CASE NO.: SA 9/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between

NORTHBANK DIAMONDS LIMITED

Appellant

And

FTK HOLLAND BV **First Respondent**

EXOTIC INTERNATIONAL (PTY) LTD **Second Respondent**

AUSSENKEHR TOWN DEVELOPERS (PTY) LTD **Third Respondent**

AUSSENKEHR FARMS (PTY) LTD **Fourth Respondent**

GRAPE VALLEY PACKERS (PTY) LTD **Fifth Respondent**

NAMIBIA NURSERIES (PTY) LTD **Sixth Respondent**

NAGRAPEX HOLDINGS (PTY) LTD **Seventh Respondent**

CORAM: Strydom, C.J., O'Linn, A.J.A. *et* Chomba, A.J.A.

HEARD ON: 11/10/2001

DELIVERED ON: 21/02/2002

APPEAL JUDGMENT

STRYDOM, C.J.: This is an appeal from a decision of a single Judge, sitting in first instance, dismissing an application by the appellant for the granting of an order for the security for costs brought against the seven respondents. The appeal was initially brought to the Full Bench of the High Court as of right. However Act No. 10 of 2001 amended the High Court Act, Act No 16 of 1990, by the abolition of appeals to the Full Bench of the High Court and granting to appellants, in this instance, a right of appeal directly to the Supreme Court. Section 9 of that Act further provided that appeals to the Full Bench of the High Court still pending at the date of promulgation of Act No. 10 of 2001 shall stand removed to the Supreme Court of Namibia.

The seven respondents together with three others, namely Namibia Grape Growers and Exporters Association, Namibia Farm Workers Union and Aussenkehr Small Businesses Association, which latter Association later withdrew from the proceedings, launched an application in the High Court against the appellant, as third respondent in the main application, and two others namely The Minister of Mines and Energy and the Minerals Ancillary Rights Commission. I will herein further refer to the appellant as Northbank and to the respondents as they are styled in the main application namely as third to tenth applicants.

The seventh applicant is the owner of the farm Aussenkehr where grapes are grown for the export market. All the other applicants are directly or indirectly involved in the business of marketing the grapes or are themselves growers. Northbank is a mining company which was granted a licence to prospect for diamonds on the property of the seventh applicant. The application launched by the applicants, as far as Northbank is concerned, is primarily aimed to stop it from continuing with its activities. Various declarators were asked, *inter alia*, on the basis that the rights sought by Northbank infringed on the seventh applicant's rights in terms of the Constitution, its rights in terms of the Foreign Investment Act, Act No. 27 of 1990 and various provisions of the Minerals Act, Act No. 33 of 1992. The applicants also attacked the renewals of Northbank's prospecting licence and asked that they be declared null and void.

The Counsel who appeared before us, namely Dr. Henning, assisted by Mr. Rossouw, for Northbank, and Mr. Barnard, for all the applicants, also appeared in the main application. The Court, at the outset, allowed certain documents and affidavits which had formed part of the record herein but which were not so included.

Notices in terms of Rule 47 of the High Court Rules preceded the application for security for costs. In these notices security was claimed from each of the applicants in an amount of N$600,000 – 00. This amount was based on a calculation made by a costs consultant. Liability for payment of security was denied by the applicants which then led to

the launching of a formal application in which Northbank claimed as follows:

> "(a) That the third applicant, fourth applicant, sixth applicant, seventh applicant, eighth applicant, ninth applicant and tenth applicant, jointly and severally be ordered to furnish security for the third respondent's costs in the main application in an amount of N$600,000.00, alternatively in an amount to be determined by the Registrar of the above Honourable Court;
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> (b) That the third applicant, fourth applicant, sixth applicant, seventh applicant, eighth applicant, ninth applicant and tenth applicant be ordered to furnish the said security within a period of 7 (seven) days after date of this order, alternatively after the date of determination of the amount by the Registrar of the above Honourable Court;
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> (c) That, in the event of the security not being furnished, leave be granted to the third respondent to apply on the same papers, duly amplified if necessary, for the dismissal of the main application with costs;

