REPORTABLE
CASE NO.: SA 5/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MATHIAS HEPUTE	**FIRST APPELLANT**
TAIMI NAMWENYO KANYEMBA	**SECOND APPELLANT**
RAFAEL LASARUS	**THIRD APPELLANT**
RICHARD MBEREMA	**FOURTH APPELLANT**
AMALIA MOSES	**FIFTH APPELLANT**
TROOI WINKLER	**SIXTH APPELLANT**

And

MINISTER OF MINES AND ENERGY	**FIRST RESPONDENT**
NORTHBANK DIAMONDS (PTY) LTD	**SECOND RESPONDENT**

CORAM: Chomba, AJA, Mtambanengwe, AJA, *et* Damaseb, AJA

Heard on: 09/11/2007

Delivered on: 31/10/2008

APPEAL JUDGMENT

DAMASEB, AJA:

[1] This appeal is against the judgment of the High Court (Muller J) ordering the appellants, jointly and severally, to pay security for the costs of the second

respondent in respect to its opposition of an application brought against it by the appellants in the High Court[1]. As regards quantum Muller J said (at 134F-H):

> "[31] With regard to the quantum of the security for costs to be awarded, I believe that I am in a better, or just as good, position to adjudicate this issue as the registrar of the court and a decision by me will avoid any further delay. The second respondent claimed an amount of N$350 000 in his rule 47 notice. Having regard to the history of the previous applications and the submissions by Mrs Heathcote and Mr. Ellis, whose averments are not disputed by expert evidence, except only by the applicants who are laymen in this field, I am satisfied that N$350 000 is a reasonable amount for security for costs. Incidentally, the quantum of the costs in the application for security for costs considered by Manyarara AJ six years ago, was NS600 000 for each of the seven applicants!"

[2] The first to sixth appellants are the applicants in a High Court case (T) A 57/04 ("the main application") in which case they are locked in battle with the present respondents. The appellants are also respondents in the application for security for costs brought by the second respondent in the main application. Because it is concerned with the security for costs application, in this judgment I will refer to first to sixth appellants as "the respondents" and the second respondent (in the appeal) as "the applicant". The main application was commenced in June 2004. Its purpose, it is common cause, is to prevent the applicant from fully exploiting the exclusive prospecting licence (EPL 2101) granted to it by the first respondent ("the minister") and to declare the granting of the EPL by the minister as invalid. The applicant has opposed the main application and proceedings therein have been suspended pending

[1] The judgment of the High Court is reported as *Hepute and Others v Minister of Mines and Energy and Another* 2007 (1) NR 124 (HC)

finalisation of the application for security for costs which has led to the present appeal.

[3] The main affidavit in support of the application for security and the replying affidavit are deposed to by Aaron Mushimba on behalf of the applicant, while the main answering affidavit in opposition to the security application is deposed to by Mathias Hepute, the first appellant in the present appeal.

[4] The notice of appeal consists of a staggering 24 grounds running to 11 pages. It is unnecessary to consider each and every ground separately for, at the end of the day, the appeal turns on whether or not the Court *a quo* misdirected itself in the exercise of its discretion whether or not to grant security for costs (and in the amount it did) against the *incola* respondents on the ground that they are “men of straw” being put up as a front of others.

The delay in setting down the application for security

[5] I wish to dispose of at the outset the ground of appeal that the Court *a quo* should have refused to grant security for costs on the basis that there was an unreasonable delay in the prosecution of the application after close of the pleadings associated with it. That the application for security was lodged in time is common cause and is not in doubt. The Court *a quo* said (at 133H-I):

"[28] The argument by Mr Barnard to the effect that the application for security for costs should be dismissed because of the delay in bringing this application cannot be accepted in the light of the history of this and prior applications. There is no indication that the second respondent has waived its right to ask for security for costs. I am not convinced that the applicants (or their 'backer') have been prejudiced by it. This issue was not raised in the affidavits and is clearly not an issue that the applicants considered relevant at all. I am not prepared to dismiss the application for the security for costs for that reason." (My underlining)

[6] The application for security was brought in terms of Rule 47(1) read with Rule 47(3) of the Rules of the High Court, which read as follows:

"47. (1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

…

47. (3) If the party from whom security is demanded contests his or her liability to give security or if 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 court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with."

[7] The applicant's notice demanding security in terms of Rule 47(1) was served on the respondents on 30 July 2004. The notice of application in terms of Rule 47(3) was then served on the respondents on 22 September 2004. The respondents'

opposing papers in the security application were served on 20 October 2004 while the replying papers were served of record on 19 November 2004. The matter was set down for hearing on 18 April 2006. It is common cause that it took the applicant close to 2 years to set down the opposed security application for hearing. The only issue that can arise, therefore, is whether there was an unreasonable delay in the application being set down. There is authority to the effect that a long lapse of time in lodging an application for security for costs is *prima facie* unreasonable: *B & W Industrial Technology (Pty) Ltd & Others v Baroutsos* 2006 (5) SA 135 at 140A. In that case an application for security (not the set down for hearing) was long-delayed and the respondent was able to raise it as an issue in the answering affidavit. I can understand the reason for this: a respondent against whom security might be sought really has no choice in the matter one way or the other, until such time as a security application is actually made. But once such an application is made, the respondent to a security application has the right in terms of Rule 6(5)(f) of the High Court Rules to expedite the matter by applying for a date itself if the applicant for security is lax in pursuing it.

