Security for costs by local companies: Back to 1909 in the Transvaal, or not?

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OPSOMMING

Sekuriteit vir koste deur maatskappye: Terug na 1909 in die Transvaal, of nie?

Die Maatskappywet 71 van 2008 bevat nie 'n bepaling soortgelyk aan artikel 13 van die Maatskappywet 61 van 1973 rakende sekuriteit vir koste deur plaaslike maatskappye nie. Dit is kennelik 'n oorsig aan die kant van die wetgewer. Gevolglik kan daar nie van 'n *incola* maatskappy *qua* maatskappy sekuriteit vir koste in siviele verrigtinge geverg word nie. Dit is 'n terugkeer na die gemeenregtelike posisie in die Transvaal voor 1909. Alhoewel Hooggeregshowe oor inherente magte beskik om die gemenereg te wysig, word aan die hand gedoen dat ingryping deur die wetgewer noodsaaklik is om die oorsig reg te stel. Landddroshowe beskik nie oor sulke inherente magte nie en ingryping deur die wetgewer sal nie alleen tot regsekerheid lei nie maar 'n eenvormige posisie in hooggeregshof- en landdroshofprosedure meebring.

1 INTRODUCTION

Unlike the Companies Act of 1892 (Cape),[1] the Companies Act of 1909 (Transvaal)[2] did not provide for security for costs by companies in civil proceedings. The new Companies Act of 2008[3] also does not provide for security for costs by companies in civil proceedings.

This article proposes to address the question whether, in the absence of statutory provision for security for costs by companies, a local company *qua* company can be compelled to give security for costs either as plaintiff or defendant following two decisions of the South Gauteng High Court, Johannesburg, namely:

1 Act 25 of 1892 which, in s 128 thereof, provided: "Where a limited company is plaintiff in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, requires sufficient security to be given for such costs, and may stay all proceedings until security is given." See *Brink v Liquidator United Farming Corporation of South Africa Ltd* 1913 CPD 371.

2 Act 31 of 1909.

3 Act 71 of 2008.

(a) *Haitas v Port Wild Props 12 (Pty) Ltd*,[4] where it was held that, having regard to section 173 of the Constitution of the Republic of South Africa, 1996, which provides that the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice, an insolvent (and liquidated) plaintiff company should in the interests of justice be ordered to furnish security for costs by a court guarding against vexatious, reckless and unmeritorious litigation; and

(b) *Ngwenda Gold (Pty) Ltd v Precious Prospect Trading 80 (Pty) Ltd*,[5] where it was held that, having regard to the fact that the new Companies Act was promulgated after the inception of the Constitution of the Republic of South Africa, 1996, it would be inappropriate to assume that the absence of a provision similar to section 13 of the Companies Act of 1973[6] was a result of an oversight of the legislature: the absence of such a provision seems to suggest that the legislature was mindful of the provisions of section 34 of the Constitution, in terms of which access to the courts is enshrined.

The discussion that follows first focuses on the common law, relevant history and statutory provisions relating to security for costs by companies. Secondly, the *Haitas* and *Ngwenda* decisions are analysed and discussed. In conclusion it is contended that the *Haitas* and *Ngwenda* decisions are without any justifiable foundation and should not be followed. It is proposed that legislative intervention is required to rectify the *lacuna* that exists in the Companies Act of 2008.

2 THE COMMON LAW, RELEVANT HISTORY AND STATUTORY PROVISIONS

Under the common law an *incola* company *qua* company could not be compelled to give security for costs. In *Witham v Venables*[7] the position is summarised as follows:

> "[N]o person, who is either *civis municeps* or *incola* of this colony, can, as plaintiff, be compelled to give security for costs, whether he be rich or poor, solvent or insolvent; and on the other hand, that every person, who is neither *civis municeps*, *nec incola*, may, as plaintiff, be called on to give security for costs, unless he prove that he is possessed of immoveable property, situated within the colony."