(d) Directing the third applicant, fourth applicant, sixth applicant, seventh applicant, eighth applicant, ninth applicant and tenth applicant, jointly and severally, to pay the costs of this application;

(e) Further and/or alternative relief "

The liability of the applicants to furnish security for costs was based, firstly on common law because of the fact that the third applicant, FTK HOLLAND BV, is a *peregrinus*. It is described as a *"beschlote vennootschap"* duly registered in terms of the laws of Holland, with its registered offices at Klappolder 191-193, NL-2665MP, Bleiswijk, Holland. (See in this regard Witham v. Venebles, (1828) 1 Menz 291 and Saker and Co. Ltd v. Grainger, 1937 AD 223 at 227). Secondly, as far as the other applicants were concerned they were all limited companies and, although *incolae* of this Court, their liability arose from the provisions of sec. 13 of the Companies Act, Act No 61 of 1973.

In regard to a *peregrinus* Dr Henning pointed out that the general principle was that a Court in proceedings so initiated was entitled to protect an *incola* "to the fullest extent." (See Saker's case p227). Unless a *peregrinus* has within the area of jurisdiction of the Court immovable property with a sufficient margin unburdened to satisfy any costs order the general rule was that security had to be furnished. (See Herbstein and van Winsen: The Civil Practice of the Supreme Court of South Africa, 4th ed. P328.) However Counsel referred the Court also to the case of Magida v. Minister of Police, 1987(1) SA 1 (A) where the South

African Appeal Court now laid down certain criteria which should be considered when the Court exercises its discretion. (See also SA Iron & Steel Corporation Ltd. v. Abdulnabi, 1989(2) SA 224 at 233F-H.)

In regard to the *incolae* companies the Companies Act provides as follows:

> "13. Security for costs in legal proceedings by companies or bodies corporate.
>
> 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 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 security is given."

Section 13, and its predecessor, section 216, was on various occasions the subject of interpretation by the Courts. In Beaton v SA Mining Supplies (Pty) Ltd., 1957(2) SA 436 (WLD) at 439 E-F, the following was stated:

> "I have therefore come to the conclusion that the applicant has established by credible testimony that there is reason to believe that if the respondent is unsuccessful in the action, it will be unable to pay the costs of the applicant. The remaining question to be determined is whether the court should exercise the discretion conferred on it under section 216 in favour of the Applicant."

Both Counsel submitted, and correctly in my view, that section 13 requires an investigation in two stages. Firstly the Court must consider

whether the applicant has established by credible testimony that there is reason to believe that the company or body corporate, if unsuccessful, will not be able to pay the costs of the defendant applicant. If the Court is not so satisfied that is the end of the matter. However if the Court is satisfied that a case was made out it must then exercise the discretion conferred on it by the section. (See also Vumba Intertrade CC v. Geometric Intertrade CC, 2001(2) SA 1068 (W) and Henry v. RE Designs CC, 1998 (2) SA 502(C) where the Courts, though dealing with section 8 of the Close Corporations Act, concluded that nothing turns on the difference in wording between that section and section 13 of the Companies Act.)

In regard to when the Court has "reason to believe" that an applicant or plaintiff company will be unable to pay a cost order against it, the following was stated in the Vumba Intertrade-case, *supra*, at page 1071 E-H, namely:

> "It is necessary to emphasise that, before a Court can decide how to exercise the discretion vested in it by s 8 of the Close Corporations Act, there must be "reason to believe" that the respondent close corporation will be unable to pay the costs of the defendant applicant if successful in its defence: Viviers v. Williams Builders & Contractors Ltd. 1936 TPD 273 at 274; Henry v. RE Designs CC (supra at 507H). Although the phrase "there is reason to believe" places a much lighter burden of proof on an applicant than, for instance, "the Court is satisfied" (Trustbank van Afrika Bpk v. Lief and Another 1963 (4) SA 752(T); Agrodrip (Pty) Ltd v. Fedgen Insurance Co Ltd 1998 (1) SA 182 (W) at 186 E), the "reason to believe" must be constituted by facts giving rise to such belief (cf London Estate (Pty) Ltd v. Nair 1957 (3) SA 591 (D) at 592 F) and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice

> In short, there must be facts before the court on which the court can conclude that there is reason to believe that a plaintiff close corporation will be unable to satisfy an adverse costs order; and the onus of adducing such facts rest on the applicant."

Although it may not always be easy to find facts which would support the "reason to believe" it follows from what is stated above that surmise, speculation and even a belief, which is not supported by the necessary facts, would certainly not suffice. There cannot be any doubt that the onus to prove so is on the applicant however, he may be assisted in his task by material or facts put before the Court by the respondent company, and where the matter is peculiarly within the knowledge of a respondent it was laid down in various cases that less evidence will suffice to establish a *prima facie* case than generally required. (See Gericke v. Sack, 1978 (1) SA 821 (A) at 827 E-G; Monteoli v. Woolworths (Pty) Ltd, 2000 (4) SA 735 (W) at 742 D-G). However less evidence does not open the door for surmise or speculation. I also agree with Dr. Henning that the words "credible testimony" mean no more than evidence capable of being believed. (See Claassen, Dictionary of Legal Words and Phrases, Vol 1, 347).

As pointed out previously, once the Court is satisfied that there is credible testimony which shows that there is reason to believe that an applicant company will not be able to pay a cost order, if unsuccessful, the Court may order it to furnish security for such costs. It was stated in Lappeman Diamond Cutting Works (Pty) Ltd v. MIB Group (Pty) Ltd (No 1), 1997 (4) SA 908 (W) at p 919G-H that the purpose of sec. 13 is to protect

the public in litigation by bankrupt companies which may drag them from one court to the other without being able to pay costs if unsuccessful.

Before the decision of the Supreme Court of Appeal in Shepstone & Wylie and Others v. Geyser NO, 1998 (3) SA 1036(SCA) it seems that the Courts generally held the view that once it was established that there was reason to believe that a company would not be able to pay a cost order, if unsuccessful in its litigation, a defendant or respondent should not be deprived of the benefit, namely to be furnished with security for costs, unless special circumstances existed. (See Fraser v. Lampert NO, 1951 (4) SA 110 (TPD) at 115B; Trust Bank van Afrika Bpk. v. Lief and Another, 1963 (4) SA 752(T) at 754H *ad fin*; Cometal-Mometal SARL v. Corliana Enterprises (Pty) Ltd, 1981 (4) SA 662 (W) at 663F-G; Petz Products (Pty) Ltd v. Commercial Electrical Contractors (Pty) Ltd, 1990 (4) SA 196 (CPD) at 206 E-H and Henry v R E Designs CC – case, *supra*, at 508B – 509I.)

However, in the Shepstone & Wylie- case, *supra*, Hefer, JA, (as he then was), at p 1045, discussed this approach and stated at 1045I – 1046C, as follows:

> "In my judgment, this is not how an application for security should be approached. Because a Court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of all the relevant features, without adopting a pre -disposition either in favour of or against granting security. I prefer the approach in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 CA at 540a-b where Peter Gibson LJ said:
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> > 'The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the

> plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.'
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> These are probably the 'considerations of equity and fairness' mentioned in *Magida v Minister of Police,* 1987 (1) SA 1 (A) at 14D-F in regard to the consideration of an application for security for costs against a *peregrinus*, and which should, in my judgment, also prevail in an application under s 13."

(Discussing the position in English law under the provisions of section 447 of the 1948 Companies Act, which are almost similar to our section 13, and its predecessor section 216, Lord Denning, in the case of Sir Lindsay Parkinson & Co Ltd v Triplan Ltd, [1973] 2 All ER 273 CA, then already stated that the discretion exercised by the court, "is unfettered even though there is before me credible evidence that if Parkinson are successful in their defence Triplan will be unable to pay their costs.")

