costs. Secondly, the plaintiff, it would seem, being a Judge in the Judiciary of Italy, is not a person who would be likely to avoid and evade their responsibilities in case an adverse outcome eventuates.

[32] In *African Iron and Steel Corporation v Abdulnabi,*[7] quoted with approval in this court in *Prosecutor-General v Nzinu,*[8] the court pointed out that the character of the foreigner must be taken into account, and so much better if they, as the plaintiffs have, a fixed address in a permanent place of domicile. Regarding the foreigner's character, the court said if the person is one of honour and integrity, the court should take that into account in deciding whether to order security for costs. The plaintiffs, it would seem to me, tick the boxes.

[33] I am of the view that although this is a case where security for costs has been found to be necessary, there are special circumstances in this case, which suggest that in deciding the amount of security, the registrar of this court should be acutely aware of its peculiarities and consequently not deal with it as if it were an ordinary case. In this regard, the nature of the primary claim must not sink into oblivion, namely that it is a dependants' claim and the main beneficiaries in this case are minors of whom courts are ordinarily regarded as the Upper Guardian of.

[34] Furthermore, the position of honour and integrity readily appearing from the 1st plaintiff's position as a Judge in Italy should count in the plaintiffs' favour. There is nothing said, suggested or apparent from the papers that should serve to disentitle the 1st plaintiff, in particular, to this favourable disposition and position. Her position of consummate integrity, as presently appears, *pro ha*

[7] 1989 (2) SA 224 at 223F-H.
[8] (A22/2013) [2014] NAHCNLD 38 (2 July 2014).

vice, in my view, should be viewed positively. Though not pointing towards security not being payable at all by the plaintiffs, it should point to the determination of a figure, form and nature of security that should not serve to constitute a bar or substantial barrier in the plaintiffs' quest for access to justice before our courts.

[35] In this regard, the quantum that is actually determined should not serve to effectively close the portals of the courts of Namibia to the plaintiffs, particularly the two minors who understandably, from a subjective point of view, are well entitled to feel that an injustice was done to them by the sudden and what they consider to be the unlawful and negligent killing of their breadwinner. It would be a sad day for this court if the plaintiffs were to hang their nets, so to speak, because the court has set a figure, nature, or form of security that effectively serves to oust them from accessing the fountains of justice in these courts.

[36] In this regard, this court should not close its eyes to the fact that there is another case involving the same plaintiffs and other defendants who have also been sued regarding the same incident. The court cannot, in all good conscience, act in oblivion to this action and the costs that the plaintiffs may have to incur to see justice done for them.

[37] Without in any way directing the registrar towards determining a particular figure, nature or form of security, in the assessment of the proper amount to fix, I am of the view that it is proper and in line with the justice of this particular case and the attendant ghastly consequences that may visit the plaintiffs, particularly if an exorbitant amount is fixed, to point out the peculiarities of this case and of which the registrar may understandably be not aware. From the papers filed and matters, which have served and have been already argued and decided by this court, I find it only proper and fair to place the registrar on the *qui vive* for what may be the judicial solicitudes expressed above.

[38] I should point out that an understandable, yet ill-advised feeling may well be engendered in the minds of the unwary, namely that in ordering the plaintiffs to pay security for costs in this case, the court may well have been guilty of speaking with a 'forked tongue' because in the other related case where the plaintiffs were being called upon by other defendants in the matter to pay security for costs, the court declined the application for security. It must be considered that these two cases are chalk and cheese or apples and oranges if you will. If another alternative is needed to emphasise the difference between the two cases, it is water and paraffin!

[39] The major and determining difference is that in the other *Martucci* case[9], the parties i.e. both the plaintiffs and defendants were *peregrini* of this court, the defendants could have the costs order issued satisfied in Italy where all the parties are domiciled and have property. In the present case, however, the defendant is an *incola* of this court and the authorities previously referred to suggest that the court will normally lean in favour of granting security for costs in favour of an *incola* if the *peregrinus* plaintiff does not have property in this jurisdiction with which to satisfy whatever writ as regards to costs the court may issue in case of an unsuccessful claim by the *peregrinus* plaintiff.

[40] In the premises, no plausible argument regarding inconsistency or contradiction can properly lie at the doorstep of the court. Mr. Vlieghe found it fit to admonish the court not to approach the current matter with a sense of *de'ja'vu* because of the underlying differences in the cases. No opiates operated in the mind of the court to have induced it to consider that a sense of *de'va'vu* was possible in the circumstances and Mr. Vlieghe should stand assured in that regard.

Alleged delay in lodging application for security for costs

[41] As intimated earlier in the judgment, the plaintiffs, as they did in the other *Martucci* matter, raised the point of law that the court should disincline towards

[9] (I 2295/2015) [2016 NAHCMD 149 (18 May 2016) (*supra*).

refusing the application for security for costs for the reason that the defendant filed its application for payment of security for costs after what can be considered to have been an inordinate delay.

[42] Cited in support of this proposition were the provisions of rule 59 (1) which call upon an applicant for security for costs 'to demand security for costs from another . . . as soon as is reasonably practicable after the commencement of proceedings . . .' It was argued that the notice in the instant case was delivered after what may be regarded as an unconscionable delay from the point at which the proceedings were lodged by the plaintiffs.

