FURNISHING SECURITY FOR COSTS BY AN INCOLA COMPANY — AT LAST SOME LEGAL CERTAINTY, OR MORE CONFUSION? *BOOST SPORTS AFRICA (PTY) LTD v SOUTH AFRICAN BREWERIES (PTY) LTD* (SCA)

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INTRODUCTION

In the South African law of civil procedure, the practice of requesting a plaintiff to furnish security for costs was limited initially to a foreign peregrinus (non-resident) plaintiff who did not own any immovable property in South Africa. Over the years, the scope of this rule has been extended, and some of the provisions regarding a request for security for costs were enacted in legislation. One such provision was s 13 of the former Companies Act 61 of 1973, which stated that where an incola (local) company or body corporate sued as a plaintiff or applicant, a court could, in its discretion, order such a company or body corporate to furnish security for the defendant's costs in certain circumstances. This section was not re-enacted in the Companies Act 71 of 2008. This omission resulted in several conflicting court decisions regarding the furnishing of security for costs by an incola plaintiff company.

In the recent case of *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) ('*Boost Sports*'), the Supreme Court of Appeal ('SCA') apparently resolves the legal uncertainty surrounding this issue. This note considers the development of the law in relation to the furnishing of security for costs by an incola plaintiff company, and critically analyses the SCA's decision in *Boost Sports*. It argues that there is confusion regarding several aspects of this decision, and that the legislature will have to intervene in order to effect legal certainty.

HISTORICAL DEVELOPMENT

At common law, a natural incola plaintiff could not be compelled to furnish security for costs. There was only one exception to this rule, namely where such a plaintiff was an unrehabilitated insolvent (*Liquidator, Salisbury Meat Market Ltd v Perelson* 1924 WLD 104 at 107 ('*Liquidator, Salisbury Meat Market*')). An incola plaintiff company could not be compelled to provide security for costs, but by contrast there was no exception to this rule (D E van Loggerenberg & J Malan 'Security for costs by local companies: Back to 1909 in the Transvaal, or not?' (2012) 75 *THRHR* 609 at 610–11; *Witham v Venables* (1828) 1 Menzie 291; *Lumsden v Kaffrarian Bank* (1884–1885) 3 SC 366; *Lombard v Lombardy Hotel Co Ltd (In Liquidation)* 1911 TPD 866; *Liquidator, Salisbury Meat Market* at 106–7). This position changed with the enactment of s 216 of the Companies Act 46 of 1926, which provided that a court could compel a plaintiff or applicant incola company to provide sufficient security for the costs of the defendant or respondent in a matter

where there was reason to believe that the company would be unable to pay the costs of the defendant or respondent if successful in his or her defence. When the Companies Act of 1926 was repealed by the 1973 Companies Act, the former s 216 was replaced by s 13 of the 1973 Companies Act, which provided as follows:

> '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 it is 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 the security is given.'

When the 1973 Companies Act was subsequently repealed by the 2008 Companies Act, the provision regarding the furnishing of security by a plaintiff company was not re-enacted and no similar section was included in the new Act. This omission gave rise to several conflicting decisions regarding a request for security for costs against an incola plaintiff company.

In *Haitas v Port Wild Props 12 (Pty) Ltd* 2011 (5) SA 562 (GSJ) ('*Haitas*'), the South Gauteng High Court (as it then was) held that because the 2008 Act does not contain a provision similar to s 13 of the 1973 Act, the common law prevailed. Accordingly, an impecunious or even insolvent company which is an incola of South Africa cannot be required to provide security for costs in relation to proceedings instituted by it (ibid at 563D–E). At the same time, the court held that to allow impecunious or insolvent plaintiffs to indulge in risk-free litigation would encourage vexatious, reckless and unmeritorious lawsuits and that courts should, in cases in which the interests of justice demand, invoke their inherent power to protect and regulate their own process by ordering the furnishing of security (ibid at 563E–H). The court stated that when the peculiar facts of a matter 'scream for the furnishing of security', a court should not hesitate to order the relevant party to file security for costs (ibid at 565A).

The *Haitas* decision was severely criticised by Van Loggerenberg & Malan, who convincingly argued that a high court cannot, under the guise of the protection and regulation of its own process, impair the existing substantive right of an incola plaintiff company to pursue legal proceedings (Van Loggerenberg & Malan op cit at 615). They also argued that the court never intended or attempted to develop the common law in this regard (Van Loggerenberg & Malan op cit at 619).

In *Ngwenda Gold (Pty) Ltd v Precious Prospect Trading 80 (Pty) Ltd* [2011] ZAGPJHC 217 ('*Ngwenda Gold*') the South Gauteng High Court (as it then was) held that it would be inappropriate to assume that the absence in the 2008 Companies Act of a provision similar to s 13 of the former Companies Act was an oversight on the part of the legislature (ibid para 12). Van der Merwe AJ held that the fact that the 2008 Companies Act was promulgated after the inception of the Constitution of the Republic of South Africa, 1996 suggested that the legislature took account of s 34 of the Constitution. Section 34 provides that '[e]veryone has the right to have any dispute that can

be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum' (para 12). The absence in the 2008 Companies Act of an equivalent to the former s 13 therefore suggests that the legislature placed greater emphasis on the entitlement of an impecunious or insolvent corporate entity to recover what was due to them without having to face the obstacle of having to provide security in advance for the costs of the litigation (para 14).

