REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no. C134/2013

In the matter between:

REV JEREMY GANGA **Applicant**

and

ST JOHN'S PARISH **Respondent**

Heard: **11 October 2013**

Delivered: **18 October 2013**

Summary: Application for security for costs.

RULING ON SECURITY FOR COSTS

STEENKAMP, J

Introduction

[1] This is an interlocutory application for security for costs brought by the respondent, St John's Parish (the parish). As both parties pointed out in

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the course of their argument, it is a topic that is rarely dealt with by this Court.

[2] The respondent, a church parish, has been sued for unfair discrimination on the grounds of race by the applicant, Rev Jeremy Ganga. The parish says that Ganga is a *peregrinus* domiciled in the UK. His application for a minister position was turned down by the parish's selection committee, comprising a majority of black people.

[3] Ganga denies that he is a *peregrinus* but in any event submits that, on considerations of equity and fairness to both parties, the circumstances do not warrant that he be required to provide security. He also claims that he has good prospects of succeeding in his discrimination claim (to the extent that the merits of the main dispute are relevant to this application) and for the same reasons, he denies that his claim is frivolous and vexatious.

The relief sought by the parish

[4] The parish applied on 28 March 2013 for an order in terms of rule 47 of the Uniform Rules of the High Court read with rule 11 of the Rules of the Labour Court, in the following terms:

4.1 that the applicant (Ganga) is required to give the respondent (the parish) security for costs in the form, manner and amount to be determined by the Registrar of this Court;

4.2 that the proceedings be stayed until such order is complied with;

4.3 in the event that security is not furnished, the parish be given leave to apply on the same papers, amplified as may be necessary, for the dismissal of the proceedings.

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Security for costs in the Labour Court:

[5] Although the Labour Court Rules do not expressly provide for applications for security for costs, it is established that the court has jurisdiction to determine such applications.[1]

[6] The principles have not, however, been fully examined in a labour context and there appear to have been only a handful of decisions in which the Labour Court has considered an application for security for costs against an individual litigant.

[7] These are: *Mkhize v Antrobus SC and Another,*[2] where the court ordered a dismissed employee to furnish security for the employer's costs in a review application that the court considered vexatious; *Pandeli v Liquidator N.O. Paltex 1995 (Pty) Ltd,*[3] where the court ordered an *incola* who had launched proceedings in South Africa against a *peregrinus* company to furnish security for the company's costs; and *Kastinger v Doornbosch Restaurant CC*,[4] where the court declined to order that an indigent *incola* be required to furnish security, taking into account, without discussing the merits, that "it does not necessarily follow that there will be costs in this court, even if he is unsuccessful."[5]

[8] The Labour Court's power to order costs derives from section 162(1) of the Labour Relations Act,[6] which provides that "the Labour Court may make an order for the payment of costs, according to the requirements of law and fairness." It follows that "costs in the Labour Court do not always and automatically follow the result."[7]

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[1] See *Mkhize v Antrobus SC NO and Another* [2013] ZALCJHB 33 (20 March 2013) at para 12.
[2] Ibid.
[3] (2008) 29 *ILJ* 3001 (LC) at para 27.
[4] (1999) 20 *ILJ* 386 (LC)
[5] Ibid at para 4.
[6] Act 66 of 1995 (the LRA).
[7] *National Commissioner of the SA Police and Another v Mfeketo* (2012) 33 *ILJ* 1412 (LAC) at para 14.

[9] Thus, for example, in *Nombakuse v Department of Transport and Public Works: Western Cape Provincial Government*[8] (a case in which absolution from the instance was granted against the applicant) this Court held as follows:

> 'The applicant created the impression of an honest witness who had the bona fide albeit misplaced perception that the respondent had discriminated against her... Although the applicant has been unsuccessful, I consider the fact that she is an individual who chose to assert her perceived rights under the [Employment Equity Act] and that the respondent is a state entity. In law and fairness, I do not consider an adverse costs order to be appropriate.'[9]

[10] Subrule (3) of rule 11 of the Rules of the Labour Court provides:

> '(3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.'

