

# Security for costs affirmed

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**L**OCAL companies which institute litigation proceedings which are vexatious or reckless or amount to an abuse can still be liable to furnish security for the defendant's legal costs, despite the legislature's omission of this provision from the Companies Act, 2008. This is the view taken by the Supreme Court of Appeal in its recent judgment in the *Boost Sports Africa v The South African Breweries* case.

There had been uncertainty on whether incola (local) companies could still be ordered to furnish security for costs in circumstances where they embark on litigation which is vexatious or reckless or which amounts to an abuse of legal process. The reason for this is that the legislature has not included in the Companies Act, 2008 a section which has the same effect as the repealed section 13 of the Companies Act, 1973.

What section 13 did was create an exception to the common law general rule that an incola plaintiff cannot be compelled to furnish security for costs. That section sought to dissuade companies, which were unlikely to be able to pay an adverse costs order if unsuccessful, from instituting litigation if they had poor prospects of success. It also provided defendants with means to secure their costs when defending frivolous claims against companies that would be unable to satisfy an adverse costs order.

After weighing up all the competing arguments, the Supreme Court of Appeal held that in the absence of a provision similar to section 13 of the Companies Act, 1973 an incola company can be compelled to furnish security for costs in terms of the common law.

The Supreme Court of Appeal arrived at this decision by developing the common law relating to the superior courts' inherent powers to regulate their own proceedings.

The Supreme Court of Appeal also clarified what should be considered in determining whether litigation proceedings are indeed vexatious or reckless or amount to an abuse.

Some will argue that this decision limits the fundamental right to access to courts which is enshrined in section 34 of the constitution. However, requiring a plaintiff to furnish security for costs should not be done on a piecemeal basis.

The Supreme Court of Appeal has set out the standards which a court must apply before coming to the conclusion that security for costs must be furnished. The decision also creates uniformity insofar as local individuals and close corporation could still be ordered to furnish security for costs despite the absence of section 13 of the Companies Act, 1973.

This should make all prospective litigants carefully consider the merits of their claims before instituting litigation proceedings. Not having the possibility that a plaintiff can be ordered to furnish security for costs would leave it open for prospective plaintiffs to proceed with vexatious litigation knowing that their opponent will not be able to recover any adverse costs orders against them.