In *Liquidator, Salisbury Meat Market Ltd v Perelson*[8] De Waal J, in refusing an application for security for costs against a plaintiff company, stated:[9]

> "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

4 2011 5 SA 562 (GSJ).
5 Unreported case no 2011/31664 (GSJ) dated 14 December 2011.
6 Act 61 of 1973.
7 (1828) 1 Menzie 291.
8 1924 WLD 104.
9 107. See also Voet 2 8 1; *Brollomer Tin Exploration Co Ltd v Kameel Tin Proprietary Co Ltd* 1928 TPD 600 601; *Van Zyl v Euodia Trust (Edms) Bpk* 1983 3 SA 394 (T) 396B–397B. In *Ecker v Dean* 1938 AD 102 110 it was held that the fact of the plaintiff being an insolvent did not *per se* entitle the defendant to demand security for costs. In addition to the insolvency of the plaintiff, the defendant had to show that the action was reckless and vexatious.

> 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. *Mears* v. *The Pretoria Estate and Market Co., Ltd.* (1907, T.P.D. 951)."

Prior to the decision in the *Salisbury Meat Market* case, De Villiers JP, in a minority judgment of the full court in *Lombard v Lombardy Hotel Co Ltd (In Liquidation)*[10] held that, because security for costs is "a question of practice" which a High Court is justified in settling for itself, the mere fact that the company is in liquidation is sufficient ground for ordering security to be given and "when the company has everything to gain and nothing to lose, as in the present case, it would be putting a premium upon vexatious and speculative actions if such practice were not adopted". The majority of the court, Wessels J and Smith J (*per* Wessels J), however, stated the common law as "an *incola* cannot demand security for costs from another *incola*". The Appellate Division, in *Western Assurance Co v Caldwell's Trustee,*[11] in a different context, held that the inherent right to prevent vexatious litigation has been recognised and freely exercised in South Africa.

This was the position when the Companies Act 46 of 1926, which was of national application, came into operation. That Act, in section 216 thereof, laid down that where a limited company was plaintiff or applicant in any legal proceedings, the court that had jurisdiction in the matter could, at any stage, if it appeared by credible testimony that there was reason to believe that the company or, if the company was in liquidation, the liquidator thereof, would be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for these costs and could stay all proceedings until security was given.

The Companies Act of 1926 was repealed by the Companies Act of 1973.[12] Section 13 of the 1973 Act provided that where a limited company was the plaintiff or applicant in any legal proceedings, a court could at any stage order it to furnish security for costs if there was reason to believe that the company or, if the company was being wound up, its liquidator, would be unable to pay the costs of the defendant or respondent if successful in his defence and could stay all proceedings until security was given.

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10 1911 TPD 866 877, relying on *Mears v The Pretoria Estate and Market Co Ltd*, *supra*. It is interesting to note the following passage in the minority judgment: "Now it was admitted that under similar circumstances in England a company could be compelled to give security for costs under sec. 278 of the Companies Cons. Act, 1908. In fact, as BRISTOWE, J., points out, it has been held in the *Pure Spirit Co.* vs. *Fowler* (25 Q.B.D. 235), that the fact that a company is in liquidation is, in itself, sufficient ground for ordering security to be given. But it was contended that this Court has no such power as the corresponding section was left out in our Company's Act, 1909, which, it was urged, follows the English Act so closely. This conclusion is, to my mind, unwarranted. The mere fact of the absence of a corresponding section in our law does not justify such a conclusion. It may be that the Legislature considered that the matter was covered by the principles of our Common Law, or it may even be a pure oversight."

11 1918 AD 262 271–272, referring with approval to the English cases of *Reichel v Magrath* 14 AC 665 and *Metropolitan Bank v Pooley* 10 AC 214.

12 Act 61 of 1973.

Under both the 1926 and 1973 Acts claims in reconvention were excluded from the legal proceedings contemplated for purposes of security for costs.