[8] In reading the authorities, and in relying on unreasonable delay in the prosecution of an application for security for costs, one must be careful to draw a distinction between a failure to lodge the application in time, and the failure to persevere with the application. This distinction appears not to have been sufficiently appreciated by the Court *a quo* in the treatment of the authorities bearing on the subject of delay. In the present case we are concerned with a delay in setting down the opposed security

application for hearing. In context, the appellants' contention is that the applicant unreasonably delayed in setting down the application for hearing and failed to explain on affidavit the reason for such failure and that for that reason, the argument goes, the Court *a quo* should have refused to order security. There are two problems with this approach: the first is that at the point the pleadings associated with the security application had closed, delay was not an issue. In order for the applicant to have given an explanation for the delay in setting down the application after those pleadings closed, it would have had to seek the leave of Court to file a fourth set of papers. It could, therefore, not have explained the delay on affidavit without such leave being granted by the Court, in terms of Rule 6(5)(e) of the High Court Rules.

[9] Secondly, the respondents not only had the right themselves to set the matter down for argument in terms of Rule 6(5)(f) of the High Court Rules, but they could have, between the close of the security for costs pleadings and the date of set down thereof, given the applicant notice that they intend to raise delay as an issue so as to force the applicant into using that as a basis for bringing an application to file a fourth set of papers to explain the delay. If the applicant for security then did nothing, the respondents would have been entitled to place such correspondence before Court for consideration by the Court and the drawing of the inference that there was an unreasonable delay. I can think of at least two reasons why a matter may not be set down after a lapse of a very long time after security for costs pleadings had closed: the parties may have agreed so, or the Court roll might have been such that an earlier date was not available. A Court cannot simply assume that a delay in setting down a

matter was on account of the remissness of the party which is *dominis litis*. I am for this reason not prepared to hold that a long delay after the close of the pleadings associated with the application for security is *prima facie* unreasonable and thus needs to be explained on affidavit. In the light of these considerations, I do not think that the judge *a quo* committed a "demonstrable blunder" in the way he approached the issue of delay.

The proper approach in resolving disputed facts

[10] I propose to now deal with an issue that was debated between the parties as regards the approach the Court *a quo* should have taken in making findings on disputed facts. This issue is dealt with at pp.128 - 131A of the judgment *a quo* and amounts to this: Does, in the adjudication of interlocutory matters such as an application for security for costs, the *Plascon–Evans*[2] rule apply?: i.e. that in motion proceedings the Court may grant final relief on the basis of the allegations of the respondent and such allegations of the applicant as are admitted by the respondent. Mr Barnard submitted that the granting of an application for security for costs is final in nature and therefore the *Plascon–Evans* rule applies; and the Court *a quo* was required to have regard to the contents of the opposing affidavit as the factual basis upon which to grant the relief and only to have had regard to the applicant's papers to the extent allegations therein were not disputed. In the Court *a quo* Muller J refused to follow that approach and gave full reasons for doing so. His conclusion is in conflict with the approach adopted by Manyarara AJ in *Northbank Diamonds Ltd v*

[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

Namibian Grape Growers and Exporters, unreported (NmHC), delivered on 29 June 2001 at p.10, where the learned judge held that in applications for security for costs the *Plascon–Evans* rule applied. Muller J set out reasons why he did not wish to follow the approach of Manyarara AJ.

[11] I agree with Mr Tötemeyer for the applicant that the conclusions and inferences arrived at by the Court *a quo* were founded either on common cause facts or on allegations which were admitted by the respondents in the Court below. That much is clear from the Court's following remark (at 131B):

> "[19] With regard to the 'iffy' argument, I do not agree with Mr Barnard's submission that the second respondent's allegations as a basis for the relief claimed by him are too 'iffy' for the court to exercise its discretion. It seems clear enough to me that certain allegations which the second respondent made and for which he may have lacked substantiation, were in fact admitted by the first applicant in his affidavit. The 'iffy' argument is consequently rejected." (My underlining)

[12] As I will endeavour to show presently, this finding by Muller J is correct. In view of what I find to be the established facts on which the learned judge properly based his finding on the central issue that was before him for decision, I do not find it necessary to here resolve the issue whether or not, in interlocutory applications brought by motion, the *Plascon-Evans* rule applies. This Court's view on the issue here raised will be *obiter* because of Muller J's finding that even if he applied the Plascon–Evans rule, his conclusion would have been the same. The following

remark by the learned judge *a quo* demonstrates that strictly it was not necessary for him to decide the point either. He said (at 132A):

> "[23] Even if the Plascon-Evans approach were applied, which I already found to be inappropriate in this type of application, on the relevant facts in the affidavits the inference is inescapable that the applicants act as a 'front' for the landowner.'' (My underlining)

Costs of Abandoned Rule 18 Application

[13] Another matter that needs to be addressed is the issue of costs occasioned by the abandonment of an application by the respondents in terms of Rule 18 of the Rules of this Court, seeking an order "permitting the contents of paragraphs 21 to 29 of the founding affidavit of Henner Diekman as evidence in the appeal". During argument Mr Barnard, for the respondents, abandoned the said application and accepted that the applicant would be entitled to the wasted costs of its opposition to the Rule 18 application. That disposes of that aspect. This clears the way for me to consider the main issue in this appeal: Was the Court *a quo* correct in finding that the respondents are "men of straw" who had been put up as a front for others?

