Putting up security for costs

By Tim Fletcher

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In Boost Sports South Africa (Pty) Ltd vs The South African Breweries Limited, the Supreme Court of Appeal (SCA) required the plaintiff to put up security for costs. It stated, "There are people who enter into litigation with... a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."

Before this decision, the general rule was that a local company could not be compelled to put up security for costs.

Section 13 of the previous Companies Act, No 68 of 1971 was an exception, providing that where there was evidence that a plaintiff company would be unable to pay the costs of the defendant, if the plaintiff were unsuccessful with its claims, then the court may order the plaintiff to provide security for costs. In terms of the Rules of Court, if security were then not provided, the plaintiff company would not be able to proceed with its litigation. The clear purpose of this provision was to ensure that where a plaintiff company was unsuccessful with its claim that a defendant would be able to recover its costs.

The new Companies Act, No 71 of 2008 does not contain such a provision.

Boost Sports South Africa (BSSA) alleged that South African Breweries (SAB) had breached a confidentiality agreement. BSSA claimed damages, which it alleged were caused by a disclosure of confidential information. SAB replied that it had not signed the confidentiality agreement and that in any event the information was already in the public domain. SAB

believed that the action would almost certainly be dismissed, was concerned that BSSA would not be able to pay its costs and demanded that BSSA put up security. BSSA refused and the issue went to court.

SAB was able to show the court that BSSA did not have any assets and had never traded. The shareholders of the company, although willing to fund the litigation against SAB, were not prepared to put up security on behalf of BSSA. In court, BSSA conceded that SAB's claims regarding its financial position were correct but contended that the demand would "effectively destroy [its] ability to prosecute its claim." The court found that the shareholders funding the litigation were not candid with the court and were on the probabilities in a position to put up security.

The court also looked at BSSA's prospects of success in its main claim and found that the claim was vexatious, in particular that the information in question was neither unique nor confidential. The court also looked at the reluctance of BSSA's shareholders to come to BSSA's aid by putting up security and held that they were effectively "shielding behind an empty shell in order to avoid liability for costs." The concern with this type of behaviour is that a plaintiff then has nothing to lose and everything to gain in the litigation and the absence of risk encourages speculative and vexatious litigation. On these facts, the SCA ordered the plaintiff to put up security for costs, notwithstanding the repeal of s13 of the old Companies Act.

This decision makes it clear that where the court's intervention concerning security for costs is warranted by the facts of the case, the merit of the claim and the financial position of the plaintiff, the court will order the plaintiff to have some skin in the game.

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