[11] Since the Labour Court Rules do not provide for security for costs, it is appropriate in the circumstances to adopt the procedure in Rule 47 of the Uniform Rules of the High Court,[10] which provides:

> **'47. Security for costs.**—(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.
>
> (2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.

[8] (2013) 34 *ILJ* 671 (LC).
[9] Ibid para 45.
[10] *Mkhize v Antrobus SC NO and Another* above n1 at 12 per Lagrange, J; *September v Muddford International Services Limited; Muddford International Services Limited v Metal and Engineering Industries Bargaining Council and Others* (C 664/2006) [2007] ZALC 100 (28 November 2007) at 6.

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(3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.

(5) Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.

(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient; and his decision shall be final.'

Grounds for security for costs

[12] The parish bases its application two separate grounds:

12.1 Rev Ganga is a *peregrinus*; and

12.2 his claim is frivolous and vexatious.

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The applicable legal principles

Security for costs generally

[13] It appears that the matter of security for costs to be provided by a *peregrinus* applicant in a matter such as the present one has not been decided by the Labour Court. However, the High Court's approach has been instructive.

[14] *Erasmus*[11] lists the following circumstances in which security for costs may be demanded: actions by *peregrini*; actions by insolvents; vexatious actions; actions by companies and close corporations; arbitration; contempt of court proceedings; and 'other cases'.[12]

[15] The court has a discretion in the matter, which is to be exercised by having regard to all the relevant facts as well as considerations of equity and fairness to both parties;[13] there is no justification for exercising discretion only sparingly.[14]

Applications by peregrini

[16] In general terms, where a *peregrinus* institutes proceedings against an *incola*, the court has a discretion to require the former to provide security for the latter's costs, which discretion should be exercised with regard to all relevant facts and on considerations of equity and fairness to both parties.[15] Although the underlying principle is that the court is entitled to protect the *incola* to the fullest extent, it should do so only after it has come to the conclusion that the *peregrinus* should not be absolved from being required to furnish security.[16]

[11] Superior Courts Practice.
[12] Erasmus, *Superior Court Practice* B1-340A to B1-343.
[13] Erasmus, *supra*, at fn 7; *Magida v Minister of Police* 1987 (1) SA 1 (A).
[14] Id, fn 8.
[15] Erasmus *Superior Court Practice* B1-341; *Magida v Minister of Police* 1987 (1) SA 1 (A) at 12A; 14E and 15D.
[16] Erasmus *Superior Court Practice* B1-342; *Magida* at 14G.

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[17] The enquiry must also be informed by the constitutional rights at play[17] – which in this case would include the right of access to the courts (section 34) and the right to equality (section 9) – and must accordingly be taken without any predisposition towards either granting or refusing to grant security.[18]

[18] The first question that this Court must decide, then, is whether Rev Ganga is a *peregrinus*. If he is not, he should not be required to furnish security unless it can be shown that his claim is frivolous and vexations. If he is, the matter will turn on considerations of equity and fairness to both parties.

[19] Domicile or residence of a permanent or settled nature is sufficient to constitute a person an *incola* for the purposes of an application for security for costs.[19] It is common cause that Rev Ganga is not presently resident in South Africa. His contention, however, is that he has never abandoned his domicile in this country.

[20] In terms of section 1(2) of the Domicile Act,[20] a 'domicile of choice' is acquired by a person who is lawfully present at a particular place (otherwise known as the *factum* requirement) and has the intention to settle there for an indefinite period (the *animus manendi*).

[21] Section 1 of the Domicile Act 3 provides:

> '1 Domicile of choice
>
> (1) Every person who is of or over the age of 18 years... shall be competent to acquire a domicile of choice, regardless of such a person's sex or marital status.

[17] See *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) at para 16.
[18] *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)* 1997 (4) SA 908 (W) at 919G-920A.
[19] *Protea Assurance v Januskiewicz* 1989 (4) SA 292 (W) at 294G; *Alam v Minister of Home Affairs* 2012 (5) SA 626 (ECP) at 629G-H.
[20] Act 3 of 1992.