[14] The basis of the application for security for costs was stated by the applicant to be that the respondents are persons of no or insufficient means to meet an adverse costs order in the main application; that the respondents are fronts for parties which are involved in prior litigation with the applicant; that the main application has been commenced in the name of the respondents but is funded by the landowner who is

using the respondents to shield itself from the consequences of an adverse costs order.

[15] Prior to the main application, the applicant was drawn in a legal dispute by, among others, the company that owns the land on which the respondents reside. That company is called Aussenkehr Farms (Pty) Ltd. The applicant and Aussenkehr Farms are therefore not strangers to each other. The legal dispute preceding the main application was under High Court case number A 132/2000 in the form of an application by Aussenkehr Farms and others to prevent the applicant from fully exploiting EPL 2101, by challenging the EPL's validity. The applicant successfully opposed that application in the High Court and an appeal by Aussenkehr and others to this Court also failed. The resultant legal costs in favour of the applicant are in the order of N$1.5m. It is common cause that the relief sought and the issues raised in the main application, are substantially the same as in the prior litigation.

Common cause or admitted facts

[16] From the papers the following facts are either common cause or are admitted: The respondents are low-income earning employees living on Aussenkehr Farm with "little means as far as possessions are concerned'' and are "relatively impecunious". All respondents reside at the Aussenkehr Village owned by Aussenkehr Farms (Pty) Ltd. The applicant is the holder of an exclusive prospecting licence (EPL 2101) issued by the minister in terms of the Minerals (Prospecting and Mining) Act, 33 of 1992. EPL 2101 is renewed from time to time by the minister in favour of the

applicant. In May 2000, an application was launched in the High Court under case number A 132/2000 challenging the renewal of EPL 2101.

[17] The following were the applicants in that application: Namibian Grape Growers & Exporters Association, an association of entities growing and exporting grapes in and from the Aussenkehr Valley; Namibian Farm Workers Union whose members (including some of the respondents) are employed by the grape cultivation industry in the Aussenkehr Valley; TK Holland BV a corporate entity of Holland which imports grapes from the Aussenkehr Valley; Exotic International (Pty) Ltd, a Namibian company which cultivates and exports grapes from the Aussenkehr Valley; Aussenkehr Small Business Association, an association of businesses, persons and entities, duly possessed with *locus standi*; Aussenkehr Town Developers (Pty) Ltd, a Namibian company involved in the development of the township on the Aussenkehr Farm; Aussenkehr Farms (Pty) Ltd which cultivates and exports grapes from the Aussenkehr Valley, and is the owner of the land in respect of which the applicant (Northbank) is asserting (through EPL 2101) certain rights in terms of the Mineral Act; Grape Valley Packers (Pty) Ltd, a duly incorporated Namibian company who had invested approximately N$6,000,000.00 in the construction of packing and cold storage facilities on the Aussenkehr Farm; Namibian Nurseries (Pty) Ltd, a duly incorporated Namibian company which cultivates and prepares vine plants for purposes of establishing vineyards in the Aussenkehr Valley and Nagrapex (Pty) Ltd, a duly incorporated Namibian company which cultivates and exports grapes from the Aussenkehr Valley.

[18] It is admitted that four out of the six respondents are in the employ of Grape Valley Management Company, Nagrapex, or Exotic International. Hepute does not say by whom the other two respondents are employed but it is clear from the papers that they reside on the property Aussenkehr Farm, presumably with the knowledge and permission of the landowner who (as I will show presently) funds the main application.

[19] In November 2000, yet another application was launched in the High Court under case number (T) I 113/2002 again challenging the renewal of EPL 2101. The application was brought by only two of the applicants referred to in paragraph 17 of this judgement: Aussenkehr Farms (Pty) Ltd and Nagrapex (Pty) Ltd. The relief sought there is, again, and in essence, to challenge the validity of EPL 2101. It is further common cause that in the proceedings under case number (T) I 113/2002 and in the main application, the respondents are represented by the same instructing and instructed counsel. It is not disputed that the applicant's costs on a party-and-party scale in opposing the proceedings under case no. A 132/2000 (in the High Court alone) is in excess of N$1,5 million. It is also admitted that the appellants do not have the necessary funds to fund the main application, and are funded for the purpose by the landowner/employer, Aussenkehr Farms (Pty) Ltd. The only interpretation one can place on the admission that the landowner/employer funds the main application is that it pays for the services of the legal practitioners acting on behalf of the respondents in the main application. It is further admitted that should the applicant

be successful with its opposition to the main application, the respondents would be unable to pay its legal costs.