Van der Merwe AJ furthermore approved the approach followed in *Ramsamy v Maarman* 2002 (6) SA 159 (C) ('*Ramsamy*'), where that court had held that 'something more' than the mere inability of an incola plaintiff to satisfy a potential costs order against him or her was required to justify an order that a plaintiff has to provide security for his or her opponent's costs (*Ngwenda Gold* para 19). In this regard, Van der Merwe AJ endorsed the finding in *Ramsamy* that even if there were poor prospects of recovering any substantial costs from an incola plaintiff company, it could only be ordered to furnish security for costs if the court was satisfied that the company's main action or application was vexatious, reckless or amounted to an abuse of the court process (ibid paras 10 and 19).

However, in *Siemens Telecommunications (Pty) Ltd v Datagenics (Pty) Ltd* 2013 (1) SA 65 (GNP) ('*Siemens*') the North Gauteng High Court (as it then was) deviated from the approach followed in *Haitas* and *Ngwenda Gold*. Fabricius J held that rule 47 of the Uniform Rules of Court did not create any rights for an applicant for security for costs (ibid para 5). The court held that the rule is purely procedural in nature — it provides only for the procedure to be adopted if a party was entitled to security for costs (ibid). The high court's inherent power under s 173 of the Constitution to regulate its own process therefore did not include the power to extend the common-law grounds on which security for costs could be granted (ibid para 9). A court could not, 'under the mantle of regulating its own process', impair the existing substantive rights of a litigant (ibid). Fabricius J also criticised the approach of Van der Merwe AJ in *Ngwenda Gold*. Fabricius J correctly pointed out that, at common law, an incola company could not be compelled to furnish security for costs, and that there was no exception to this rule. Consequently, a company could not be ordered to provide security for costs even if it embarked upon vexatious and/or speculative litigation (ibid).

In *Maigret (Pty) Ltd v Command Holdings Ltd* 2013 (2) SA 481 (WCC), the Western Cape High Court (as it then was) held that applicants for security for costs had a fairly low hurdle to cross to persuade a court to grant security under the 1973 Companies Act (ibid para 8). The legislature expressly omitted a corresponding provision from the 2008 Companies Act, with the result that corporate plaintiffs were now treated in the same way as any other plaintiff (ibid para 10). Gamble J held that the preferred approach was the one adopted by Thring J in *Ramsamy*, namely, that the court had a discretion, but that such discretion could only be exercised when a party had set up facts to bring it within the ambit of the approach suggested in *Ramsamy* (para 17). The court also held that an applicant for security for costs may not base the application exclusively on the insolvency of a company (ibid para 18).

In *Genesis on Fairmount Joint Venture v KNS Construction (Pty) Ltd* [2012] ZAGPJHC 264 ('*Genesis on Fairmount Joint Venture*'), the South Gauteng High Court (as it then was) relied on *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) ('*MTN Service Provider*'), and held that there should be a clear distinction between natural persons and companies. Willis J held that the common law related to insolvent natural persons who were incolae, in which instance security would only be ordered in exceptional circumstances (*Genesis on Fairmount Joint Venture* paras 11–12). The judge provided the following reasoning for this distinction (ibid para 13):

> 'It is perfectly understandable why at common law there would be a reluctance to slam the doors of justice in the face of a poor litigant but I see no reason why the common law should be confined to preventing corporate litigants from litigating only in vexatious and/or reckless and/or frivolous circumstances. There is no reason why the common law principle against slamming the doors of justice against widow and orphans should extend to purely commercial matters such as this.'

Willis J concluded that a court has a judicial discretion which must be exercised appropriately, having regard to all the facts and circumstances (ibid para 14).

In *Hennie Lambrechts Architects v Bombenero Investments (Pty) Ltd* 2015 (6) SA 375 (FB) ('*Hennie Lambrechts Architects* (2015)'), the full bench of the Free State Division of the High Court, in an appeal against *Hennie Lambrechts Architects v Bombenero Investments (Pty) Ltd* 2013 (2) SA 477 (FB), held that in light of the circumstances of the case and so many divergent decisions, the common law should be developed beyond existing precedent (ibid para 28). The court held that companies comprise natural persons in their capacities as directors who, when sued, can hide behind the corporate veil and not furnish security, whilst knowing that the company they run was actually or commercially insolvent and would not be able to afford the costs of an award in favour of the respondent (ibid para 33). It was not just or equitable to equate companies to what the SCA referred to as 'widows and orphans' (ibid). A finding, as a general rule, that an incola company, regardless of peculiar facts which 'scream for the furnishing of security', would be incongruent with the spirit, purport and objects of a Constitution designed to ensure equality of all before the law (ibid para 34). Such a finding would mean that a party who would be gravely prejudiced by another's refusal to furnish security because of the unfortunate absence of the equivalent of s 13, would be without a remedy (ibid). Such a party would therefore be left to suffer considerable financial consequences of such an absence, which eventuality would, in turn, offend against the principles of equality and of just and equitable decision-making (ibid).