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> (2) A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.'

[22] It appears from the authorities that a change in domicile is never presumed; that the onus of proving a change in domicile lies with the party alleging it;[21] and that length of residence, though a factor for consideration, is not decisive.

[23] Thus in *Erskine v Chinatex Oriental Trading Co*[22] a full bench of the Western Cape High Court reviewed the authorities on the acquisition of a domicile of choice and confirmed that: "length of residence may be indicative of an intention to remain indefinitely, but if the fact of residence is absolutely colourless, and there is nothing else, the animus remains unproved."[23]

[24] According to Professor Chuma Himonga:

> 'Generally speaking, a person with the necessary legal capacity may be said to have abandoned his or her previous domicile... when he or she has left the country of such domicile with the deliberate intention of not returning to it.'[24]

[25] The *Erskine* case concerned an application for summary judgment by the Respondent against the Appellant in the Western Cape High Court, on the basis of a judgment that it had obtained against him in a court in the UK. In the circumstances, this required the Respondent to prove that the Appellant had acquired a domicile of choice in the UK by the time the proceedings in the UK court had been instituted against him. The Respondent's contention was that the Appellant – the holder of dual South African and British citizenship – had acquired a domicile in the UK over a

[21] See for example *Ley v Ley's Executors* 1951 (3) SA 186 (A) at 191-192.
[22] 2001 (1) SA 817 (C).
[23] at 823C – D (references omitted).
[24] In *Wille's Principles of South African Law* 9ed (2007) at 155.

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period of approximately 18 months that he had resided there, together with his wife, in a house that they had owned together and to which he had referred in correspondence as his "usual residential address".[25] The Appellant explained that he had business dealings all over the world and had spent many years living abroad. He admitted that he had lived in the UK for business purposes over the period in issue, but insisted that had always regarded South Africa as his permanent home.[26] The court held that there was nothing in the evidence adduced by the Respondent to refute the Appellant's assertion that he regarded South Africa as his place of domicile: the Respondent had therefore failed to discharge the onus upon it to prove that the Appellant had acquired a domicile of choice in the UK.[27]

[26] In *Protea Assurance v Januskiewicz*[28] Goldstone J stated as follows:

> 'In my opinion, the proper approach is therefore that domicile or residence of some permanent or settled nature is sufficient to constitute a person an *incola* for the purpose of being obliged to furnish security for costs.'

[27] The underlying principle that in proceedings initiated by a *peregrinus,* the court is entitled to protect the *incola* to the fullest extent, should be read subject to the qualification that it is applicable only after the court, in the exercise of its discretion, had come to the conclusion that the *peregrinus* should not be absolved from furnishing security for costs.[29]

[28] The leading case in this regard, *Magida v Minister of Police,*[30] was decided in the pre-constitutional era. However, the principles applied are likely to pass constitutional muster since it espouses a wide discretion in which the court has regard to all the circumstances of the case and

[25] See *Erskine* at 821F–I.
[26] Ibid at 821J – 822J.
[27] Ibid at 823D – G.
[28] Above n 19 at 294F, cited with approval in *Alam v Minister of Home Affairs* 2012 (5) SA 626 (ECP) at 629F-H.
[29] Erasmus, *Superior Court Practice* B1-341 to B1-342 at fn 1.
[30] 1987 (1) SA 1 (A).