What is placed in dispute?

[20] In the founding affidavit of Mushimba, the applicant pertinently makes the following contention in support of its application for security:

> "24.3 [A]applicants are persons of no or little means or assets and thus, with respect, essentially persons of straw. They are also effectively litigating in this matter in a nominal capacity or as a front for others and more particularly as a front for all or one or more of the applicants in the earlier abovementioned proceedings, who do not only fund the main application, but have clearly initiated same and which serves to advance their purported interests. The main application again seeks to achieve what the aforesaid earlier applicants (and particularly Aussenkehr Farms (Pty) Ltd and Nagrapex (Pty) Ltd) sought to achieve with the earlier applications all along, namely to extinguish the rights of Northbank to and in respect of EPL 2101.''

And:

> "25. This application therefore has the result that all, alternatively one or more of the earlier applicants have put up the current applicants as a front for them, whereas the aforesaid entities (who back the current litigation) will escape liability for Northbank's costs should the main application fail. Northbank will then be unable to recover its legal costs from any party, since it will not be able to recover same from the impecunious applicants.''

[21] The respondents deny that they are men of straw or that they are nominal plaintiffs and say that if they were to represent other entities there should be proof of an agreement to that effect and that the second respondent failed to prove such an

agreement. They also state that in prior litigation their interests were protected by their trade union (Namibia Farmworkers' Union) and that, for that reason, the allegation that they only now appeared on the scene is not justified or supported by the evidence. On behalf of the respondents it is specifically stated as follows in answer to the applicant's contention in paragraph 24.3 of Mushimba's founding affidavit:

> "I reiterate that the representative union of the current Applicants, namely the Namibian Farm Workers Union, has been active in its resistance to the endeavours of Northbank to conduct its exploration and mining activities within the proximity of or in the Aussenkehr village, from a date preceding the institution of Case No. A 132/2000 in the Namibian High Court. It is thus clear that the Namibian Farm Workers Union, representing the interests of people such as the Applicants, has at all material times independently and in its own right sought to protect parties such as the Applicants. The Applicants in turn, as indicated above, represent various other labourers also represented by the Namibian Farm Workers Union.''

[22] As regards the applicant's contention in paragraph 25 of Mushimba's founding affidavit, the following contention is made by Hepute in answer on behalf of the respondents:

> "70. The ramifications alluded to in the paragraph under reply are self-evident. Such ramifications were clearly foreseen by Northbank when it commenced with its endeavours to conduct its mining and exploration activities, which would ultimately be to the detriment of the villagers of the Aussenkehr village. It was furthermore clearly foreseen by Northbank that parties such as the Applicants would seek to, legal proceedings, put an end to Northbank's endeavours to infringe and/or violate their fundamental human rights. Such fact, clearly, in turn caused Northbank to foresee that it would launch an

> application to compel any impecunious parties such as the Applicants to furnish security for Northbank's costs as measure to quell any resistance to Northbank's endeavours to simply disregard the fundamental human rights of such villagers.''

With respect, this is not a rebuttal of the very crucial contention in paragraph 25 of Mushimba's founding affidavit that the respondents were put up as a front for other parties.

[23] Our common law recognises, as a general rule, the immunity enjoyed by an *incola* plaintiff or applicant from having to provide security of costs. The *ratio* behind this rule is that every citizen should have uninhibited access to the courts: *Vite v Mbuque; Namoyi v Mbuque* 1993(4) SA 93 at 94F-95B. One exception to this general rule, founded in my view on the principle that the process of the court should not be abused, is that an *incola* who is a man of straw and litigates in a nominal capacity, or as a front for another may be ordered to furnish security: *Pillemer v Israelstam Shartin 1911 WLD 156; Vanda v Mbuque, supra* at 94J-95A, and the *obiter dictum* in *Mears v Brook's Executor and Mears's Trustee* 1906 TS 546 at 550.

[24] I agree with Muller J that the implicated exception creates two discrete categories: while being a man of straw litigating in a nominal capacity, or while being a man of straw being put up as a front for another. Both instances would amount to an abuse of the process of the court. There is, or ought to be, a distinction between being a nominal plaintiff and being a front. In my view, a nominal plaintiff/applicant is

one who, although he might be entitled to maintain the action, has no interest in the subject matter of the cause such as the case was in *Mears*' case, *supra* at 550. A front, on the other hand, is one who is being used to shield another from the adverse consequences of litigation. In both respects, the principle underlying the rule is sound and is founded on the public policy consideration that the abuse of the process of the court should be frowned upon: it is not fair to allow a plaintiff with no real interest in the litigation to drag another through litigation while being unable to meet an adverse costs order at the end of the day; and it is equally unfair to allow a party who has an interest in the litigation to use a poor man (who also has an interest) and in so doing hedge itself against an adverse costs order. It needs to be understood very clearly that in the application of the exception, a person is not ordered to pay costs because he or she is poor but because, while being impecunious, he or she is either a nominal plaintiff/applicant or is being used as a front by another. Poverty, without more, is no bar to seeking justice.