As to the nature of the discretion which a Court must exercise when dealing with section 13, the following was stated in the Shepstone & Wylie-case, *supra,* at p 1044I – 1045D, namely:

> "The last preliminary matter relates to the discretion which a court has to grant or refuse relief under s 13. Numerous judgments of this Court are to the effect that the power to interfere on appeal with the exercise of a discretion is limited to cases in which it is found that the trial Court has exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons (See, for example, *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782B and the cases cited there.) The judgment in *Knox D'Arcy Ltd and Others v Jamieson and Others (supra)* reveals, however, that this is not the correct approach in cases where the word 'discretion' is not used in the strict sense. To say,

> for example, that the Court has a discretion to grant or refuse an interim interdict means no more than that 'the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a conclusion' (*per* EM Grosskopf JA at 316 H-I). In such cases the Court of appeal is at liberty to decide the matter according to its own views of the merits. (See also *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA at 401G-402C.) Accordingly, whenever such a Court is asked to interfere, the nature of the discretion must first be ascertained. This will not be a simple exercise where a discretion is conferred in a statute by the use of the word 'may' which, standing on its own, is not particularly informative."

The Court, in the Shepstone & Wylie-case, *supra*, was not called upon to determine the nature of the discretion exercised by a Court of first instance in terms of section 13 because the Court *a quo,* in that case, had wrongly come to the conclusion that section 13 did not apply to Liquidators of insolvent companies litigating on behalf of such company. However this issue was decided by a Full Bench of the Witwatersrand Local Division in the matter of Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another, 1999 (4) SA 799 (WLD) at 804G – 808B. After a thorough discussion of the issue, Cloete, J, who wrote the judgment of the Court, came to the conclusion that the discretion with which a Court of first instance is vested by section 13 is a narrow or strict one. Four reasons for this conclusion are given by the learned Judge, namely:

> "(1) Section 13 is essentially concerned with costs – a matter invariably held to involve the exercise of a discretion in a narrow sense.
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> (2) 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 – a decision which may be made, in terms of

> the section 'at any stage' of proceedings (and therefore *in medias res*) – but also, where it grants such an order, whether the litigant should be allowed to proceed until such security has been provided. The regulation of a Court of its own procedure is also a matter usually to involve a discretion in the narrow sense.
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> (3) The discretion requires in essence the exercise of a value judgment and there may well be a legitimate difference of opinion as to the appropriate conclusion.
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> (4) Appeals against the exercise of the discretion conferred by s 13 should be discouraged in the absence of some demonstrable blunder or unjustifiable conclusion on the part of the trial Court, otherwise the decision on the merits of a matter before the Court would be delayed by an appeal on an application which (to use the words of Innes CJ in *Warner's* case *supra* at 310), 'marks no stage in the progress of the case but is quite outside and incidental to it'."

Except that I would be hesitant to categorise, and thereby to limit, the instances where a Court of appeal would be entitled to interfere in the exercise of the discretion by a Court of first instance as set out in paragraph (4) above, for fear of introducing a more stringent qualification into what is already a limited jurisdiction for a Court of appeal to interfere (See Shepstone & Wylie-case, *supra*, at 1044I-1045D) I, with respect agree with the reasoning and conclusion of the learned Judge. I also did not understand Counsel for Northbank to submit otherwise.

This brings me to the merits of the appeal. I will first deal with the application based on section 13 of the Companies Act. This, as previously pointed out, first of all involved a determination by the Court – *a-quo* whether there was credible testimony giving rise to a reason to believe that any of the applicant companies would not be able to pay the

costs of Northbank if the latter was successful in its defence of the application.