The question arises as to what the effect of the respective statutory provisions of 1926 and 1973 was on (a) the common law and (b) the inherent right of the courts to prevent vexatious litigation by ordering security for costs. As regards the common law, the answer is simple: the respective statutory provisions added other instances and grounds on which security for costs could be granted. As regards the inherent right of the courts to prevent vexatious litigation by ordering security for costs, the answer is more complex.[13] For present purposes it suffices to point out that the only instance where the Appellate Division decided that the inherent right of a court to prevent an abuse of process also entails such court ordering a litigant to give security for costs, is *Ecker v Dean*.[14] As the *Ecker v Dean* cases did not relate to a company, they are clearly distinguishable on the facts.

As pointed out above,[15] the Companies Act of 2008 does not provide for security for costs by companies at all. This hiatus was addressed in *Haitas* and *Ngwenda*.[16]

3 *HAITAS*

3 1 Facts

The plaintiff, a local private company, instituted action against the defendant in the South Gauteng High Court, Johannesburg. The defendant requested security for costs under Uniform Rule of Court 47, which was refused by the plaintiff. The defendant then brought an application for security for costs which was opposed by the plaintiff.

The following facts were common cause:[17] the plaintiff was incorporated in accordance with the company laws of South Africa; the plaintiff was insolvent; subsequent to the institution of the action, the plaintiff was liquidated; the plaintiff had neither realisable assets nor cash; the plaintiff had instituted the action in 2006, applied for a trial date after the close of pleadings in 2009 and thereafter did nothing to enrol the case; there were no prospects that the plaintiff would be able to meet its obligations in the event of an adverse order being made against

13 Questions such as following arise in this regard: (a) Did the legislator intend to limit the instances in which a plaintiff or applicant company (or its liquidator) could be ordered to pay security for costs to those laid down in the respective statutory provisions or was it intended to create another ground on which security for costs could be demanded from a company, that is, in addition to the ground that such security could be demanded from an insolvent (albeit a company) who embarked upon reckless or vexatious litigation? (b) Is a court, in the exercise of its inherent right to prevent abuse of its process, entitled to create grounds on which security for costs can be demanded in addition to grounds already existing under the common law and/or in terms of statutory provisions? This question is reverted to in the discussion of *Haitas* in para 4 below.

14 *Supra*. In this case the court, with reference to *Western Assurance Co v Caldwell's Trustees*, *supra*, expanded the inherent right to the granting of security for costs against an insolvent who is found to have embarked upon an action that is reckless or vexatious. See also *Ecker v Dean* 1937 AD 254.

15 See Introduction.

16 *Supra*.

17 562I–563B.

it; under section 13 of the Companies Act of 1973 the plaintiff would have been obliged to furnish security for costs; section 13 of the Companies Act of 1973 had been repealed; and there was no provision similar to section 13 in the Companies Act of 2008.

3 2 Judgment

Tsoka J held as follows:

(a) The omission in the Companies Act of 2008 of a provision similar to section 13 of the Companies Act of 1973 was for the common law to prevail, that is, "an impecunious or even an insolvent company . . . which is an *incola* of South Africa cannot be required to give security for costs for proceedings instituted by it".[18]

(b) "[T]he mere fact that an *incola* plaintiff is insolvent . . . does not justify that such a plaintiff should be ordered to furnish security for costs" but such a plaintiff could, in terms of the inherent power of a High Court to regulate its own process, be ordered to provide security for costs if the action was reckless or vexatious.[19]

(c) Section 173 of the Constitution of the Republic of South Africa, 1996,[20] recognised the High Courts' inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice.[21]

(d) In regulating its own process under its inherent power, a High Court should guard against vexatious, reckless and unmeritorious litigation, bearing in mind the right of every litigant to have any dispute settled in a court of law.[22]

(e) Having regard to the facts that were common cause, the interests of justice would be served in requiring the plaintiff to furnish security for costs:[23]

> "It is inimical to the interest of justice to expect the plaintiff to proceed with the matter to its finality, well knowing that in the event that the defendants succeed and an adverse costs order is made against the plaintiff, such costs order would not be satisfied. In these circumstances it would also be unfair, unjust and inequitable that an impecunious and insolvent plaintiff would be allowed to proceed with the trial while not on risk. The approach would encourage *incola* and insolvent plaintiffs to unnecessarily embark on litigation with a clear knowledge that they have nothing to lose. Vexatious litigation would be the order of the day. In these circumstances, it would only be the defendants who would be on risk with regard to costs. This, in my view, is not in the interest of justice."