[25] A defendant/respondent who wishes to obtain security for costs on the strength of the implicated exception should, on balance of probability, show that the plaintiff/applicant is poor and is, in addition, a nominal litigant or a front of another party. If the jurisdictional facts are established for the invocation of the exception, the court may order security for the costs of the defendant/respondent upon application therefor.

[26] The Court *a quo* made, and arrived at, the following critical factual findings and conclusions (at 127G-J):

"[9] [I]t is necessary to keep in mind that the landowner, Aussenkehr Diamonds (Pty) Ltd, on whose land the applicants reside in fact brought an application to this court, in May 2002 (case No. A132/2000), which application was eventually decided after approximately two years and presently an appeal judgment of the Supreme Court of Namibia (case No. SA 14/2002) is awaited. The costs of that application were severe and according to the allegations on behalf of the second respondent were in the region of N$1.5 million. Both the landowner and Nagrapex (Pty) Ltd were among the applicants in that application. Another application was also brought in which the landowner and Nagrapex (Pty) Ltd, but not the applicants, were the applicants against the same respondents in November 2002 (case No. I 113/2002). The main application was thereafter launched in June 2004, not by the landowner, but by the six applicants, referred to earlier herein, against the same respondents (case No. (T) A 57/04). It is submitted that in this application nearly the same relief was claimed against the respondents as in other applications." (My underlining)

And (at 13 H-J):

"[22] Upon perusing the affidavits filed in this intermediate application for security for costs the applicable facts seem to show that the applicants:

(a) reside on the land of the landowner;

(b) were not parties to approximately the same legal battles over similar disputes;

(c) are *incolae* of this Court;

(d) do not have the means to litigate on their own;

(e) commenced proceedings which are approximately the same or closely related to that which the landowner and others launched against the second respondent;

(f) are represented by the same legal practitioner and counsel as the landowner and others in the previous applications;

(g) are dependant on the landowner for the costs for opposing this application; and

(h) the landowner foots the bill of the current proceedings.''

And further (at 132 B-G):

> "[23] Although it is suggested that their interests were in fact 'represented' by the Union (The Namibian Farm Workers Union) in the first application (A 132/2000), they were not applicants, nor represented in the second application ((T) I 113/2002), where the applicants were the landowner (Aussenkehr (Pty) Ltd and Nagrapex (Pty) Ltd. The applicants' constitutional rights relied on, as I understand it, existed long before the latter application. Why were they not applicants in that application? Furthermore, the relief claimed in the previous applications was also in respect of the renewal of the particular EPL. I am not aware, neither was it referred to, that the applicants exercised their rights or attempted to, when the EPL was first granted. I find it strange, if not incomprehensible, that the six applicants, who had the same rights when the other applications were brought, in particular the one ((P) I 113/2002), remained silent in the past and only now entered the arena, with the landowner (who was always an applicant) footing the bill."

[27] Subject to what I will say later as regards the trade union's alleged involvement on behalf of the respondents in prior litigation, Muller J's findings and conclusions are based on facts that are either common cause, are admitted or not denied by the respondents. The only question really is whether the Court *a quo* was justified in drawing the inference from them that the respondents are men of straw put up as a front for one or more of the parties who were applicants in the prior litigation.

[28] On that question, Muller J held at 132E-F:

> "[24] I agree with Mr Tötemeyer that the only reasonable inference to be drawn from these facts, is that the landowner is in fact the driving force behind this (main) application and the applicants are only a front, for the landowner, financially supported and 'backed' by him. By their own admission the applicants cannot fund these proceedings and are dependent on the landowner in that regard.''

He further said (at 132G-H):

> "[25] In my opinion it is competent for an *incola* to be ordered to furnish security for costs if it is established by the facts that such a person acts as a 'front' for another, effectively enabling that party to escape liability for the costs of the respondent if the *incola* applicant should lose. In the summary of White J in the *Nomoyi* case exceptions departing from the general rule are recognised, namely a litigant acting in a nominal capacity or as a front for another. These are clearly two separate concepts. I have no doubt that the facts of this matter place it squarely within the scope of the latter exception. The constitutional rights of the applicants have no effect in respect of the applicable considerations at this stage.
>
> …
>
> [27] Mr Barnard submitted that an order against the applicants to furnish security for costs would prevent them from proceeding with the main application. Whilst recognising the principle that a court should consider that such an order may prevent an applicant from pursuing its litigation, it remains an aspect that the court has to consider in exercising its discretion. I did consider it, but in the light of the history of this matter and the costs involved in the previous applications, as well as the volume of the applicants' own founding affidavits and annexures, I do not believe that such an order will prevent the applicants from providing security for costs and continuing with their litigation in the main application. In any event it has been admitted that the

> landowner will fund the 'current proceedings'. That inevitably includes the main application of which the application for security for costs is an interlocutory proceeding. Furthermore, the applicants and their 'backer' would only have to 'pay' if the applicants do not succeed in the main application." (My underlining)

[29] The underlined remarks by the learned Judge *a quo* in paragraph [27] of his judgment make it clear that he had due regard to the potential adverse effect of a security for costs order on the respondents. In his discretion he decided not to invoke it against ordering security. He was entitled to do so given the wide discretion he enjoyed. The possibility, without more, that the order for security might put a stop to the litigation is no bar to the exercise of the Court's discretion to order security. As Hefer JA put it in *Shepstone & Wylie and Others v Geyser* NO, 1998 (3) SA 1036(SCA) at 1046H-I:

> "[T]he mere possibility that the order will effectively terminate the litigation can plainly not affect the Court's decision. It only becomes a factor once it is established as a probability by the plaintiff or applicant. And, even if it is established, it remains no more than a factor to be taken into account; by itself it does not provide sufficient reason for refusing an order.''