The grounds of appeal, regarding this part of the case, are aimed at, what is termed, the findings of the Court *a quo* that the applicants were jointly and severally able to pay any order of costs which may be awarded to Northbank if it should succeed in its defence in the main application. That in my opinion is the main thrust of Northbank's attack although certain grounds also individually attacked certain findings made by the Court and complained of factors not considered by the Court, which it should have. During argument Northbank's Counsel submitted that the finding of the Court *a quo* that the issue is really one whether the overall financial position and the pooled financial resources were sufficient to take care of any costs order made against the applicants meant that the Court never reached the stage where it was called upon to exercise a discretion as it did not get past the requirement for the exercise of such a discretion laid down by section 13, namely the reason to believe that one or some or all of the applicants would not be able to comply with such an order. This, so it seems to me, presupposes a finding by the Court *a quo* that all the applicants were pecunious and had the necessary financial resources to pay such an order. In my opinion the Court never made such a finding either expressly or by implication.

Although, on the other hand, the Court did not make a specific finding that some of the applicants, or all of them, were impecunious, its reference to the pooled financial resources and overall financial position of all the applicants would have been meaningless if the Court did not

come to the conclusion that, at least in regard to some of the applicants, there was reason to believe that they would not be able to pay an order for costs. The Court *a quo*, in my opinion clearly demonstrated its understanding of section 13. The Court, in its judgment, referred to the words of the section namely, that the Court may make an order if there is reason to believe, and then continued and stated:

"My understanding of the statement is that the section confers a discretion on the court to make an order *if the requirements of the section have been satisfied."*

The Court itself supplied the emphasis to the last part of the sentence. The reference to the requirements of section 13 can only refer to the "reason to believe". The Court then dealt with the financial position of some of the applicants and concluded that the pooled resources of all the applicants would be sufficient to pay any order of costs made against the applicants jointly and severally. Although the Court, in the exercise of its discretion, also took other factors into consideration, such as the possibility that the backers of the various companies would come to their rescue in the case of a costs order, it came to the conclusion that Northbank did not show that the pooled resources of all the applicants were not sufficient to pay its costs.

Counsel on both sides also raised various other arguments. Mr. Barnard submitted, *inter alia*, that because of the lateness of the application the

Court should dismiss it. He further submitted that the appeal really only concerns costs and should simply for that reason not be entertained by this Court. He also questioned the *bona fides* of Northbank and submitted that it is a company entirely run and financed by outsiders. Dr. Henning, on the other hand, submitted that there is reason to believe that each and every one of the applicants would be unable to pay an order of costs if Northbank should be successful in its defence of the main application. Counsel pointed out that the applicants have omitted to substantiate any of their allegations by placing financial documents and Balance Sheets before the Court. Because of the conclusion to which I have come it will not be necessary for me to deal with all of these contentions.

On all the evidence placed before the Court it seems to me that in regard to the fourth, sixth and ninth applicants there is reason to believe that they would be unable to comply with an order of costs against them. In regard to some of them there is a dearth of information concerning their financial position. Until the transformation, alleged in regard to the fourth applicant, takes place, its financial position is uncertain. It suffered a loss of N$l,726 million during the 2000 financial year. As far as the sixth applicant is concerned the proclamation of the township has not yet happened and in any event, as was pointed out by Dr. Henning, that is no indication by itself of financial ability. The ninth applicant was only registered in November 1999 with an issued share capital of N$100, and apart from the value of some grape sticks very little other information was given. In regard to these applicants, or some of them, the omission to give financial information such as balance sheets etc. may very well

lead to the inference that had they given such information, that would not have provided any answer to the demand for security for costs. (See in this regard Milne v. Sadowa Minerals (Pty) Ltd, 1956 (2) PH F89 (W); Equitable Trust and Insurance Company of SA Ltd v. Registrar of Banks, 1957 (1) SA 689 (T) at 691D-F; Petz Products (Pty) Ltd v. Commercial Electrical Contractors (Pty) Ltd, 1990 (4) SA 196 © at 206E-G and Henry v. RE Designs CC, *supra,* at 512E.)