Consequently, the plaintiff was ordered to file security for costs in an amount to be determined by the registrar in terms of Uniform Rule of Court 47.[24]

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18 563D–E, relying on Meskin *Henochsberg on the Companies Act* 28(1).
19 563E–H, relying on *Ecker v Dean supra* 110 and *Western Assurance Co v Caldwell's Trustee supra* 274.
20 Hereinafter referred to as "the Constitution".
21 563H–I.
22 564I–565J.
23 564G–I.
24 565B–D.

4 CRITICAL ANALYSIS OF *HAITAS*

As pointed out above a company *qua* company could not be required to furnish security for costs under the common law. The fact that the company was impecunious or even insolvent played no role in that regard.

The reference by Tsoka J[25] to *Western Assurance v Caldwell's Trustee*[26] on the basis that the Appellate Division, in the exercise of its inherent power, ordered the plaintiff company to furnish security for costs in order to prevent frivolous or vexatious litigation, is factually incorrect. The court in the *Western Assurance* case was not concerned with an application for security for costs but with one for a stay of proceedings. The case is therefore irrelevant for purposes of deciding whether a company could (or should) be ordered to furnish security for costs.

The reference by Tsoka J[27] to *Ecker v Dean*[28] as authority for the finding that security for costs could be ordered against a plaintiff company that is insolvent under a High Court's inherent power to prevent abuse of its process is also without foundation. First, the facts in the *Ecker v Dean* cases are distinguishable from those in the *Haitas* case simply on the basis that no company was involved in those cases. Secondly, at the time that the judgments in the *Ecker v Dean* cases were delivered, the Companies Act of 1926 was already in operation nationally and provided for security for costs by companies, including companies in liquidation. As far as security for costs by companies was concerned at the time, the position was governed by that Act and abuse of process played no role whatsoever.

The next aspect of the *Haitas* decision that needs to be considered, is the court's reliance on its inherent power to prevent an abuse of its process under section 173 of the Constitution. In this regard the question arises whether a High Court's inherent power under the Constitution to regulate its own process, taking into account the interests of justice, includes the power to extend the common law grounds on which security for costs could be granted.

The last question that arises is whether it could justifiably be argued that Tsoka J developed the common law so as to include a new ground on which security for costs could be granted, that is, against an insolvent company.

The two questions are addressed *seriatim*.

4 1 First question

Section 173 of the Constitution, *inter alia*, provides that High Courts have the inherent power (a) to protect and regulate their own process and (b) to develop the common law, taking into account the interests of justice. It is submitted that the inherent power of High Courts to protect and regulate their own process is separate and distinct from their inherent power to develop the common law. It is submitted that under its inherent power to regulate its own process, a High Court does not have the power to create substantive law; the creation of substantive law is reserved for its inherent power to develop the common law. In other words:

25 563G–H.
26 *Supra*.
27 563F–G.
28 *Supra*.

Under section 173 of the Constitution a High Court cannot use its own process to impair the existing substantive rights of a plaintiff. It can only protect and regulate its own process. Under the common law, which we submit now again prevails in respect of companies, an *incola* company *qua* company cannot be ordered to furnish security for costs, that is, an *incola* plaintiff company has an unimpaired substantive right to pursue legal proceedings. Should a High Court order such *incola* company to furnish security for costs, its rights will be impaired. This can only be done by the legislature creating exceptions to the common law or by a High Court in the development of the common law. It cannot be done by a High Court under its inherent power to protect and regulate its own process.[29]

4 2 Second question

There is no indication in *Haitas* that Tsoka J intended or attempted to develop the common law as contemplated in section 173 of the Constitution. Tsoka J simply approached the case on the basis of a High Court's inherent power to prevent an abuse of its process, taking into account the interests of justice. It could therefore not justifiably be argued that the common law has been developed in *Haitas*.