The learned judge went on to say (at 1047A-B):

> "I am in full agreement … that 'the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or <u>other backers or interested persons</u>'.'' (My underlining)

[30] What the Court is engaged in is a balancing exercise. As was said in *Keary Development Ltd v Tarmac Construction Ltd and Another,* [1995] 3 ALL ER 534 (CA) at 540a-b:

> "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 plaintiffs 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.''

Sight should not be lost of the fact that Muller J was satisfied that the backers of the litigation, in view of their financial support to the respondents in funding the main application, would stand in for such security.

[31] In coming to the above conclusions, Muller J stated the applicable law as follows (at 128A):

> "[I0] It is trite that in an application for security for costs
>
> a) the court has 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) <u>the court does not enquire into the merits of the dispute, but may have regard to the nature of the case</u>.

> These principles are trite. (Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at 344.)" (My underlining)

In paragraph 25 of his judgment *(supra)* Muller J said that the *"constitutional rights of the applicants have no effect in respect of the applicable considerations at this stage".* The learned judge appears to find support for that conclusion from the learned authors Herbstein & Van Winsen. In my view the proposition by the learned authors Herbstein & Van Winsen relied on by the judge *a quo* must be approached with great caution lest, in the process of trying to draw what must be a very fine dividing line between what is properly "the merits of the case" as opposed to "the nature of the case", the real purpose of the inquiry is lost and the Court's discretion unduly fettered. With respect, the cases on which the learned authors rely in support of their above proposition are of contestable authority in the light of recent judgements in South Africa: See *Hix Networking Technologies v System Publishers (Pty) Ltd and Another*, 1997 (1) SA 391(A) at 401D-F and 402C-F; *Shepstone & Wylie and Others v Geyser* NO 1998 (3) SA 1036 at 1047H-J; *Bookworks (Pty) Ltd v Greater Johannesburg TM Council* 1999 (4) SA 799 at 810G-H.

[32] When security for costs is sought against an applicant who alleges the infraction of his/her constitutional rights, consideration of the nature and extent of the alleged violation is an important consideration in exercising the discretion one way or the other. In our new constitutional dispensation with a justiciable Bill of Rights, it is untenable to suggest that the constitutional rights enjoyed by a litigant and which, through litigation, he or she wishes to vindicate cannot be of any consequence in the

exercise of the court's discretion whether or not to order security. In as much as the Court *a quo* suggests otherwise it was wrong. It however needs to be said that the seriousness of the infraction of the constitutional rights is but one (not the only consideration) that goes into the weighing scale (*Shepstone's* case *supra*). Although the Court *a quo* took the view that the infraction of the constitutional rights of the respondents is not a relevant consideration when weighing the discretion whether or not to order security, it was alive to the need to have regard to the "nature of the case".

[33] As regards the alleged violation of the respondents' constitutional rights, the applicant said this in paragraph 9.5 of the answering affidavit (and I refer to it because, excepting the argumentative parts, not much in it can be disputed):

> "The alleged violation of the constitutional rights of the inhabitants of Aussenkehr village has been extensively relied upon in both earlier applications pertaining to EPL 2101 referred to in my founding affidavit;
>
> …
>
> The alleged violation has been (it is submitted) comprehensively and convincingly gainsaid in both the aforesaid earlier applications. I point out that the challenge under case number A 132/2002 – which was partially based on the aforesaid alleged violation of the rights of the applicants in this matter which allegedly result from second respondent's activities concerning EPL 2101 – failed in the High Court.''

[34] That the violation of the constitutional rights of the inhabitants of Aussenkehr on account of the exploitation of the EPL 2101 was an important aspect of the earlier

litigation between the applicant and the parties mentioned in paragraph 17 of this judgment, is obvious from the pleadings in the earlier litigation, which pleadings have been made available to us for consideration as part of the case now before us, and the "history of the case" the Court *a quo* had regard to when it exercised its discretion in favour of granting security. Looked at in this way, therefore, I do not consider that the admitted failure of the Court *a quo* to have had regard to the alleged violation of the respondents' constitutional rights, was as weighty as it would have been if the issue had not been previously ventilated in the judicial proceedings which resulted in favour of the applicant.