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considerations of fairness and equity to both parties. In that case the appeal court overturned an order in the court *a quo* to grant an order that the *peregrinus* plaintiff should provide security for costs. Factors considered by the court to weigh in favour of the *peregrinus* were:

28.1 as a labourer in East London who received legal aid, he was a citizen and an *incola* of South Africa when he launched his action but became a *peregrinus* when the Ciskei became an independent state in 1981;[31]

28.2 he was impecunious and an order compelling him to furnish security would effectively destroy his chances of prosecuting his action against the respondent;

28.3 he was economically active within the jurisdiction of the court, and thus not a *vagabundus* or *suspectus de fuga* or a dishonourable person; and

28.4 execution of the court's judgment was possible where the appellant resided in the Republic of the Ciskei.[32]

[29] In its analysis of the applicable principles, in addition to those that it applied as set out above, the court added that no one should be required to furnish security beyond his means to an *incola,* nor should a non-domiciled foreigner be compelled to perform the impossible; and the object of the rule, based on considerations of equity and justice, was to prevent an impecunious non-domiciled foreigner from being deprived of his right to litigate against an *incola.*[33]

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[31] Of course, the Ciskei was not recognized as such by the world community, other than a few pariah states; but the principles remain relevant.
[32] *Magida* at 14H to 15G.
[33] Ibid at 12G-H.

[30] In *Lappeman Diamond Cutting Works*, [34] the Court considered the constitutionality of s 13 of the Companies Act, 1961[35] in the light of s 22 of the Interim Constitution,[36] very similar to s 34 of the Final Constitution. It found that it was not in conflict, but that the court should exercise a wide discretion without any predisposition against a party, and that a narrow discretion would be in conflict with the constitutional right. The court drew on the approach in the *Magida* case:

> 'Guidance in this regard can, however, be obtained from the judgment in *Magida v Minister of Police* 1987 1 SA 1 (AD). The applicant, a *peregrinus*, who did not own unmortgaged immovable property in the Republic was ordered to furnish security for the costs of his action. The approach till then adopted by the courts to applications of that kind emerge from judgments such as *Saker and Co Ltd v Gringer* 137 AD 223 at 227, namely that 'The principle underlying this practice is that in proceedings initiated by a *peregrinus* the Court is entitled to protect an *incola* to the fullest extent' and *South African Television Manufacturing Co (Pty) Ltd v Jubate and Others* 1983 2 SA 14 (ECD) at 19E namely that 'There must be some special fact, inherent in the action itself, which will persuade a Court to exercise its discretion in favour of the peregrini and finally *Santam Insurance Co Ltd v Korste* 1962 (4) SA 53 (ECD) at 56E namely that 'The reason for the rule being what it is, it follows that the Court shall exercise its discretion in favour of a *peregrinus* only sparingly and in exceptional circumstances.'[37]

[31] After considering the provisions of the Interim Constitution, the court concluded:

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[34] Above n 18.

[35] Section 13 of the [old] Companies Act 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.'

[36] S 22 of the Interim Constitution: 'Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, other independent and impartial forums.'

[37] *Lappeman Diamond Cutting Works* (supra*)* At 916D-G.

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> 'The object of section 13 is to protect the public in litigation by bankrupt companies (*Hudson and Son v London Trading Co Ltd* 1930 WLD 2-8). The bankrupt company is not excluded from the courts but only prevented if it cannot find security from dragging its opponent from one court to another (*Cowell v Taylor* 31 Ch.D. 34 at 38). In my view this object can be achieved and the values of the Constitution referred to above can be respected if the discretion contained in section 13 [of the old Companies Act] is approached, neither with a predisposition to granting security, as is the present approach in this division, nor with the predisposition not to grant security. The wide discretion favoured by the English cases, pursuant to which the discretion is approached without any commitment in advance as to how the discretion is to be exercised, will achieve the desired result. This would be in keeping with the approach in other divisions as set out above, as also in England, and it would also be in keeping with the appellate division's approach in granting security where a *peregrinus* who does not own immovable property sues.'[38]

[32] The Constitutional Court in *Giddey NO v JC Barnard and Partners*[39] dismissed an appeal against a ruling by the Johannesburg High Court that security for costs should be provided in terms of section 13 of the Companies Act 61 of 1973 read with rule 47 of the High Court Rules. The appeal was misdirected since the constitutionality of section itself 13 was not attacked and the case turned on the proper exercise of discretion by the court *a quo*. However, the court, per O'Regan, J, commented on the ground on which the appeal was brought, which was that section 13 was in breach of section 34 of the Constitution, which provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing.[40]

[33] The court reflected on the fact that s 13 is a longstanding provision in our law, and indeed, mirrors provisions in other countries. The provision

[38] Ibid at 919 G – I.
[39] Above n17.
[40] Ibid at para 15.