BOOST SPORTS AFRICA (PTY) LTD v SAB LTD

On 21 October 2011, the appellant, Boost Sports Africa (Pty) Ltd ('BSA'), instituted an action for damages in the Gauteng Division of the High Court,

Pretoria against the respondent, the South Africa Breweries Ltd ('SAB') based on an alleged breach of contract by SAB. BSA alleged that it had disclosed to SAB a particular advertising concept referred to as the 'fans challenge concept' under an agreed confidentiality regime between them. BSA further alleged that SAB breached this agreement when it later used the disclosed concept to conduct an event called 'Be the Coach'. In its plea, SAB raised two main defences. First, it denied that there was any confidentiality agreement between the parties in relation to the concept in question and, secondly, it contended that when BSA first disclosed the concept to SAB, the information was already in the public domain (para 1).

After BSA had made its discovered documents available to SAB, SAB became concerned that BSA would not be able to meet an adverse costs order should it fail in its action. Accordingly, when BSA refused to furnish evidence of its ability to pay SAB's costs in the event of its claim being dismissed, SAB launched an application against BSA on 1 August 2013 for security for its costs. The shareholders of BSA, although willing to fund the litigation against SAB, were not prepared to furnish security on behalf of BSA. In court, BSA conceded that SAB's claims regarding its financial position were correct but contended that the demand for security would effectively destroy its ability to prosecute its claim (paras 2–3).

The issue before the court was whether BSA could, in terms of the 2008 Companies Act, be required to furnish security for SAB's legal costs in this matter. The SCA considered the matter as if it was res nova, and the principles laid down in this case would therefore be authoritative in future applications for security for costs (para 12).

The SCA held that the omission in the 2008 Companies Act of a provision similar to s 13 of the 1973 Companies Act signalled a change of intention on the part of the legislature and that it was therefore not open to a court to approach the enquiry as if the former s 13 still formed part of our law (para 13). Rather, the common law is applicable to any enquiry relating to an application for security for costs (para 13).

With reference to *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 ('*Western Assurance*'), *Ecker v Dean* 1937 AD 254 at 259 ('*Ecker*') and *Ramsamy*, the SCA held that at common law, the mere inability of an incola natural person to satisfy a potential cost order is not sufficient to justify an order for security for costs and that something 'more' is required, namely, that the action was reckless and vexatious (para 15).

The SCA therefore dismissed the appeal and held that as a plaintiff, a South African company may be compelled to furnish security for costs at the discretion of the court where its claim was vexatious, reckless or amounted to an abuse of the court process. The SCA held that BSA's advertising concept was neither unique nor confidential at the date on which BSA alleged that the parties entered into a confidentiality agreement in respect of the concept, and that its claim was therefore vexatious as it was obviously unsustainable. The main reasoning of the SCA was as follows (para 16):

> 'Absent s 13, there can no longer be any legitimate basis for differentiating between an *incola* company and an *incola* natural person. And as our superior

courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings, it must follow that the former can at common law be compelled to furnish security for costs. Accordingly, even though there may be poor prospects of recovering costs, a court, in its discretion should only order the furnishing of security for such costs by an *incola* company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse.'

Some of the principles laid down by the SCA are analysed below.

CRITICAL ANALYSIS

At first glance, the decision in *Boost Sports* seems meritorious in so far as it appears to clear up the confusion regarding the furnishing of security for costs by an incola plaintiff company, and provides guidelines on how courts should deal with future applications for security for costs. However, when one considers the judgment more closely, there are certain problematic aspects that warrant further analysis.

Is the common-law position now the default position?

The SCA correctly stated that it is a well-established principle of statutory construction that it should be accepted that the legislature is aware of the existing nature and state of the law when legislation is passed. An enquiry into the furnishing of security could therefore not proceed on the basis that the law is unaltered (para 13).

Van Loggerenberg & Malan argued that the omission from the 2008 Companies Act of a provision similar to s 13 of the 1973 Companies Act was probably the result of an oversight by the legislature. They contended that if the legislature had deliberately omitted a s 13 equivalent from the 2008 Companies Act, it would also have removed s 8 of the Close Corporations Act 69 of 1984. The latter provision provides that a close corporation may be required to furnish security for costs (Van Loggerenberg & Malan op cit at 619). On the other hand, it may be argued that if the omission was purely an oversight, the legislature would have rectified the position by now, especially in light of all the conflicting decisions and the resulting legal uncertainty.

Whichever argument may be correct, the SCA has now made it quite clear that the legislature, for whatever reason, deliberately omitted the equivalent of the previous s 13 from the 2008 Companies Act (para 13). This means that the common law is indeed the default position now when a court has to deal with an application for security for costs.

The common-law position

It is submitted that the SCA erred in its finding on the common-law position in respect of an enquiry for security for costs. It seems that confusion arose amongst the courts after a long line of reported decisions that started with *Western Assurance* and culminated in *Ramsamy* at 172J–173A (emphasis supplied), where the court stated:

> 'As a general rule then, the inability of a plaintiff or applicant as the case may be, who is an incola, to satisfy a potential costs order against him is insufficient in itself in a case of this kind to justify an order that he furnish security for his opponent's costs. Something more than this is required before that can be done. What this "something" is has been variously described in a number of decisions. Thus in Ecker v Dean (supra) it was said ... that the basis of granting an order for security was that the action was "reckless and vexatious".'

