REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 07/2014

In the matter between:

1.1.1.1. **WITVLEI MEAT (PTY) LTD**
APPLICANT

and

THE CABINET OF THE REPUBLIC OF NAMIBIA	**1ST RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**2ND RESPONDENT**
THE MINISTER OF TRADE AND INDUSTRY	**3RD RESPONDENT**
THE MEAT BOARD OF NAMIBIA	**4TH RESPONDENT**
THE MINISTER OF AGRICULTURE, WATER AND FORESTRY	**5TH RESPONDENT**
MEATCO	**6TH RESPONDENT**
BRUKARROS MEAT PROCESSORS (PTY) LTD	**7TH RESPONDENT**

Witvlei Meat (Pty) Ltd v The Cabinet of the Republic of Namibia (A 07/2014) [2014] NAHCMD 79 (12 March 2014)

Coram: Smuts, J

Heard: 27 February 2014
Delivered: 12 March 2014

Flynote: Application for security for costs brought under Rule 47 read with s11 of the Companies Act, 28 of 2004. Test restated. Applications granted.

ORDER

---

a) The applicant (in the main application) is to provide security for the fourth and sixth respondents costs in the form and a manner as approved by the registrar in the amount of N$350 000 for each such respondent within 5 days from the date of this order;
b) The main application initiated by the applicant under case number A 07/2014 is stayed pending compliance with paragraph (a) of this order;
c) The fourth and sixth respondents are granted leave in the event of the applicant not complying with the order set out in paragraph (a) to apply to this court on the same papers duly amplified as may be necessary, for the dismissal of the applicant's main application on the above basis;
d) The applicant in the main application is to pay both the fourth and sixth respondents' costs of their applications. These costs include the costs of one instructing and one instructed counsel.

(b)

JUDGMENT – SECURITY FOR COSTS

Smuts, J

(c) I have before me two applications for security for costs brought against the applicant in a review application against several respondents in which

interim relief has been sought on an urgent basis (the main application). The fourth and sixth respondents in the main application thus apply for security for their costs against the applicant in the main application. For the purpose of clarity the parties are referred to in that way – as in the main application.

(d)

(e) The main application was launched on 21 January 2014 against the seven respondents cited in it. It is a voluminous application in which the applicant seeks to set aside a decision taken by one or more of the respondents for the allocation of what is known as the Norway Beef Export Quota. Interim relief pending the final determination of the main review application is also sought. The papers in the main application run to some 800 pages.

(f) The fourth and sixth respondents each delivered a notice for security for costs on the applicant in terms of the Rule 47 on 14 February 2014. A meeting was convened at the Registrar's office on 18 February 2014 at which it became clear that the applicant in the main application disputed its liability to provide security for costs.

(g) The application for interim relief in the main application, brought as one of urgency, was set down and heard on 20 February 2014. On the day of that application, the fourth and sixth respondents each launched their own applications for security for costs. Both applications are based upon the provisions of s11 of the Companies Act.[1] Section 11 provides:

> **'Security for costs in legal proceedings by companies and bodies corporate**
>
> Where a company or other body corporate is the 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 being would up the liquidator of the company, will be unable to pay the costs of the defendant or respondent if the defence of the latter is successful, requires sufficient security to be given for those costs and may stay all proceeding until the security is given.'

[1] Act 28 of 2004.

(h)

(i) The applications for security were handed in at outset of the hearing of application for interim relief on 20 February 2014, although I was informed that a copy of one of the applications had been provided to the applicant's counsel on the previous evening. It was thus clear that the applicant had not yet had the opportunity to answer to those applications and was entitled to do so. I proceeded to hear argument in the application for interim relief in the main application on 20 February 2014 and reserved judgment and I postponed the applications for security to 27 February 2014 to enable the applicant to file answering affidavits to the applications and for the fourth and sixth respondents to reply thereto.

(j)

(k) The fourth and sixth respondents' notices in terms of rule 47(1), which preceded the application for security, were in similar terms. Both notices relied upon statements made in the applicant's founding affidavit in the main application where the following was stated:

> 'The latest financial projection of the applicant shows that the applicant has cash reserves of about N$7 million and operational costs of about N$1.5 million per month. The applicant can therefore only manage to stay afloat for the next 3-4 months. A copy of the applicant's latest financial projections are attached here and marked "SWM. . ." (sic). These financial projection (sic) shows a severe situation for the applicant unless this Honourable Court grants to the applicant the urgent relief contained in the notice of motion accompanying this affidavit.
>
> The applicant is still a very fragile business. . . The drastic reduction of the applicant's share . . . has immediate and devastating consequences for the applicant:
>
> 48.1 It will immediately, and has since, reduced the applicant to a loss making entity;
>
> 48.2 . . .[2]
>
> Should the applicant be constrained to pursue an ordinary review as per the said Part B of the accompanying notice of motion without any urgent interim relief, it will lead to immediate severe prejudice and the final destruction of the

[2]Page 36, par [45].

applicant long before such ordinary review has been finalised.[3]

The relief sought by the applicant in Part A of the notice of motion is thus necessary for the survival of the applicant in order to avert the severe threat that the applicant is facing.'[4]

(l)

(m) Both the fourth and sixth respondents referred to the complexity of the main application and the voluminous documentation. The sixth respondent stated that its legal costs up to the date of hearing of the main application on 20 February 2014 total N$224 221, 60. It was stated that these costs are likely to double as the process continues and sought an order for security for costs in the sum of N$500 000. The fourth respondent sought the same amount in security. Both these respondents have engaged two instructed counsel, given the complexity of the main application and its importance to their respective clients. Both these respondents submitted that, by virtue of the statements made by the applicant in the founding affidavit, (and certain portions contained in the replying affidavit relied upon by the fourth respondent), in the event of the applicant's main application being unsuccessful and a costs order being granted in their favour, the applicant would not be in the position to pay their respective costs.