However in regard to the seventh Applicant it was alleged, and accepted by the Court *a quo*, that it had received some N$9,23 million in respect of 92 000 of approximately 270 000 boxes of Aussenkehr grapes which were sold to overseas markets and paid approximately N$1,3 million in cash as wages to its workers. It was the owner of Aussenkehr farm of which portion 7 was sold for an amount of N$ 18 million. The remainder of the arable land would fetch about N$500 million in terms of current market value. It was thus accepted that the seventh applicant had generated a nett income of N$9,23 million during the current grape season and had, as at 26 January 2001, the date on which the application was due to be heard, liquid funds of a little over N$979 000 in its bank account, which amount is subject to fluctuation. The highest credit balance was N$1,229 million and the lowest N$3015 debit.

Dr. Henning criticized this information and pointed out that again no financial statements were put before the Court. In this regard it was pointed out by Cloete, J. in Vumba Intertrade CC-case, *supra,* at 1072A that the furnishing of a balance sheet so that the Court could see by how much a corporation’s assets exceeds its liabilities could not be elevated

to a rule which permits a defendant to an order for security where such documents were not produced on demand. That, so it seems to me, would depend on the strength of the case made out and the other information put before the Court, also information put before the Court by the company. In this regard there is the value of the land possessed by the seventh applicant. Dr. Henning said that the value was based on hearsay evidence. That may be true to a certain extent but this value can be compared with the price for which previously land was sold for N$l8 million. This price was paid for 778,3760 hectares of arable land according to Walker, the deponent on behalf of Northbank (See the record p 16, pa 20.4, vol. 1). Even if it was accepted that the value of the remainder, which comprises some 10 000 hectares of arable land, is not necessarily the same as that for which portion 7 was sold, it still remains that such land must be worth many million dollars. This is, in my opinion, supported by the fact that two bonds were registered over the property, one in the amount of N$38,5 million and another of N$5 million. It is so that these bonds are liabilities but at the same time it is also a reflection of the value of the land over which they were passed. The first bond was serviced by payment of an amount of approximately N$6 million for the year in March 2001. The income of N$9,23 million was not substantiated other than by a composite statement, as was pointed out by Counsel, but on the other hand it could also not be denied. Documents to substantiate the sale of so many boxes of grapes would in all probability have swollen the record far beyond what it already is and would have been impractical. In regard to the credit balance of N$979 000 on its bank account, nothing much could be said except that the seventh applicant was being selective in placing only one page of its

statement before the Court. I am satisfied that there is no reason to believe that the seventh applicant would be unable to pay any order of costs made against it. The above evidence, in my opinion, clearly showed that the seventh applicant would be able to generate sufficient funds to pay any adverse costs order.

In regard to the eighth applicant it was alleged that it owns a store worth $1 million American dollars which was built with a loan in that amount and that it made a trading profit of N$400 000. During the current season it packed 150 000 cartons of grapes at a packing fee of N$3,5 million. The tenth applicant owns land on Aussenkehr the value of which was alleged to be N$25 million dollars based on the current market value in that area and has a loan of N$18 million.

In its replicating affidavit, and in answer to the applicants' set out of their financial position, the deponent on behalf of Northbank stated that although the applicants did not have to prove that they were solvent, they had to prove that they were possessed of sufficient liquid assets to pay Northbank's costs if ordered to do so. If this means that the company must have some liquid fund ready and available to pay for such costs then I cannot agree. In my opinion the company must be able to show that it has free assets which can easily be liquidated or in respect of which the necessary funds can be raised to pay an order for costs.