5 *NGWENDA*

5 1 Facts

The respondents in the application for security launched an application against the applicants in that application in the South Gauteng High Court, Johannesburg. The main application was opposed and, in addition, met by a counter-application. The litigation between the parties arose out of a certain memorandum of understanding which had failed. Relief consequent upon such failure was claimed reciprocally.

In the application for security the applicants contended that (a) the respondents had no immovable property registered in their names, and, further, had no trading income, cash flow or liquid assets; and (b) that there was reason to believe that the respondents would be unable to pay the costs of the applicants.

The respondents contended that (a) the merits in the main and counter-applications should be disregarded in the light of the factual disputes that existed between the parties; and (b) that it possessed of valuable prospecting rights (worth hundreds of millions of rands) against which it could, if necessary, raise finance for the amount of the security for costs demanded from them.

5 2 Judgment

Van der Merwe AJ held as follows:

(a) The *Haitas* decision was not authority for the proposition (a) that the approach reflected in section 13 of the Companies Act of 1973 should still find application, notwithstanding the fact that the legislature has seen fit not to retain the equivalent thereof in the Companies Act of 2008, (b) that an insolvent company or even a company in liquidation was in general obliged to provide security for costs, and (c) that a company whose assets exceeded its

29 Cf *Oosthuizen v Road Accident Fund* 2011 6 SA 31 (SCA) 39D.

liabilities by a large margin, but whose assets were not readily realisable, was obliged to provide for security for costs.[30]

(b) In the absence of a provision similar to section 13 of the Companies Act of 1973, an applicant in an application for security had to found its entitlement to security for costs on the principles of the common law.[31]

(c) At common law, an *incola* company could not be required to give security for costs in civil proceedings.[32]

(d) It would be inappropriate to assume that the absence of a provision similar to section 13 of the Companies Act of 1973 was as a result of an oversight on the part of the legislature: the fact that the Companies Act of 2008 was promulgated after the inception of the Constitution of the Republic of South Africa, 1996, suggested that the legislature, in not retaining an equivalent provision to former section 13, was mindful of the provisions of section 34 of the Constitution, in terms of which access to the courts was enshrined.[33]

(e) The absence of an equivalent to section 13 of the Companies Act of 1973 indicated that the legislature, in promulgating the Companies Act of 2008, deviated from the approach as reflected in, *inter alia*, *Shepstone & Wylie v Geyser NO*,[34] namely, that section 13 could have the undesirable consequence that an impecunious or insolvent company was precluded from recovering a valid claim.[35]

(f) The absence of an equivalent to section 13 suggested that the legislature placed greater emphasis on the entitlement of even impecunious or insolvent corporate entities to recover what was due to them in courts of law without the obstacle of having to provide security in advance for the costs of the litigation.[36]

(g) A valid consideration in support of the approach of the legislature as reflected in the Companies Act of 2008,

> "would be the fact that litigation can seldomly, if at all, be instituted and proceeded with on a risk-free basis. At the very least, those funding the litigation on behalf of the insolvent or impecunious corporate entity would normally be exposed to the deterrent that the funding provided would be irrecoverable in the event of unsuccessful litigation".[37]

(h) The facts of the case were distinguishable from those in *Haitas* in which the facts supported a conclusion that the plaintiff was proceeding with vexatious, reckless and unmeritorious litigation.[38]

(i) The *Haitas* decision indicated that other considerations which were recognised as special circumstances, justifying the granting of an order for security for costs, might very well be developed by the courts in those instances

30 Para 9.
31 Para 10.
32 Paras 10 and 11.
33 Para 12. S 34 of the Constitution reads as follows: "Everyone 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."
34 1998 3 SA 1036 (SCA).
35 Para 13.
36 Para 14.
37 Para 15.
38 Para 16.

where insolvent corporate entities instituted litigation, for example, one of the considerations which might constitute special circumstances (as identified in *Haitas*) was the fact that the plaintiff had for an extended period of several years lost interest in the litigation and had failed to proceed expeditiously with the finalisation thereof.[39]