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constitutes an exception to the ordinary common-law rule that plaintiffs who reside in South Africa may institute actions in our courts without furnishing security for costs. The court commented on the purpose of the rule, without criticism of it or expressing a view about its constitutional validity. It is to protect persons against liability for costs in regard to any action instituted by bankrupt companies, since the normal risk of a costs order is insufficient as a deterrent.[41] For courts to function fairly, said the court, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence. Very often, the interpretation and application of the rule will require consideration of the provisions of the Constitution, as section 39(2) of the Constitution instructs.[42] A court that fails to adequately consider the relevant constitutional provisions will not have properly applied the rules at all.[43]

[34] In *September v Muddford International Services Limited; Muddford International Services Limited v Metal and Engineering Industries Bargaining Council and Others*[44] the Labour Court ordered an applicant employer in a review application who was a *peregrinus* to provide security for the compensation it was ordered to pay in the award on review. The court dismissed the only ground of opposition, that the application for security was brought late in the day, and stated that the respondent would not suffer any real prejudice if it provided security for costs;[45] and also that the order was equitable and fair.[46]

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[41] Ibid at paras 6 to 7.
[42] Section 39(2) of the Constitution provides as follows:
> 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'
[43] *Giddey NO* at par 16.
[44] (C 664/2006) [2007] ZALC 100 (28 November 2007).
[45] Ibid at para 10.
[46] Ibid at para 16.

[35] In *Pandeli v Liquidator N.O. Paltex 1995 (Pty) Ltd and Others*[47] the Labour Court ordered the applicant, an individual, to provide security for costs for a *peregrinus* respondent who was sued in South Africa.

[36] What we gain from the above is the following:

36.1 when the court exercises its discretion whether a *peregrinus* is required to furnish security for costs, it must have regard to all relevant facts as well as considerations of equity and fairness to both parties;

36.2 the court must consider the relevant provisions of the Constitution, which include sections 34 and 39, section 9 (the right to equality before the law), and section 23 (the right to fair labour practices); and

36.3 common law rules which limit a person's access to court should be applied in appropriate circumstances.

Vexatious litigation

[37] When it comes to vexatious litigation, the court is entitled to prevent an abuse of the court process.

[38] In *Biowatch Trust v Registrar, Genetic Resources and Others*[48] the Constitutional Court stated:

> 'Thus in *Affordable Medicines*[49] this Court stated that the ability to finance the litigation was not a relevant consideration in making a costs order. It held that the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs to the state should not be departed from simply because of a perceived ability of the unsuccessful

[47] (JS188/06) [2007] ZALC 113 (20 March 2007).
[48] (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009) at 18.
[49] See *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at para 139.

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litigant to pay. It accordingly overturned the High Court's order of costs against a relatively well-off medical practitioners' trust that had launched unsuccessful proceedings. Conversely, a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal representation. This means it should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the Court.'

[39] In regard to the consideration relating to constitutional litigation, in *Kini Bay Village Association (Pty) Ltd v Nelson Mandela Metropolitan Municipality and Others,*[50] in which an appeal was dismissed against an order to provide security for costs, the SCA stated:

'[17] Whilst the Constitutional Court has sometimes found it inappropriate to make costs awards lest they have a chilling effect on members of society wishing to vindicate their constitutional rights,[51] there is nonetheless no rule of thumb that a costs order will not be made in constitutional litigation. In *Affordable Medicines Trust v Minister of Health*,(footnote omitted) Ngcobo J reiterated this position as follows:

> "[T]he general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs… is not an inflexible rule… There may be circumstances that justify departure from this rule... The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."