In *Ecker*, with reference to the decision in *Western Assurance*, the court stated that a superior court had inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the court process. It further stated that one of the ways in which this could be achieved was by ordering the vexatious litigant to provide security for the costs of the other party. However, this approach is problematic in relation to applications for security for costs by an incola company, for a number of reasons.

First, in both cases the vexatious litigants were unrehabilitated insolvents who instituted action independently of their trustees in regard to the general administration of their estates. As already stated, at common law this was the only exception to the general rule that nobody but a peregrinus could be required to furnish security for costs under any circumstances. The common-law position was pertinently set out in *Liquidator, Salisbury Meat Market* (supra) at 107, where De Waal J said (emphasis supplied):

> 'I can find no principle of our law upon which the application for security for costs can be supported. The general rule of our law is that nobody but a peregrinus can be called upon under any circumstances to give security for costs, and that the Court has no jurisdiction to make an ordinary litigant, or one who sues under a power conferred upon him expressly by Act of Parliament, give security for costs. I know of only one exception to the general rule, namely, that an unrehabilitated insolvent who sues independently of his trustee in regard to the general administration of his estate may be ordered to give security for costs.'

The SCA referred to the decision of the TPD in *Lombard* (supra) at 877, where De Villiers JP stated that the rule should be laid down that an insolvent ought to give security for costs as 'this is a question of practice this Court is justified in settling for itself'. The SCA, however, failed to mention that this statement was made in a minority judgment and that the majority of the court, consisting of Wessels and Smith JJ, made it quite clear that the common law position was that 'an *incola* cannot demand security for costs from another *incola*' (also see the discussion by Van Loggerenberg & Malan op cit at 611). Once again this statement referred specifically to an unrehabilitated insolvent and not to a natural person in general.

Secondly, in both *Ecker* and *Western Assurance* the respondents were natural persons, and no companies were involved.

Thirdly, in *Ramsamy* the court followed the decision in *Crest Enterprises v Barnett and Schlosberg* 1986 (4) SA 19 (C). Both these matters related to the question whether security for costs could be ordered against an *insolvent trust*, and came before court while the 1973 Companies Act was still in force. As

there was no authority dealing with the peculiar position of a trust either at common law, or in previous case law, these courts held that security against an *insolvent trust* could only be ordered where its action was vexatious or reckless or amounted to an abuse of the court process.

Fourthly, as Van Loggerenberg & Malan (op cit at 614) correctly point out, the court in *Western Assurance* was not concerned with an application for security for costs but with one for a stay of proceedings. Subsequent courts were therefore not permitted to follow this decision in applications for security for costs.

Finally, if it is accepted that *Ecker* and *Western Assurance* broadened the scope for the ordering of security for costs to natural persons, who are not unrehabilitated insolvents, where the relevant action was reckless and vexatious, it can be argued that the court could not, under the guise of the regulation of its own procedure, change a substantive legal right of a natural person to pursue legal proceedings. (This matter will be discussed more fully below.)

In subsequent decisions, these essential differences were overlooked. The courts applied the principles outlined above also to natural persons who were not unrehabilitated insolvents, as well as to companies (see the case law cited earlier). Clearly, all of these decisions are in conflict with the common-law principles relating to security for costs. At common law, a peregrinus could be ordered to furnish security for costs. In addition, a local natural unrehabilitated insolvent who sues recklessly, vexatiously and independently of his trustee in regard to the general administration of his estate, could be ordered to furnish such security. There were absolutely no other exceptions to this rule.

Although the SCA, with reference to *MTN Service Provider* paras 15–16, acknowledged that an order to furnish security can only be granted against an insolvent *natural* person who is an incola and whose action can be found to be reckless and vexatious, and not against a company, the court still erred in its finding that the common law allowed a court to order security against a natural person, *who was not an unrehabilitated insolvent, who sues independently of his trustee in regard to the general administration of his estate*, where the action was reckless and vexatious.

The High Court's regulation of its own procedure

The SCA apparently amended the common-law position by stating that there can no longer be any legitimate basis for differentiating between an incola company and an incola natural person, and that an incola company may therefore now also be required to furnish security for costs where its action is reckless and vexatious. However, a court cannot amend the common-law mero motu: either the common-law must be developed in terms of s 39 of the Constitution, or a high court may utilise the regulation of its own procedure in certain limited instances to amend the common law.

A problematic aspect of the decision in *Boost Sports* is the fact that the SCA did not make itself clear on the reasoning it used to come to its conclusion

that a plaintiff incola company may, at the discretion of the court, be required to furnish security for costs. Ponnan and Mbha JJA correctly stated that s 173 of the Constitution provides that the Constitutional Court ('CC'), SCA and the High Court have inherent power to protect and regulate their own process, and, with reference to *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G, 'that there is no doubt the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice' (para 13).