[43] In support of their case, the plaintiffs relied on *Blastrite (Pty) Ltd v Genpaco Ltd*.[10] There, the court dealt with the matter of delay in demanding security for costs in the following manner:[11]

> 'As to delay, the general rule is that a party is expected to apply expeditiously for security but may seek additional security at any stage, although an unreasonable delay in doing so may be decisive in the exercise of the court's discretion.'

Also emphasised in this judgment was that it was alleged that the applicant for security for costs in that matter had not given an explanation for the delay. The court, was, based on this and other cases, urged to non-suit the plaintiffs in relation to the issue of security for costs and dismiss the application.

[44] In the instant case, it is the plaintiffs' case that the defendant waived its right to claim security for costs when it put its imprimatur as it were, to the case management report in which it initially indicated that security for costs would be demanded but that such demand did not thereafter eventuate, even within a reasonable time. I must mention that waiver must be approached with caution for a party that is found to have waived its rights, must have done so with full knowledge and appreciation of its election and the consequences thereof. There is no evidence that the defendant in this matter elected to discontinue

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[10] 2016 (2) SA 622 (WC) at para [14].
[11] *Supra* at para [14].

the security for costs route with full knowledge of the attendant consequences and with a presence of mind thereto.

[45] I am of the view, in the instant matter that the position in South Africa may well materially differ from the position in this jurisdiction in so far as the question of security for costs is concerned. I say so for the reason that in this jurisdiction, issues of security for costs are raised early in the proceedings, normally in the case planning conference filed in terms of rule 23 and this appears to have been the case in this matter as the defendants evinced their intention to demand security for costs very early in the proceedings.

[46] Where an intimation is made of the desire to bring such an application in the case plan, I am of the view that the party against whom security is intimated to be demanded is thereby placed on the *qui vive* and may not just wish or 'silence' the intimated demand away. They should enquire if the other party still intends to pursue the said step and put them on notice that if they do not do so, they may waive their right to do so.

[47] Once a case plan is adopted by the court, it becomes a court order and a party that fails to comply therewith may be sanctioned in an appropriate manner as stated in rule 53. It is in that forum that a party may properly forgo its right to bring an application for security for costs in my view, having been given notice or faced some sanction for not complying with the case plan or management conference order, as the case may be.

[48] In this regard, this court has held that the court will not lightly sanction a party to the extent of denying it an opportunity to pursue its claim without having afforded it an opportunity to explain its delay and to show cause why it should not be censured therefor. In this regard, a party fully aware that the other has fallen short of complying with a case plan order or such other document, may not cross its fingers that the other party does not discover its shortcoming until a long time has elapsed. In my view, the ethical thing to do is to alert the other side and point to them the consequences to follow should they not attend to the

shortcoming. A simple letter, of a few lines to the adversary can and should suffice. This, the plaintiffs did not do and seem desirous of pouncing upon the delay alleged in this case to their benefit.

[49] The plaintiffs placed reliance on the case of *Boost Sports Africa (Pty) Ltd v South African Breweries Ltd.*[12] There, the court said:

> 'Delay in itself is not an automatic bar to an application for security for costs. It is but one of the factors a court may take into account in determining whether to deprive a defendant of the benefit of security for any adverse costs order that may be made against an *incola* plaintiff company. I accept unreasonable delay, depending on the circumstances of a particular case, may be decisive in the exercise of the court's discretion.'

[50] In any event, I am of the view that the delay in demand for security has been explained by the defendants in this matter and it is chiefly on account of the file having been transferred from Messrs. Andreas Vaatz & Partners to the defendant's present legal practitioners of record. This was followed up by an intimation that the parties wished to consolidate this matter with the other case I have referred to earlier.

[51] I am of the considered view that although there was some delay in this matter in actually filing the demand, that should not on its own serve as a bar to the defendants, considering the explanation given, together with the fact that the case planning conference had intimated the issue of security for costs. More vigilance would have however been expected of the defendant in following up on the issue of security for costs notwithstanding the change in legal practitioners.

Costs

[52] I am of the view that the fair order to make in the circumstances, considering that each party has had a fair measure of success, is that each

[12] 2014 (4) SA 343 (GP).

party should bear its own costs. Although I found that the defendant did explain the delay in launching the application for security for costs, I am of the view that its delay should also serve to disallow it the costs it may well have been entitled to considering its relative success.

Conclusion

[53] In the premises, I am of the considered view that the point raised regarding the delay in filing of the application for security for costs should fail. A reasonable explanation has, besides the other observations I made been given for the delay in the circumstances.

[54] Having regard to all the foregoing, I am of the opinion that the proper order to make in circumstances is the following:

1. The application for the amount of security for costs to be determined by this court is dismissed.
2. The 1st plaintiff is ordered to furnish security for costs to the defendant in a manner, form and quantity to be assessed by the registrar in line with the guidelines set out in this judgment.
3. The Registrar is ordered, within 7 days of the date of this judgment, to arrange a meeting for the parties where at the assessment of the nature, form and quantum of the security for costs is to be made.
4. Should the plaintiffs fail or neglect to comply with the order for security for costs issued by the Registrar within a reasonable time, the proceedings shall be stayed pending compliance.
5. Each party is ordered to pay its own costs.
6. The matter is postponed to 14 September 2016 at 15h15 for status hearing.

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TS Masuku

Judge

APPEARANCES:

PLAINTIFFS:	B. De Jager
	Instructed by Francois Erasmus & Partners
DEFENDANT:	S. Vlieghe
	Instructed by Koep & Partners