Indeed, authorities abound in which both this court and the Constitutional Court, in keeping with the trite principle that costs

[50] (434/07) [2008] ZASCA 66; [2008] 4 All SA 50 (SCA); 2009 (2) SA 166 (SCA) (29 May 2008) at para 17.
[51] See, for example, *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC) at para 74; *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 62.

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> should ordinarily follow the result, have made costs awards in matters in which the parties sought to invoke constitutional rights (Footnote omitted). Significantly, in a number of those cases private individuals were ordered to pay the costs of public authorities. Having due regard to the facts of this case and the principles of equity and fairness, there seems to me no reason justifying a departure from the usual rule. The appellant should not escape liability for costs."

Considerations of fairness and equity

[40] A fundamental purpose of the procedure for security for costs where a *peregrinus* institutes proceedings against an *incola*, is to protect the *incola* from the prospect, if successful, of having to recover legal costs in a foreign jurisdiction.[52]

The facts

Is Rev Ganga a peregrinus?

[41] Rev Ganga is a South African citizen by birth and was domiciled in South Africa prior to his move to the United Kingdom in 1990. He has been living in the UK for the past 23 years. The question is whether he abandoned his domicile in South Africa (or, to put it differently, whether he acquired a new domicile of choice) during his period in the UK. As it is common cause that he is currently physically present in the UK, this question turns on the *animus* requirement.

[42] Mr *Kantor* submitted that Ganga is a *peregrinus* because he has no domicile or residence of some permanent or settled nature in South Africa. He has been resident in the UK since 1990. He intends to return to live in South Africa at some time in the future and he has applied for a job in

[52] See *Exploitatie- En Beleggingsmaatschappij Argonauten 11 BV and Another v Honig* 2012 (1) 247 (SCA) at para 19.

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South Africa commencing in 2014. His wife is still working in the UK, though.

[43] At the time he filed his statement of claim Rev Ganga resided in the UK and he still does. He is currently a full time student at the University of London. He is not presently in South Africa with the intention of remaining here indefinitely, although he says that he intends to return next year. He is a citizen of both South Africa and the UK and he has a British passport. He is not able to demonstrate current residence in South Africa of some permanent or settled nature.

[44] Mr *Pickering* submitted that there is nothing in the Parish's evidence to refute Rev Ganga's repeated assertions that he has always regarded South Africa as his permanent home and that he never formed the intention necessary to acquire a domicile in the UK. However, those assertions must be tested in the light of the objective facts.

[45] On the objective facts, Rev Ganga has acquired a new domicile in the UK. He has been living there for 23 years. Both he and his wife are working there. His wife, an educational psychologist, works in London. His children were born in the UK. (It must be added that the eldest two are 19 and 16 years old, respectively, but Rev Ganga has applied for places at Bishops and Rondebosch preparatory schools for his youngest son, aged 8. Surprisingly, he only attached letters from those schools confirming the application from February and May 2013, respectively; there is no indication what the current position is, shortly before the end of the school year).

[46] Rev Ganga states that he did not intend to move to the UK permanently; yet he has lived there for 23 years and he does not deny that he moved there for an indefinite period. I agree with Mr *Kantor* that there is a difference and that the objective facts supports a finding on a balance of probabilities that he did intend to move there for an indefinite period.

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Together with his and his family's continued presence there at the time of this ruling is consistent with a finding that he has acquired domicile in the UK and has abandoned his domicile in South Africa, the country that he left at the age of 28 (he is now 51 years old).

[47] Given these facts, I find that Rev Ganga is a *peregrinus.* It is therefore not necessary to find that his action is frivolous or vexatious. I shall nevertheless consider his prospects of success in order to exercise my discretion fairly in considering the further aspects of fairness and equity to both parties.