(j) Whilst future legal development might entail that special circumstances or considerations were recognised in the case of insolvent or impecunious corporate entities which justified the granting of an order for security for costs, "it is clear that the common law requires '*something more*' than mere insolvency or impecuniosity in the event of *incola* plaintiffs or applicants, irrespective of whether the plaintiff or applicant is a private individual or a corporate entity".[40]

(k) Future legal development might very well recognise the fact that the plaintiff or applicant "*had nothing to lose*" in the litigation as a relevant factor which contributed to a finding that special circumstances were present which justified the granting of an order for security for costs.[41]

Absent special circumstances, the application for security for costs was accordingly dismissed.[42]

6 CRITICAL ANALYSIS OF *NGWENDA*

The *Ngwenda* decision is open to criticism on, at least, two material grounds. First, in that it was held that the absence of a provision similar to section 13 of the previous Companies Act in the Companies Act of 2008 was not a result of an oversight on the part of the legislature. Secondly, in that it was held that the common law required "*something more*" than mere insolvency or impecuniosity in the event of *incola* plaintiffs or applicants, irrespective of whether the plaintiff or applicant was a private individual or a corporate entity, before an order of security for costs could be made against such plaintiff or applicant. The grounds of objection are dealt with shortly.

6 1 First ground

As stated above, the court suggested that the explanation for the absence in the Companies Act of 2008 of a provision equivalent to section 13 of the Companies Act of 1973 should be sought in the intention of the legislature to protect a plaintiff or applicant company's right of access to court, as provided for in section 34 of the Constitution, rather than as being the result of an oversight on the part of the legislature.

The role of section 34 of the Constitution when considering an application for an order for security for costs in terms of section 13 of the Companies Act of 1973, has been considered by both the Constitutional Court and the Supreme Court of Appeal.[43]

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39 Paras 17 and 18.
40 Para 19.
41 Para 20.
42 Paras 19 and 22.
43 *Giddey NO v JC Barnard and Partners* 2007 5 SA 525 (CC); *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 6 SA 620 (SCA) and *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 2 SA 166 (SCA).

Although neither the Constitutional Court nor the Supreme Court of Appeal had been asked to consider the constitutionality or otherwise of section 13, neither court gave any indication that the section was or might be unconstitutional.

In *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd*[44] the court, *inter alia*, stated that section 13 of the Companies Act of 1973 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, if unsuccessful, will not be able to pay the applicant's costs in the main proceedings. If the applicant fails to meet this threshold requirement, that is the end of the matter. The application is bound to be refused. If, on the other hand, the Court is satisfied that such reason to believe exists, it must, at the second stage, decide, in the exercise of the discretion[45] conferred on it by the section, whether or not to compel security."

In *Giddey*[46] the applicant argued that the effect of the order for security for costs was to put an end to the litigation, and that the order was therefore unconstitutional in that it violated the applicant's right, in terms of section 34 of the Constitution, to have a dispute that could be resolved by the application of law decided in a court or tribunal in a fair public hearing (that is, that it violated the applicant's right to access to court provided for in section 34 of the Constitution).

In *Giddey,*[47] O'Regan J stated that as follows:

(a) The courts had recognised that in applying section 13, they needed to balance the potential injustice to a plaintiff if it was prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against the potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its own costs in the litigation.[48]

(b) An order to furnish security for costs made in terms of section 13, by a court that had properly exercised its discretion provided for in that section, was not unconstitutional. Section 13 was not capable of being read, in light of the Constitution or otherwise, as meaning that the court had no discretion to order security for costs where the effect of the order would be to terminate the litigation.[49]

(c) In exercising its discretion in terms of section 13, a court had, however, to bear in mind the provisions of section 34 of the Constitution and weigh them in light of the other factors laid before it.[50]

In *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality*[51] the court, *inter alia*, stated the following:

> "Whilst the court is enjoined to exercise its discretion with the litigant's constitutional right to access to courts in mind, the mere possibility that an order

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44 2007 6 SA 620 (SCA) 622I–623A.