Although the SCA never stated this in express terms, it appears to have based its decision to amend the common-law position partly on this principle, and therefore effectively followed *Haitas* in this regard. As already stated, the high court cannot, under the guise of the protection and regulation of its own process, impair the existing substantive right of an incola plaintiff company to pursue legal proceedings. The high court's inherent power under s 173 of the Constitution to regulate its own process does not include the power to extend the (substantive) common-law grounds on which security for costs could be granted (Van Loggerenberg & Malan op cit at 615; *Siemens* para 9). As Fabricius J correctly pointed out in *Siemens* (ibid), the high court does not have the power to create substantive law under its constitutional power to regulate its own process; the creation of substantive law is reserved for its inherent power to develop the common law in terms of s 39 of the Constitution.

It is a pity that the SCA in *Boost Sports* did not consider these arguments. In light of this, it is submitted that the SCA erred in utilising the high court's inherent power to regulate its own procedure to come to the conclusion that there can no longer be any legitimate basis for differentiating between an incola company and an incola natural person, with the result that a plaintiff incola company may be ordered to furnish security for costs where its action is reckless and vexatious.

Development of the common law

As indicated above, the SCA in *Boost Sports* seemed to rely on the development of the common law to justify its conclusion that an incola plaintiff company may be compelled to furnish security for costs (para 13). There are, however, several fatal flaws in this approach. First, although the SCA specifically referred to the two-stage enquiry that is required when courts are embarking on the development of the common law (para 13), the court did not undertake this enquiry. In terms of this enquiry, a court should first ask itself whether, given the objectives of s 39(2) of the Constitution, the existing common law should be developed beyond existing precedent. If the answer to that question is in the negative, that should be the end of the enquiry. If the answer is, by contrast, that the existing law should be developed, the next enquiry should be how the development should occur and which court should embark on that exercise (ibid). As Fabricius J correctly pointed out in *Siemens* (para 9), a mere reference to the development of the common law in this context would be of no assistance. Before

that exercise can be done, a number of questions must first be asked and answered; something that the SCA did not do in *Boost Sports*.

Secondly, the court did not specifically refer to the decision in *Hennie Lambrechts Architects* (2015), where the court indeed properly developed the common-law position regarding the furnishing of security of costs by an incola plaintiff company. As already mentioned, the SCA considered the matter before it as if it was res nova, and therefore, by implication at least, the decision in *Hennie Lambrechts Architects* (2015) no longer has any authority. If the SCA wanted to develop the common law, it would have had to embark anew on the above-mentioned two-stage enquiry, which it failed to do.

Thirdly, an argument can be made that the SCA would in any event not have been in a position to develop the common law, even if it had embarked on the prerequisite two-stage enquiry. As already stated, the majority judgment of the full bench of the Free State Division of the High Court in *Hennie Lambrechts Architects* (2015) developed the common law so that a court would have the discretion to order a plaintiff incola company to furnish security for costs (para 28). However, in a dissenting judgment, Moloi J convincingly argued that the omission from the 2008 Companies Act of an equivalent provision to that in the 1973 Companies Act leaves one with no law of general application in terms of which the right in s 34 of the Constitution would be justifiably and reasonably limited. In light of this, the development of the common law may not be used to limit the provisions of a constitutionally entrenched fundamental right. Moloi J correctly stated that the development of the common law cannot be used to resuscitate the repealed s 13 of the former Companies Act. This would not be justifiable or reasonable, as the court would thereby usurp the powers of the legislature. The effect of developing the common law to give the courts a discretion to order payment of security for costs by an incola company would amount to subverting the legislature that consciously and deliberately omitted an equivalent of the previous s 13 from the 2008 Companies Act; doing so would resuscitate it without even applying the limitations set out in s 36 of the Constitution (see paras 3–4 of minority decision).

In view of the above, it is submitted that the only logical reason why the legislature would have deliberately omitted the former s 13 from the 2008 Companies Act was because the legislature was mindful that this provision may have been inconsistent with the provisions of s 34 of the Constitution. If this viewpoint is correct, it would have the ironic result that the courts would not be in a position to develop the common law in a manner that is inconsistent with s 34 of the Constitution, and that any development in this regard can only be embarked on by the legislature itself. It is therefore submitted that the approach of Moloi J was correct. This means that the SCA in *Boost Sports* would in any event not have had the authority to develop the common law regarding the furnishing of security by an incola plaintiff company in a way which would be inconsistent with section 34 of the Constitution.

If, therefore, the SCA in *Boost Sports* was not in a position to base its decision on the inherent power of the high court to regulate its own procedure or to develop the common law regarding the furnishing of security for costs by an incola plaintiff company, it would effectively mean that the common law should still prevail. Accordingly, an incola plaintiff company can never be required to furnish security for costs. However, it is highly unlikely that the SCA or CC will deviate from the decision in *Boost Sports* in the future. It is therefore submitted that any change in this regard will have to be brought about by the legislature itself.

Even so, if the legislature were to revert to the pure common-law position, the question arises whether it would still be adequate to cater for the demands of modern commerce.

Is the common-law position still adequate for the demands of modern commerce?