Prospects of success

[48] In *Exploitatie- En Beleggingsmaatschappij Argonauten 11 BV and Another v Honig*[53] the Supreme Court of Appeal noted that there are authorities to the effect that the court will not enquire into the merits of the main dispute in exercising its discretion as to whether or not to order security for costs, but found that this was not a wholly inflexible rule.[54]

[49] In this regard the court referred to its previous decision in *Zietsman v Electronic Media Network Ltd*[55] where Streicher JA said:

> 'I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party's prospects of success would depend on the nature of the dispute in each case.'[56]

[50] In *Mkhize,*[57] where the respondent in an application for security for costs had, in effect, launched an appeal of private arbitration proceedings in the guise of a review, the court was able to conclude that he was pursuing the

[53] See footnote 52 above.
[54] Ibid at para 20.
[55] 2008 (4) SA 1 (SCA).
[56] Ibid at para 21 of that judgment. Cited in *Honig* at para 20.
[57] *Mkhize* above n1.

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review "with a reckless disregard for the likely outcome" and was, accordingly, persuaded to order him to furnish security for costs.[58]

[51] The cases above offer examples of the kinds of circumstances in which the court might be swayed by the merits of the main dispute in an application for security for costs. In *Honig* and *Mkhize* there were significant legal obstacles, aside from any real consideration of the facts of the dispute, to the main claims succeeding. In *Zietsman,* it was not apparent whether the applicant in the application for security for costs had any defence to the main claim at all.

[52] Given my finding that Rev Ganga is a *peregrinus*, it is neither necessary nor appropriate to address the merits in any detail. I will consider it briefly only in order to exercise a proper judicial discretion.

[53] Mr *Pickering* submitted that Rev Ganga has demonstrated good prospects of succeeding in the main dispute. Rev Ganga's only competitor for the position of Parish Rector, Rev McLea, was furnished with a copy of Rev Ganga's CV and job application prior to the selection process, during which he was also afforded an opportunity to interview Rev Ganga and to submit his views on his competitor to the selection committee. That, he submitted, constituted a serious discrepancy in a competitive process.

[54] As to the Parish's assertions that Rev McLea did not gain any advantage through his opportunity to interview Rev Ganga and in the access that he was given to Rev Ganga's CV and job application, the selection interviews covered a wide range of topics[59] and the potential for Rev McLea to have tailored his own responses in light of the perceived strengths and weaknesses of his competitor's application, is clear. In any event, the Parish has not established on the papers that he could not or did not do so.

[55] That may well be so, but does it constitute discrimination?

[58] Ibid at para 16.
[59] Bundle A, 139 – 142.

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[56] Mr *Pickering* submitted that an appointment procedure which affords a candidate who is already an Associate Rector a distinct competitive advantage in circumstances where the Associate Rectors are, and historically always have been, disproportionately made up of white men, has the effect of differentiating between white and black candidates. The procedure is therefore indirectly discriminatory on the grounds of race, he argued. Rev Ganga's claim is, alternatively, that the selection procedure did not only have the effect of favouring Rev McLea but was deliberately designed to favour the white candidate, and therefore that it was directly discriminatory.

[57] The Parish, on the other hand, has shown on the evidence so far (without the benefit of oral evidence or cross-examination at this interlocutory stage, it must be borne in mind):

57.1 the pre-interview scoring favoured Rev Ganga, a counter-indication of any intention to disadvantage him;

57.2 the purpose of sending Rev Ganga's CV to Rev McLea was entirely innocent and based only on the fact that he was one of the Associate Rectors;

57.3 Rev McLea derived no advantage thereby;

57.4 The questions in the interviews were designed to minimise any advantage to the internal candidate and focused on proven ability in areas of competency required for the job;

57.5 The reason that Rev Ganga was not selected was that he fared poorly in the interview and in the psychometric test;

57.6 Feedback from the Parish Rectors via Rev Gready was not racist but generally supportive of the applicant except that two of the

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associate rectors raised the question of whether he had enough experience running churches;

57.7 The fact that Rev Ganga was found unsuitable did not automatically mean that Rev McLea was selected; the option of not making a selection was also considered;

57.8 The parish's selection panel, the majority of whom were black, "prayerfully considered" the matter at length and unanimously decided to select Rev McLea;

57.9 The applicant's claim (without any further oral evidence at this stage) is based on his reliance on hearsay and unsubstantiated rumours; and