45 In *Giddey NO v JC Barnard and Partners supra* 535H–536A, the Constitutional Court held that the discretion that a court was called upon to exercise in terms of s 13 of the Companies Act of 1973 was a discretion in the strict sense.

46 *Supra*.

47 *Supra*.

48 530D–G.

49 538A–B.

50 538C.

51 *Supra* 172C–D.

> for security will effectively put an end to the litigation, which seemingly is the intended and inevitable result of s 13, does not constitute sufficient reason for its refusal – this is but one of the factors (there is no closed list) a court will consider in the exercise, which involves weighing the potential injustice to the plaintiff or applicant if it is prevented from pursuing a legitimate claim, against the potential injustice to the opposing party if it succeeds in its defence but cannot recover its costs."

In *MTN Provider*[52] the court held as follows:

(a) In the exercise of its discretion under section 13 of the Companies Act of 1973, there was no reason why the court should order security only in exceptional cases. Since the section presented the court with an unfettered discretion, there was no reason to lean towards either granting or refusing a security order.[53]

(b) The *bona fides* of the plaintiff's claim as well as the possibility that a security order could effectively deprive a plaintiff of the opportunity to proceed with its claim, were factors (amongst many) that the court would take into account in exercising its discretion.[54]

It appeared, therefore, that a statutory provision such as section 13 of the Companies Act of 1973 was capable of existing alongside section 34 of the Constitution.

The absence of a provision similar to section 13 of the Companies Act of 1973 in the Companies Act of 2008 was probably the result of an oversight on the part of the legislature. This contention was strengthened by the fact that the legislature left section 8 of the Close Corporations Act[55] intact and unaffected in framing the Companies Act of 2008.[56]

6 2 Second ground

As already pointed out,[57] at common law an *incola* company *qua* company could not be compelled to give security for costs. No exception to this rule existed. Thus, even if a company embarked upon vexatious and/or speculative actions, it could not be ordered to provide security for costs. As also pointed out,[58] there is no indication in *Haitas* that Tsoka J intended or attempted to develop the common law in this regard. This is recognised in *Ngwenda* where Van der Merwe AJ stated the following:[59]

> "In the Haitas-judgment (above), the court recognised in paragraph 4 of the judgement that, in the absence of a provision similar to the previous section 13 of the previous Companies Act, the principles of the common law prevail, in terms whereof '*an impecunious or even an insolvent company or other corporate entity which is an incola of South Africa cannot be required to give security for costs for proceedings instituted by it. That being the case the mere fact that an incola plaintiff is insolvent, as is the case in the present matter, does not justify that such a plaintiff should be ordered to furnish security for costs*'."

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52 *Supra*.
53 625D–F.
54 625D–H.
55 69 of 1984.
56 See further the notes *sv* "The Position of Close Corporations" in para 7 below.
57 See para 2 above.
58 See para 4 2 above.
59 Para 15.

7 POSITION OF CLOSE CORPORATIONS

Section 8 of the Close Corporations Act[60] is not affected by section 224(2) read with Schedule 3 of the Companies Act of 2008. It provides as follows:

> "**8 Security for costs in legal proceedings by corporations**
> When a corporation in any legal proceedings is a plaintiff or applicant or brings a counterclaim or counter-application, the court concerned may at any time during the proceedings if it appears that there is reason to believe that the corporation or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent, or the defendant or respondent in reconvention, if he is successful in his defence, require security to be given for those costs, and may stay all proceedings till the security is given."

It is submitted that in deciding whether security for costs should be granted against a close corporation, the courts should be guided by the principles laid down under section 13 of the Companies Act of 1973. It is submitted that these principles apply *mutatis mutandis* to the provisions of section 8.[61]

8 POSITION IN MAGISTRATES' COURTS

Rule 62 of the Magistrates' Courts Rules, which is modelled on Uniform Rule of Court 47, deals only with procedural aspects of applications for security for costs. It does not provide for the instances in which security for costs in civil proceedings can be obtained. Consequently, the common law prevails as regards *incola* companies.