[35] It has been argued very forcefully on behalf of the appellants that in funding the main application, the landowner is acting in compliance with Article 5 of the Constitution which states:

> "The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable …" (My underlining)

[36] I do not think that an employer can be faulted for assisting an employee to seek redress against another where the employee feels their fundamental rights and freedoms are being violated. I do not think, however, that the constitutional requirement that the fundamental rights and freedoms enshrined in the Constitution shall be respected and upheld by the executive, the judiciary, and by, where applicable, natural and legal persons (and shall be enforceable by the courts),

equates to imposing a legal duty on an employer to fund litigation by an employee aimed at enforcing their fundamental rights and freedoms. In any event, the assistance being provided in funding the litigation in this case cannot be seen in a vacuum: It is assistance which is being provided after the present backer in one case where substantially the same relief was sought, lost the legal battle and became liable to pay a very substantial amount of money in legal costs. Although there is merit in the argument (contrary to the finding of the Court *a quo*) that the respondents' interests were, in prior litigation, looked after by their trade union, that trade union (like the present backer) is not a party to the present litigation without it being explained why – and all this after a substantial debt was incurred in legal costs in the prior litigation. It is unrealistic to suggest that the Court *a quo* should not have taken this factor into consideration.

[37] In his heads of argument, Mr Barnard makes much of the statement he made during argument in the Court *a quo* that he was withdrawing a concession he had made (it is not clear where because the only statement under oath on that score is that of Hepute) that the landowner is funding the litigation. Could he have withdrawn an averment in the affidavit of the applicant? It must be remembered that the fact of the funding of the litigation by the landowner is *the* basis on which the application for security for costs was brought. Not only does Hepute not deny that, he confirmed it in the following terms in his answering affidavit:

> "The funding of the costs of the application in the current proceedings is attended to by the landowner."

[38] How it can be said that the Court *a quo* ought not to have decided the application on the basis that the landowner was funding the main application is incomprehensible. There is authority in the High Court that concessions made in affidavits cannot simply be recanted or withdrawn. The basis for it must be clearly set out under oath and the court must sanction its withdrawal. As was said by a Full Bench of the High Court in *SOS Kinderdorf International v Effie Lenten Architects* 1992 NR 390 (HC) at 398 H-I:

> "Where a case is conducted by a client's legal representatives, such representatives are in charge of proceedings. A litigant is bound in the conduct of its case by counsel (within the limits of counsel's brief) and by admissions which the legal representatives may make in pleadings or in drafting affidavits, unless satisfactory reasons are given to show that such persons had no right to make such admissions. In *Sliom v Couzyn* 1927 TPD 438 the Court held that without such satisfactory explanation a litigant could not lead oral evidence to withdraw an admission made in an affidavit.''

This is a correct statement of the law.

[39] It is clear to me that what Mr Barnard sought to do is to withdraw from the Bar a concession made in the affidavit of Hepute. It is not clear on whose instruction he made the withdrawal. Be that as it may, it was not open for him to do so. The Court *a quo* was entitled to have regard to that concession in arriving at a decision in the

matter. It stood as an established fact that the landowner is funding the main application. Mr Barnard's attack directed at the Court *a quo's* reliance on the averment that the landowner is funding the litigation, is therefore without merit. It is also common cause that both instructing and instructed counsel in the present matter also acted in the prior litigation for the landowner and those who made common cause with it in the prior litigation.

Persons of straw?

[40] Was Muller J wrong in concluding that the respondents are persons of straw? The appellants admit that they are impecunious. The *Advanced Oxford Learners Dictionary* defines the word impecunious as "having little or no money" or "poor/penniless". It is common cause that the respondents all live on the landowner's land. Their continued presence there depends on the continuation of the employment relationship with the landowner or the corporate entities associated with it. In my view, not much can turn on Hepute's allegation that his wife (to whom he is married in community of property) is now "entitled" to transfer of 4 hectares of land at Aussenkehr Farm. No explanation is provided when she will take transfer. The fact remains she does not own the land on which she lives with deponent Hepute. There is no allegation that the rest of the respondents own fixed property either where they work or live or anywhere else in Namibia. We are not even told how much they earn per month. The only thing we know is that they belong in the low-income bracket of our employment market. It is a matter of public notoriety that legal costs are very high and represents a serious challenge to even those who earn relatively high incomes.

If all these factors are considered- against the backdrop that the appellants admit that they would be unable to meet a costs order in the event that the applicant is successful in the main application - the applicant had established on a balance of probabilities that the respondents are persons of straw.

Are respondents a front for others?

[41] That the respondents have a real interest in the matter is not in dispute, as is the fact that the mining activity about which they complain would affect them as residents of Aussenkehr. Although the applicant maintains that it will deny that its mining activity is in breach of the respondents' constitutional rights once the pleadings in the main application are resurrected in the fullness of time, the allegations on the face of it are sufficiently serious that the Court must have had due regard to them in exercising its discretion whether or not security for costs was to be ordered. To the extent that the Court *a quo* took the view that it did not have to consider the consequences on the appellants of the mining activity complained of, it commited a misdirection - but not one which, on the facts of this case (and particularly because of what I said in paragraph 34 *supra*), vitiated the manner in which it approached its discretion in granting an order for security.