57.10 If anything, the process advantaged a black applicant.

[58] Rev Ganga would have to show at trial that there was discrimination in order to cast the burden of proof on the parish in terms of s 11 of the Employment Equity Act[60] to prove that it was fair.[61]

[59] The test for whether the conduct complained of amounts to discrimination is set out in *Harksen v Lane*:[62]

> 'Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the

[60] Act 55 of 1998.
[61] Section 11 provides: 'Burden of proof.—Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.' The applicant must show that discrimination exists - *IMATU and Another v City of Cape Town* [2005] 11 BLLR 1084 (LC) at paras 79 to 81, *Tombikayise and Another v Department of Public Works and Another* (LC) case no. C890/10, 25 July 2012, unreported at para 30.
[62] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); (1997 (11) BCLR (1489).

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> fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.'[63]

[60] The differentiation complained of was between an internal and an external job applicant. Clearly this was not on a specified ground. Even though Ganga is black and McLea is white, the evidence thus far does not show any differentiation on the grounds of race. Nor can the differentiation be said to be based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. At this stage, on the papers before me, Rev Ganga has not passed the threshold to lead to an inference of direct discrimination.

[61] Indirect discrimination occurs when an employer utilises an employment practice that is apparently neutral, but disproportionately affects members of disadvantaged groups in circumstances where it is not justifiable.[64]

[62] The applicant is unable to show that the selection process was designed in order to give, or in effect gave, Rev McLea a competitive advantage over the applicant. It will be extremely difficult to establish that, merely, because the historical pool of candidates for the position was white, the process disproportionately affected Rev Ganga.

[63] Having regard to the provisions of the Employment Equity Act and the test as formulated in *Harksen v Lane*, it appears to me that Rev Ganga's prospects of success at trial are poor. Should he be unsuccessful at trial and despite the provisions of s 162 of the LRA, there are very real prospects that a costs order could be made against him.

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[63] Ibid at para 46. This test applies to both direct and indirect discrimination - *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17 at [63]; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).

[64] *POPCRU and Others v Department of Correctional Services and Another* [2010] 10 BLLR 1067 (LC) at para 215.

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Considerations of fairness and equity

[64] In order to consider the principles of fairness and equity, Rev Ganga's financial position must be considered. He denies that he is impecunious but he owns no immovable property. His wife is employed in the UK. He is a full-time student there, although he has been employed as a parish priest. One can infer that he would not effectively be prevented from litigating should he be ordered to provide security for costs.

[65] The Court has found that Rev Ganga is a *peregrinus*. It will be difficult for the Parish to recover costs from him should the Court order costs in its favour at the end of the trial. He is not so impecunious that an order to provide security for costs would prevent him from coming to court. He may be inconvenienced, but the considerations of fairness and equity favour the Parish.

Conclusion

[66] I conclude that Rev Ganga is a *peregrinus* and that considerations of fairness and equity do not absolve him from having to furnish security for costs.

[67] Given that the registrar of this Court is not accustomed to dealing with applications for security, the Court will direct the Registrar as to the amount of security to be furnished and the manner in which it is to be done.

[68] It will be just and equitable for the costs of this application to be costs in the cause of the trial.

Order

[69] I therefore make the following order:

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1. The applicant (Rev Ganga) must furnish the respondent (the Parish) with security for costs in the amount of R75 000, 00;

2. Rev Ganga must pay the amount of R75 000, 00 into the trust account of the Parish's attorneys not later than 30 November 2013, and provide the Registrar with proof that he has done so;

3. The proceedings are stayed until Rev Ganga has complied with this order;

4. In the event that security is not furnished, the Parish is given leave to apply on the same papers, amplified as may be necessary, for the dismissal of the proceedings;

5. Costs of this application are to be costs in the cause of the trial.

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Anton Steenkamp

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adam Pickering of Cheadle Thompson & Haysom.

For the Respondent: Peter Kantor

Instructed by Dorrington Jessop attorneys.

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