The Court *a quo* exercised its discretion against Northbank on the basis that the pooled resources of the applicants were sufficient to pay the

costs if Northbank were successful in its defence in the main application. The first requisite for such a finding is of course that the facts must be such that if an order of costs is made that it will be made against all the applicants jointly and severally. That the Court has a discretion to make such an order is not in dispute. In Minister of Labour v. Port Elizabeth Municipality, 1952 (2) SA 522 (A) at 537A-D the following was stated:

> "I have cited these examples to show that the practice in Voet's time was quite different from modern practice, for what Voet says does not apply to-day. This being so, it seems to me to be unsafe to accept Voet as a guide in matters of costs. It is, however, interesting to note that Voet in 42.1.23 recognised that the Court has a wide discretion where he said that it would not be unjust that one of several co-litigants in the same law suit should be alone condemned to pay the costs of suit, insofar as he alone caused the costs to be increased by his own fault and obstinacy.
>
> The doubt, which seems to have been raised in Gray's case, supra, as to whether a Court can grant costs jointly and severally against more than one defendant, appears to me to have no substance. In modern practice a trial Court has a discretion as to costs and the successful party should, as a general rule, have his costs."

See further Cilliers, Law of Costs, (2nd ed.) p175 and Yassen and Others v. Yassen and Others, 1965 (1) SA 438 (N) at 444F-H. In Blou v Lampert and Chipkin NNO and Others, 1972 (2) SA 501 (T) at 505E-G it was said that:

> "There is no fault to be found with the suggestion that the unsuccessful opponents be ordered to pay costs jointly and severally because if no such special order is made an order for costs against them as *consortes lites* means that each one of them is only liable for his aliquot share of the costs. Where they have made common cause with one another in bringing the unsuccessful proceedings or in opposing them, the successful party is entitled to ask that they be ordered to

> pay his costs jointly and severally even if there has been no specific prayer to that effect…"

In the present instance all the applicants, also those not involved in this application, made common cause and joined together to bring the main application against Northbank and the other two respondents. That the case of the one is also the case of the other was demonstrated by the fact that they confirmed the affidavit by their deponent Ndauendapo, who concluded his affidavit by stating that he "prays on behalf of the applicants for the relief set out in the Notice of Motion". There is therefore a total overlapping of the causes of action of the various applicants and if an order of costs is made in favour of Northbank it will be made jointly and severally against all the applicants. After all, it was the finding of the Judge*-a-quo,* which is also the Judge in the main application, that in regard to costs it is the pooled resources of all the applicants that are at stake. That is also the attitude of Mr. Barnard and he would hardly be able to submit otherwise when it comes to a costs order in Northbank's favour at a later stage in the proceedings. It was submitted that some of the applicants might decide to withdraw as did happen in the case of the fifth applicant. It is not clear to me when the fifth applicant withdrew but at this stage we were informed that the case has been argued for a considerable number of days and it is therefore unlikely that further withdrawals would take place. We were also informed that the *locus standi* of certain of the applicants are attacked.

On the allegations made this is of course always a possibility but one which this court can hardly adjudicate upon without going extensively

into the merits of the main application which, as I have understood counsel, is not permissible in applications of this nature. To what extent the Court may consider the merits see Henry v R.E. Designs cc, *supra,* p 508. There was, in any event not sufficient material put before the Court to enable it to undertake such an investigation.

Mr. Barnard, supporting the finding of the Court *a quo*, submitted that where one or more of the applicant companies are shown to be able to pay an adverse costs order and where it is also clear that such order to pay costs will be made jointly and severally, it does not follow that the fact that some of the applicant companies were shown to be impecunious, the Court would order the impecunious companies to furnish security for costs. For this submission Counsel relied on English cases and the interpretation of section 447 of the English Companies Act, 1948, by the Courts.

