IN THE HIGH COURT OF SWAZILAND

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CASE NO. 929/98

IN THE MATTER BETWEEN

SAMUEL S. EARNSHAW & CO	APPLICANT
VS	
ZI-BLENDS (PROPRIETY) LIMITED	RESPONDENT
CORAM	S.B. MAPHALALA - A J
FOR APPLICANT:	MR L. HOWE
FOR RESPONDENT:	MR P. DUNSEITH

JUDGEMENT ON URGENT APPLICATION

(28/05/98)

Before court is an urgent application where the applicant is applying for a rule nisi to issue calling upon the respondent to show cause on the 5th June, 1998 why:

2.1 (a) The respondent should not be ordered to pay security for costs in terms of section 207 A of the Companies Act No. 7 of 1912 in respect of the action and summary judgement proceedings pending before this court under the afore mentioned case number in the sum of E25,000-00 (twenty five thousand emalangeni) or in such sum as this court or the Registrar of this court may determine within 10 (ten) days of the date that it is ordered to do so.

2.2 (b) In the event that the respondent is ordered to pay security for costs, the action and the application for summary judgement proceedings should not be stayed pending payment of security for costs.

2.2. The action and the application for summary judgement proceedings should not be stayed pending the finalization of this application.

3. That paragraph 2.2. hereof operate as a temporary interdict and staying order pending the final determination of this matter.

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4. In the event that respondent is ordered to pay costs within the time or period stipulated for it to do so, and fails to pay, the action and the application for summary judgement be dismissed with costs.

5. In the event that the respondent files the security for costs within the stipulated period the applicant shall file its affidavit resisting summary judgement or take such steps as it may be advised within ten (10) days of date hereof.

The applicant is represented by Mr Howe and the respondent is represented by Mr Dunseith.

The court heard submissions on the 27th May, 1998 where Mr Dunseith intimated that he is opposing the application and make submissions from the bar as he was not given enough time to file papers in accordance with the rules. The matter then proceeded in that vein.

Mr Howe for the applicant contends that the applicant is an "incola" in terms of section 207 A of the Company Act which provides as follows: "where a limited company is a plaintiff or applicant in any legal proceeding the court having jurisdiction in the matter may, at any stage (my emphasis), if it appears by credible testimony that there is reason to believe that the company or the liquidated of a limited company 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 still (sic) the security is given".

To prove a credible case Mr Howe referred the court to paragraph 7 of the affidavit of Nelson Nxumalo he deposed in another case that the respondent had for a period in excess of one year, failed and or refused to pay the agreed monthly rental for the lease of the motor vehicle. The respondent Managing Director, Mandla Hlatshwako, explained that the respondent was no longer in business and that it did not have the means to meet rentals. Further, Mr Howe contended that according to annexure "SSE2" a letter from the Registrar of Companies the respondent has not submitted annual statutory returns and was thus in default of the payment of E1,180-00 being licence fee plus penalties in terms of the requirements of the Company Act. He argued furthermore that all has to be shown is that the company cannot pay its debts.

In reply, Mr Dunseith submitted that in cases of this nature the court has a discretion to either grant or not grant security for costs. In the absence of opposing papers from the respondent the court may on its own on perusal of the papers before it find whether or not a case to order a stay of proceedings and security for costs has been established. He referred the court to page 322 of the Civil Practice of the Supreme Court of South Africa (4th ed) by Herbstein and Van Winsen that there are various grounds on which a plaintiff may be ordered to furnish security for costs. Mr Dunseith argued those cases should be brought before the court in terms of Rule 47 of the High Court Rules. He went on to contend that the applicant has not established credible

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testimony in terms of the requirements of section 207 A (supra). He took the court through the papers to show that applicant has not furnished credible evidence. That the affidavit of Mr Earnshaw founding the papers is full of bold statements which are not supported by any other independent testimony. Furthermore that applicant has breached ethical standards by divulging information given to him in confidence as he was attorney for the respondent as some point.

In reply Mr Howe submitted that they are within their rights to proceed in terms of section 207 A of the Company Act. That if they had followed the long form they would have fallen outside the 10 days. He further argued that there is nothing in Mr Earnshaw's affidavit where he said something which is privileged information. That does not mean one cannot defend himself. The applicant cannot say too much because of the problem of confidentiality.

These are the issues before me. First and foremost I agree in toto with Mr Howe that they are entitled in law to proceed in terms of section 207 A of the Companies Act. According to legal authority Rule 47 does not indicate the types of case in which one party is entitled to demand security for costs from the other, it deals only with purely procedural aspect of the matter. Recourse must therefore be heard to the common law and to other statutory provisions which deal with security for cost. (See Erasmus on Superior Court Practice at B1- 340).

The author went on to consider common law and certain relevant statutory provisions but of particular relevance to this case in actions by corporations in terms of section 13 of the Company Act 61 of 1973

(South African Act) which is similar in effect to the Swaziland section 207 A and couched in more or less the same language.

Now having disposed of that I have to decide whether the applicant has made a credible case in conformity with the section. The onus of establishing that the company or its liquidator will be unable to pay costs of the defendant if successful in his defence is on the party applying for security (refer to Roseville Buildings (Pty) Ltd VS Powis & Co (1923) Ltd 1942 NPD 94). It is my respectful opinion that the applicant has discharged this onus in the present case. The fact that respondent had not paid licence fees in terms of the Companies Act is indicative that respondent is in dire financial straits. This fact was not challenged by Mr Dunseith in his address to the court. I agree with Mr Howe is his submissions as to urgency and privilege. That in view of the relationship between applicant and respondent the applicant could not disclose some of the information to support his case, lest he be guilty of unethical conduct. His hands were tied as it were. Applicant is in fact entitled to defend itself.

It is stated law that the court has a wide discretion whether or not to order security to be lodged in any given case and if the defendant "incola" is sufficiently safeguarded in other ways the court will not order the security to be given. In the present case it is my view that the applicant is entitled to security for costs.

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I thus grant an order in terms of prayers 1, 2, 3, 4 and 5. Costs to be costs in the cause.

S.B. MAPHALALA

ACTING JUDGE