In *Hennie Lambrechts Architects* (2015), the court agreed with the appellant that the common law was simply inadequate and not aligned to the demands of the modern commercial world. The court held that the common law should be developed and that companies should be treated differently from natural persons, or what the SCA referred to as 'widows and orphans' who could only be ordered to furnish security in exceptional circumstances (para 33). The court furthermore held (para 34):

> 'A finding, as a general rule, that an *incola* company regardless of the peculiar facts which scream for the furnishing of security is not bound to provide security would be incongruent with the spirit, purport and objects of a Constitution designed to ensure equality of all before the law. Such a finding would mean that a party, who would be gravely prejudiced by another's refusal to furnish security because of the unfortunate absence of the equivalent of s 13, would be without remedy and, thus, left to suffer considerable financial consequences of such an absence which eventuality would, in turn, offend against the principles of equality and of "just and equitable decisions".'

One has to agree with this viewpoint. If the common law were to prevail, it would basically mean that an incola plaintiff company would be placed in a better position than what the SCA referred to as 'widows and orphans', in that such a company would not be required to furnish security for costs even in exceptional circumstances, such as vexatious or reckless litigation (as held by some courts), or more correctly, where an unrehabilitated insolvent who sues independently of his trustee in regard to the general administration of his estate embarks on reckless and vexatious litigation. It is therefore clear that the common law would not provide an equitable solution in a modern society.

The question is how the common law should be amended in this regard. As already stated, the common law cannot be changed by relying on the high court's power to regulate its own procedure, and also not by the development of the common law. The only option is for the legislature to intervene.

The first obvious solution would be for the legislature to enact a provision similar to the previous s 13 in the 2008 Companies Act, or in the Superior

Courts Act 10 of 2013 and Magistrates' Courts Act 32 of 1944 respectively, as Van Loggerenberg & Malan (op cit at 621) recommend. The main problem with this approach is that the new provision may be open to constitutional attack, given that this is probably the reason why the legislature omitted such provision from the 2008 Companies Act in the first place. Accordingly, before this can be recommended as a viable option, it is necessary to consider briefly the constitutionality of s 13 of the 1973 Companies Act.

Constitutionality of s 13 of the 1973 Companies Act

In *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) ('*Giddey*') para 7 the CC, confronted with the question of the constitutionality of s 13 of the 1973 Companies Act, explained the position as follows:

> 'A salutary effect of the ordinary rule of costs — that unsuccessful litigants must pay the costs of their opponent — is to deter would be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects of success are poor. Where a limited liability company will be unable to pay its debts, that salutary effect may well be attenuated. Thus the main purpose of s 13 is to ensure that companies, who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense.'

In *Hennie Lambrechts Architects* (2015) Moloi J, in his dissenting judgment, correctly pointed out that in *Giddey* the applicant did not challenge s 13 of the 1973 Companies Act on the basis that it constituted an unjustifiable limitation of s 34 of the Constitution. Nor did the applicant argue that s 13 was unconstitutional on the basis that it conferred an inappropriate discretion on the courts. Accordingly, in *Giddey* the CC proceeded on the basis that s 13 was constitutional. Section 36 of the Constitution was also not applicable in this circumstance as it would only be relevant if s 13 were directly challenged and found to limit a constitutional right. The CC therefore never pronounced on the constitutionality of s 13 (para 4 of the minority decision). Nevertheless, there are ample suggestions in *Giddey*, as well as other case law (*Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 (2) SA 166 (SCA) 172C–D and *MTN Service Provider* para 16), that s 13 was *not* unconstitutional and that the legislature was overcautious in not re-enacting a similar section in the 2008 Companies Act. Van Loggerenberg & Malan convincingly argue that, although the courts did not specifically consider the constitutionality of the old s 13, there are several indications from reported case law that the courts did not find any fault with the practical application of this provision and that a statutory provision such as s 13 of the 1973 Companies Act was not in conflict with s 34 of the Constitution (Van Loggerenberg & Malan op cit at 619).

In *Twee Jonge Gezellen (Pty) Ltd* v *Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (3) SA 1 (CC) the CC, in relation to the procedure of provisional sentence, held that s 36(1) of the Constitution

requires that a court must bear in mind that it is performing a balancing act between two legitimate interests when it exercises its discretion. In provisional sentence proceedings, on one side of the scale, there is the right of a plaintiff, armed with a liquid document, to obtain speedy relief; on the other side there is the defendant's right to a fair hearing in terms of s 34 of the Constitution. The CC concluded that the provisional sentence procedure constitutes a justifiable limitation of the defendant's s 34 right to a fair trial in cases where the court has no discretion in the absence of narrowly defined 'special circumstances', to refuse provisional sentence. In other words, it was not the exercise of a judicial discretion by a court which may lead inevitably to the fact that a party is deprived of its s 34 right to a trial, but the lack of such a discretion in certain circumstances. In relation to security for costs, this viewpoint was supported by Willis J in *Genesis on Fairmount Joint Construction*, where he declared (para 14) that 'the court has a judicial discretion, which must be appropriately exercised, having regard to all the relevant facts and circumstances'.