The early practice in English law in regard to Co-plaintiffs or applicants where one is a *peregrinus* is to refuse an application for security for costs if there is a fund available within the jurisdiction against which a successful defendant can enforce the judgment for costs. (See Porzelack KG v Porzelack (UK), [1987] 1 All ER ChD 1074 at l076 I – 1077a; Sykes v. Sykes, (1869) LR 4 CP 645; D'Hormusgee v. Grey (1882) 10 QBD 13 and Pearson v. Naydler [1977] All ER Ch D 531 at 534c). In regard to the interpretation of sec 447 of the English Companies Act, 1948, which is almost similar to our section 13, this rule of practice was now regarded as a factor which the Court, in the exercise of its discretion, should consider. See the Pearson-case, *supra,* at 535i; In the case of John

Bishop Ltd v. National Union Bank Ltd, [1973] All ER 707 Ch D, also dealing with the interpretation of section 447, the Court ordered security to be given because the Court was not satisfied that the one co-plaintiff "…will necessarily be ordered to pay to the defendants all the costs which they incurred vis-à-vis the plaintiff company."

As far as South African law is concerned the Court was only referred by Mr. Barnard to two cases dealing, to a certain extent, with this issue. That is Kruger Stores And Another v. Koopman and Another, 1957 (1) SA 645 (WLD) and Paradigm Capital Holdings Ltd v. Pap Computer Services CC, 2000 (4) SA l070 (WLD). (This last mentioned case does not seem to me to be of any assistance.) In the Kruger-case, *supra,* at 648 F-H the following was stated:

> "I do not think that there is any substance in the second argument. Mr. Kentridge's point, as I have said, was that even if the applicant company was ordered to give security that would not prevent it from proceeding in the name of the second applicant as agent for the second applicant. I am unable to agree with that. If there are two applicants and one is a company then that one surely can be ordered to give security even though there is another applicant that is not a company. Mr. Oshry's answer to the argument was that that argument could only succeed if the applicant company withdrew from the proceedings, leaving a non-company applicant as the sole applicant, ant I am disposed to agree with that argument; as long as the company remains on the record as an applicant with a potential liability for costs that applicant can be ordered to give security."

I do not think that anyone can argue with the statement that as long as the company remains on record as an applicant with a potential liability for costs that such company can be ordered to give security for costs.

The question whether the Court will do so in the exercise of its discretion where the other co-applicant is pecunious and where there is a total overlapping of causes of action, was however not decided.

In the exercise of its discretion in terms of section 13 of the Companies Act the Court "…must decide each case upon a consideration of all the relevant features…" (My emphasis. See the Shepstone-case, *supra,* p1045 I.) In the present case where all the applicants have made common cause and where it is clear that if Northbank is successful in its defence that an order jointly and severally for the payment of such costs will be made by the Court, then if one or more of such applicants would be able to foot the bill, that is a feature which the Court has to consider in the exercise of its discretion. Dr. Henning, if I understood him correctly, conceded this. In fact such a situation where one or more of the appellants are well able to pay an order for costs made jointly and severely would remove any possible injustice to Northbank of not being compensated for its costs if it is successful in its defence of the claims instituted by the applicants bearing in mind that one or more of the applicants are able to pay its costs. (See Keary Developments Ltd v. Tarmac Construction Ltd and Another, [1995] 3 All ER 534 (CA) at 540a-b-).

It therefore seems to me that the Court *a quo* was entitled to consider the overall financial position of the applicants and their pooled financial resources and that this Court, sitting as a Court of appeal, will not interfere with the exercise of its discretion by the Court *a quo.*

As far as the third applicant is concerned, that is the *peregrinus* to the Court's jurisdiction, it seems that the finding of the Court *a quo* that the pooled resources of all the applicants were sufficient to ensure payment of any order of costs in favour of Northbank also operated in favour of the *peregrinus* company. As the same facts, concerning a joint and several order for costs, which applied to the incola companies, also applies to the *peregrinus* company, it seems to me that there is likewise no basis on which this Court, sitting as a Court of appeal, can interfere with the exercise of its discretion by the Court *a quo.* The attack on this part of the judgment must therefore also fail.

In the result the appeal is dismissed with costs.

(signed) STRYDOM C.J.

I agree.

(signed) O'LINN, A.J.A.

I agree.

(signed) CHOMBA, A.J.A.

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