It is submitted that as magistrates' courts do not possess any inherent power under section 173 of the Constitution to prevent an abuse of process of their own process, they cannot, as was done by the High Court in *Haitas* (albeit incorrectly), grant security for costs against an insolvent company on the basis that it embarked upon vexatious, reckless and/or unmeritorious litigation.

To summarise: in magistrates' courts civil proceedings an *incola* company *qua* company cannot be compelled to give security for costs.

9 POSSIBLE SOLUTIONS

The position in respect of security for costs by companies has for a long time been regulated by statute. In some other jurisdictions, including the United Kingdom and Australia, it is still regulated by statute.[62]

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60 69 of 1984.

61 See in this regard Van Loggerenberg and Farlam *Erasmus Superior court practice*, Main Volume, B1–343/344B (Service 38, 2012).

62 S 726(1) of the Companies Act, 1985 (UK), provides as follows: "Where in England and Wales a limited company is plaintiff in an action or other legal proceedings, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and must stay all proceedings until the security is given."

S 1335 of the Corporations Act, 2001 (Australia), provides as follows:

"(1) Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

(2) The costs of any proceeding before a court under this Act are to be borne by such party to the proceedings as the court, in its discretion, directs."

Although the common law could be developed by our superior courts under section 173 of the Constitution, this would, in our submission, be a cumbersome process which will have to await, *inter alia*, the correct set of facts. The more obvious, cost-effective and speedy remedy lies in legislative intervention. This could entail either an amendment to the Companies Act of 2008 or amendments to the Supreme Court Act[63] and the Magistrates' Courts Act.[64] In the absence of appropriate legislative intervention, litigants faced with the apparent *lacuna* in the Companies Act of 2008 with regard to security for costs will have to resort to involved and potentially costly arguments for the development of the common law or reading in of an appropriate provision in the Companies Act of 2008.[65]

An amendment to the Companies Act of 2008 would entail the mere introduction of a provision in respect of security for costs by local companies. An amendment to the Supreme Court Act and the Magistrates' Courts Act could, however, be done on a broader basis by stipulating in each instance all the grounds on which security for costs could be granted, including security for costs by companies, *peregrini*, etcetera. In our view this approach is the preferable one: the (*numerus clausus*) grounds on which security for costs could be granted by High Courts and magistrates' courts will then be found in the respective statutes dealing with these courts (thus enhancing legal certainty), and be followed, in the rules of these courts, by the procedure to be adopted in obtaining security for costs.

10 CONCLUSION

It is contended that the absence of a corresponding section in the Companies Act of 2008 to section 13 of the Companies Act of 1973 is a pure oversight by the legislature and that legislative intervention is the most appropriate remedy to rectify the situation. In this regard it is contended that the legislative intervention could entail the introduction of a provision similar to that of section 13 of the Companies Act of 1973 into the Companies Act of 2008. The proposed provision could, in addition, make provision for security to be given by a plaintiff or applicant in reconvention. In this regard section 8 of the Close Corporations Act could serve as a guideline in the framing of the new provision. The better approach, however, seems to be that the legislative intervention should entail an amendment to each of the Supreme Court Act and the Magistrates' Courts Act, on a broader basis, namely, to stipulate the *numerus clausus* grounds on which security for costs may be granted. Such amendments should include the introduction of a provision similar to that of section 13 of the Companies Act of 1973, and the introduction of security for costs to be given by a plaintiff or applicant in reconvention in each of the instances provided for in the amendment. As far as companies are concerned, section 8 of the Close Corporations Act should serve as a guideline in the framing of the new amendments.

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63 59 of 1959.

64 32 of 1944.

65 Both the development of the common law and the possibility of "reading-in" an appropriate provision in the Companies Act of 2008 will necessitate arguments based on the limitation of the equality clause in s 9 of the Constitution and the right to access to court in s 34 of the Constitution. As appears from the difference in approach adopted in *Haitas*, on the one hand, and *Ngwenda*, on the other hand, as well as the possibilities of developing the common law or "reading-in", the current situation does not promote legal certainty and can only be remedied in a cost-effective manner by the legislature.