As regards the suggestion that s 13 of the 1973 Companies Act was excluded from the 2008 Companies Act because its inclusion would limit the fundamental constitutional right of access to the courts and would therefore be unconstitutional, the SCA in *Boost Sports* disagreed. The SCA explained that if s 13 were unconstitutional, it would ignore the fact that s 13 conferred a discretion on a court and that a court performs a balancing act when exercising such discretion. On the one hand, a court must weigh the injustice to the plaintiff if it were prevented from pursuing a proper claim by an order for security. On the other hand, it must weigh the injustice to the defendant if no security is ordered and the defendant finds himself unable to recover costs if the plaintiff's claim fails (para 13). In light of this, it is submitted that s 13 of the 1973 Companies Act was indeed constitutional and could have co-existed with s 34 of the Constitution.

The way in which a judicial discretion should be exercised was aptly summarised in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 11:

> 'A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

Two further aspects of the decision in *Boost Sports* warrant closer inspection. The first is the notion that a court may only order the furnishing of security by an incola plaintiff company where its action is vexatious, reckless or amounts to an abuse of the process of court. The second is the notion that the omission of an equivalent of the previous s 13 from the 2008 Companies Act inevitably means that an incola plaintiff company must now

be treated in the same way as an incola natural person when it comes to applications for security for costs. These two aspects are considered in more detail below.

Vexatious or reckless plaintiffs

As already stated, the SCA erred in its interpretation that, at common law, a natural person (who was not an unrehabilitated insolvent that sued independently of his trustee in regard to the general administration of his estate) could be required to furnish security where his or her action was reckless and vexatious and that a company should henceforth be treated likewise (paras 15-16). Section 13 of the 1973 Companies Act also never referred to the fact that a court had a discretion to order security against an incola plaintiff company only in circumstances where the action was vexatious, reckless or amounted to an abuse of the process of court. In this regard, it was held in *Hudson & Son v London Trading Company Ltd* 1930 WLD 288 at 291 that the object of security for costs was to protect persons against liability for costs in regard to any action instituted by bankrupt companies, regardless of whether the action was vexatious or reckless. It is therefore clear that in relation to s 13 of the 1973 Companies Act, the legislature did not intend to limit an application for security against an incola plaintiff company only to circumstances in which the action was vexatious, reckless or amounted to an abuse of the process of court. The only yardstick was the inability of the plaintiff company to satisfy an adverse cost order.

As already stated, *Ramsamy* incorrectly interpreted the common law when it held that it was a prerequisite for the action to be reckless and vexatious before a court would order security against a natural person who was not an unrehabilitated insolvent. This precedent was erroneously followed by subsequent courts in relation to companies, as I have discussed above. It is therefore submitted that it should not be an absolute requirement that the action was reckless and vexatious or an abuse of the court process before security is ordered against a local company. Other factors should also be taken into account when a court embarks on the relevant enquiry.

Differentiation between natural and company incola plaintiffs

The statement in *Boost Sports* that, in the absence of the equivalent of the former s 13, there can no longer be any legitimate basis for differentiating between an incola company and an incola natural person, is open to criticism. The SCA made it clear that s 13 of the 1973 Companies Act was not in its view unconstitutional. It even referred to the European Court of Human Rights' view that security for costs pursued a legitimate aim, namely, to protect a litigant from being faced with an irrecoverable bill for legal costs. Furthermore, since the prospects of success were taken into account, the requirement could be said to have been imposed in the interests of the fair administration of justice (para 13).

It is submitted that the SCA should rather have followed the approach of the court in *Genesis on Fairmount Joint Venture* para 13, where it was held that

it was understandable why at common law there would be an inclination on the part of the courts to protect an indigent natural person against an order for security, but that such protection should not be afforded to corporate litigants created purely for commercial matters. The court therefore was of the view that security for costs should not be required against corporate litigants only where its action was reckless and vexatious. As the SCA correctly stated in *Boost Sports*, the shareholders of a company can fund the relevant litigation and then hide behind the 'corporate veil' of the company when a cost order is granted against it (para 25). This luxury is not afforded to a natural person.

It would be preferable to follow this approach in a modern society where companies are registered on a daily basis for purely commercial purposes. Such an approach would not offend s 34 of the Constitution, as a court would still have a discretion (which should be exercised judicially) to order the furnishing of security for costs. The correct approach was set out in *Shepstone & Wylie v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045 where Hefer JA held:

> '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 the relevant features, without adopting a predisposition either in favour of or against granting security.'

This approach was also endorsed in *MTN Service Provider*, where the court held that there is no reason why a court should order security only in exceptional cases and that mere bona fides in itself cannot serve as a basis to refuse security for costs (para 16). Although both these matters were decided when the previous s 13 was still in force, it is submitted that there is no reason why this approach should not still apply to current disputes. *Genesis on Fairmount Joint Venture* (decided after the enactment of the 2008 Companies Act) accepted as much when it held that 'the court has a judicial discretion, which must be appropriately exercised, having regard to all the relevant facts and circumstances', and that this approach is reconcilable with the position at common law (para 14).