[42] Both instructing and instructed counsel are professionally engaged by entities which were parties in prior litigation against the applicant under equality of arms. Those counsel continue to act for Aussenkehr and Nagrapex in litigation that is still continuing aimed at invalidating the renewal of EPL 2101. The legal strategy in the

main application is, therefore, being determined by legal advisors who are on the payroll of Aussenkehr and Nagrapex, who, we know, have incurred a huge debt by way of costs in other litigation against the applicant. As Hepute puts it:

> "I place on record that it simply makes good legal sense to appoint a counsel with extensive background knowledge of the relevant facts, to represent the Applicants in the main application''.

[43] Quite to the contrary, the significance of this is that in the pursuit of what they allege to be a vindication of their own constitutional rights, there is no arms-length relationship between the landowner/employer (who funds the main application) and the respondents and that raises the inference, in the light of the history relating to EPL 2101, that they are being put up as a front by those who pay for the main application and stand to benefit directly therefrom in the event the main application is successful. Although the applicant did not expressly allege or provide evidence that there was an agreement between the appellants and the landowner and Nagrapex; that much was implied on a proper reading of its affidavits. The existence of such an agreement (or arrangement) is one which can quite properly be determined on the probabilities. I am satisfied that the probabilities favour the version that the respondents are acting as a front for one or more of the parties involved in earlier litigation against the applicant. As far as pleadings go, Mushimba's allegation in support of that agreement/arrangement is contained in paragraphs 24.3 and 25 of his founding affidavit as quoted in paragraph [20] of this judgment.

[44] Where defendant/respondent A and plaintiff/applicant B are engaged in litigation under equality of arms (the collateral litigation), and B subsequently financially backs plaintiff/applicant C[3] to initiate fresh litigation against A (the new litigation) wherein C seeks substantially the same relief as the one in the collateral litigation - and it is clear that the issues raised and the relief sought in the collateral litigation and the new litigation are substantially the same without B being exposed to the risk of an adverse costs order in the new litigation - there is a very strong inference that C is acting as a front for B in the new litigation. A would, in such circumstances, have discharged the burden of proof justifying the invocation of the Court's discretion to order security for costs against C in the new litigation on the basis that C is acting as a front for B in the new litigation; unless it be shown that such an inference is not justified or that security should not be ordered for some other reason. Such an inference would be the more stronger where B does not join in the new litigation but counsel acting for B in the collateral litigation also acts in the new litigation for C for reward by B; and more so where the funding of C arises after B had incurred a substantial amount of debt in the collateral litigation by way of costs.

[45] The probability or inference that the present respondents are a front for other parties – although not the only reasonable one – is stronger than the one that they are not: Compare *M Pupkewitz & Sons (Pty) Ltd v Walter Kurtz,* unreported (NmSC) delivered on 14/07/08 at paras [30] to [32].

[3] And C is impecunious and unable to meet an adverse costs order.

Discretion in the narrow sense

[46] Both Mr Tötemeyer and Mr Barnard are in agreement that whether or not security should be granted is a matter properly of practice. Mr Barnard relied for this proposition on the following statement of the law by Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa* 4th ed. (at 321):

> "The question of security is one of practice and not of substantive law. The Courts have discretion to grant or refuse an order for security and in coming to a decision will consider the relevant facts of its case.''

[47] In *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 at 625E-G, the Supreme Court of Appeal of South Africa restated the role of the Court of appeal when it comes to matters "*relating to the conduct of the business of the Court hearing the application"* and in respect of which "*different judicial officers, acting reasonably, could legitimately come to different conclusions on the same facts"*; referred to as discretion in the strict or narrow sense. The Court held that where a court at first instance enjoys a discretion in the strict or narrow sense, "*A Court of appeal can interfere only if the Court which heard the application 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*". It has been correctly held by a Full Bench of the Witwatersrand Local Division in South Africa that the exercise of the discretion whether or not to order security for costs is one in the strict

or narrow sense and that appeals against the exercise of that discretion should be discouraged unless the trial court can be held to have committed a "demonstrable blunder" or came to an "unjustifiable conclusion": *Bookworks (Pty) Ltd v Greater Johannesburg TM Council* 1999 (4) SA 799 WLD (Full Bench), 804H - 808B, and particularly at 804H - J, 807G - H, 808A - B. (See *Northbank Diamonds Ltd v FTK Holland BV & 6 Others* 2002 NR 284 at 290G - H). I cannot emphasise too strongly that a Court of appeal should not interfere with the exercise of the lower Court's discretion whether or not to grant security just because it thinks it would have exercised the discretion differently.

[48] In my view no case has been made out that the Court *a quo* committed a demonstrable blunder in coming to the conclusion, first, that the respondents are persons of straw and, secondly, that they have been put up as a front for others engaged in prior litigation with the applicant. I can also see no basis on which to interfere with the decision of Muller J to fix the amount of security at N$350 000.

[49] Accordingly, I make the following order:

1. The applicant is awarded the wasted costs occasioned by the abandonment by the respondents of the application in terms of Rule 18, including the costs consequent upon the employment of one instructing and one instructed counsel; and

2. The appeal is dismissed with costs, including the costs of one instructed and one instructing counsel.

_____
DAMASEB, AJA

I agree.

_____
CHOMBA, AJA

I also agree.

_____
MTAMBANENGWE, AJA

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