In light of the above, it is submitted that s 13 of the 1973 Companies Act was not unconstitutional — not even when the application thereof was not limited to vexatious, reckless or abusive actions by *incola* plaintiff companies. However, the insertion of a provision similar to the former s 13 into the 2008 Companies Act or the Superior Courts and Magistrates' Courts Act respectively would not be a viable option, as it may result in the courts once again accepting the approach adopted in *Ramsamy*. This would leave the approach adopted by the SCA in *Boost Sports* basically unaltered. Accordingly, the legislature should enact a set of detailed provisions dealing not only with the specific categories in terms of which security could be granted, but also setting out in no uncertain terms that the furnishing of security against a local company is in the sole discretion of the court, notwithstanding the fact that the claim may not be vexatious, reckless or an abuse of the court process.

Some practical implementation problems

In *MTN Service Provider* the SCA held that the previous s 13 required a two-stage enquiry. At the initial stage, the question is whether the applicant for security had established, by credible testimony, that the body corporate will not be able to pay the applicant's costs in the main proceedings if it is unsuccessful. If the applicant failed to meet this threshold requirement, that was the end of the matter and the application would be refused. If, on the other hand, the applicant met this requirement, at the second stage the court had to exercise the discretion conferred on it by s 13 to decide whether or not to order the furnishing of security (para 7).

In *Boost Sports*, the SCA specifically referred to this two-stage enquiry (para 10). It must therefore be assumed, at least by implication, that this enquiry is still applicable to applications for security for costs. The SCA further held that an incola plaintiff company should present evidence to a court that there has been an attempt to raise funds from shareholders or other interested parties to put up security for the company's costs, but that these parties have been unable to do so. The plaintiff must also be able to show that an order compelling it to furnish security will in effect force it to terminate its action (para 25).

The question that arises is whether the failure of a plaintiff incola company to present evidence to a court of its attempt to raise funds from its shareholders or other interested parties, or that an order compelling it to furnish security will in effect force it to terminate its action, now constitutes additional grounds (for instance where the claim is not vexatious or reckless) for the furnishing of security for costs by a plaintiff incola company. Alternatively, is this only one of the factors that a court has to consider during the first stage of the enquiry relating to the ability of the company to pay the costs of the applicant in the main proceedings, or, during the second stage of the enquiry where the court, in the exercise of its discretion, should decide whether or not to order the furnishing of security? Furthermore, if this relates to the first stage of the enquiry, does this mean that the onus of proof is on the company to prove that it is able to pay for the applicant's costs in the main proceedings if unsuccessful?

The SCA was extremely vague on this matter. In particular, it failed to construe practical guidelines as to how courts should embark on this enquiry. It is submitted that the failure of a plaintiff incola company to present evidence to a court that it has attempted to raise funds from its shareholders or other interested parties or that an order compelling it to furnish security will force it to terminate its action should rather be a factor that the court should consider in its judicial discretion in an enquiry for security for costs, as these factors will become more relevant during the second stage of the enquiry.

The SCA also referred to the fact that s 8 of the Close Corporations Act remains in force (which section has been interpreted in accordance with the principles that have evolved in relation to the corresponding provisions in

the 1973 Companies Act) and that the principles regarding the furnishing of security by a close corporation will henceforth differ from those applicable to a company (para 13). This statement of the SCA is puzzling. Why will the position of close corporation plaintiffs in relation to the furnishing of security for costs be any different from the approach adopted by the SCA in *Boost Sports*? Arguably, the SCA was of the opinion that a court would have a wider discretion to order security for costs against a close corporation than the narrowly defined circumstances of vexatious, reckless or abusive litigation. However, this would result in the untenable position that there will be two different approaches regarding applications for security for costs against companies on the one hand, and close corporations on the other hand (also see Van Loggerenberg & Malan op cit at 620).

In sum, there are a number of unanswered questions after the decision of the SCA in *Boost Sports*, and it is time for the legislature to intervene.

CONCLUSION AND RECOMMENDATION

Although the SCA in *Boost Sports* made some valuable contributions regarding the furnishing of security for costs, it is submitted that the court did not properly consider the demands of modern commerce. There is also confusion regarding certain aspects of its decision. It is therefore submitted that the legislature should intervene as a matter of urgency. As Van Loggerenberg & Malan suggest, the best place to bring about these amendments would be in the Superior Courts and Magistrates' Courts Act respectively (Van Loggerenberg & Malan op cit at 621). However, the amendments should not only include the specific categories in terms of which security could be granted. They should also include the specific factors relating to incola plaintiff companies that should be taken into consideration by a court when exercising its discretion in a matter where the claim is clearly not vexatious, reckless or amounts to an abuse of the court process. An example of such factor relates to the failure of a plaintiff incola company to present evidence to a court that there has been an attempt to raise funds from its shareholders or other interested parties or that an order compelling it to furnish security will force it to terminate its action. These amendments should also state clearly that:

(a) security for costs can only be ordered against a natural person where his or her claim is reckless, vexatious or amounts to an abuse of the process of court;

(b) security for costs can be ordered against any juristic person where it is shown that the juristic person's claim is reckless, vexatious or amounts to an abuse of the process of court, or, where the court has reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if it is unsuccessful. The court may stay all proceedings until such security is given.