(n) The applicant opposed the application for security. Much of the answering affidavit was devoted to taking the point that the two respondents had not provided a sufficient explanation for bringing the security application only on 20 February 2014 and submitted that their applications had not been promptly and should be dismissed for that reason alone.

(o)

(p) The applicant also took issue with the estimate of costs relied upon by both respondents. But the applicant does not specifically deal, in its answer, with the time and money already spent on the matter.

(q)

(r) On the merits, the applicant referred to its cash reserves to the tune of some N$7 million. The applicant also referred to its movable assets in the sum

[3]Page 37, par [58].

[4]Page 40, par [49].

of approximately N$26 million reflected in the most recent audited annual financial statements which had been attached to the founding affidavit. The applicant also disputed the length of time which the sixth respondent said it would take for the respondents to proceed with the taxation of their costs and submitted that there would still be sufficient cash available to defray any cost orders granted against the applicant.

(s)

(t) Both the fourth and sixth respondents replied to the applicant's answering affidavit. The fourth respondent explained that its board was not constituted at the time the main application had been served upon it and could only meet to provide a mandate to oppose the main application and seek security for costs on 13 February 2014. The notice in terms of Rule 47(1) was given the very next day. There can thus be no question of any failure to act promptly on its part.

(u)

(v) Both respondents contended that there was also a failure on the applicant to provide any details of the assets forming part of the N$26 million referred to in the answering affidavit and to provide any further updated financial information, given the fact that the audited financial statements were for the year ending 28 February 2013. They both also pointed to the applicant's own statements concerning its worsening financial position with each passing month as a consequence of the decisions taken on review by the applicant.

(w)

(x) The sixth respondent also explained that the application was brought on 20 February 2014 because its initial priority was preparing and delivering answering papers to the voluminous founding papers in the main application under pressure of time and then only dealing with the question of security for costs by filing its notice on 14 February 2014. The point was taken that the applicant had not sustained any prejudice by reason of the fact that it was afforded a sufficient opportunity to answer to the application and to prepare argument in relation to it.

(y) Mr Van Vuuren, who appeared for the fourth respondent, referred to the factual basis relied upon by the respondents in the application which I have

quoted above. He also referred to portions of the replying affidavit in the main application. He also referred to the answering affidavit in this application which was largely focused upon complaining about the delay in the bringing of these applications. He referred to the failure on the part of the applicant to provide any details as to its assets and any more recent financial information as to its current assets and liabilities, particularly in view of dire picture presented in the founding affidavit in the main application. He referred to the test for applications of this nature in *Cellphone Warehouse (Pty) Ltd v Mobile Telecommunications Limited*[5] and *Hepute and Other v Minister of Mines and Energy and Another*[6] as well as the High Court decision in the *Hepute* matter.[7]

(z)

(aa) My Van Vuuren submitted that the fourth respondent had established the requisites of s11 of the Companies Act by showing that there was reason to believe that the applicant in the main application would not be able to pay the costs of the fourth respondent if the latter was successful and that this was based upon credible testimony in the form of the applicant's own evidence under oath in the founding and replying affidavits in the main application. Mr Van Vuuren also relied upon the commentary contained in *Henochsberg on the Companies Act*[8] where the learned authors referred to the inference to be drawn from a failure to place sufficient material before court on a company's financial position. Mr Van Vuuren also complained of the voluminous irrelevant matter attached to the applicant's answering affidavit and the need for parties to raise issues in an affidavit instead of attaching a mass of annexures which are not properly referred to and in this instance which also mostly entirely irrelevant.

(bb) Mr Heathcote SC, who together with Mr D. Obbes appeared for the sixth respondent, relied upon similar authorities to those raised by Mr Van Vuuren and submitted that the applicant did not place a single fact in its answering affidavit to address the basis upon which the applications for security had been brought. He submitted that no recent financial information had been provided to allay the

---

[5]2002 NR 318 (HC).

[6]2008 (2) NR 399 (SC).

[7]Hepute and Others v Minister of Mines and Energy 2007 (1) NR 124 (HC).

[8]Meskin Henochsberg on the Companies Act (4) d at p24.

apprehension on the part of the sixth respondent that its costs would not be met by the applicant if the latter were to be unsuccessful in the main application. He too referred to the date of the financial statements being 28 February 2013 without any further updated financial information placed before the court. He argued that the applicant was on its own version soon to be commercially insolvent.

(cc) Mr Tötemeyer SC, who appeared for the applicant in the main application at the outset apologised for the irrelevant matter which had been attached to the applicant's answering affidavit.

(dd)

(ee) Mr Tötemeyer also submitted that the first leg of the enquiry contemplated by s11 of the Companies Act, namely credible testimony for reason to believe that the applicant would not be able to pay the costs, had not been established. He submitted that the two respondents had selectively referred to the applicant's founding papers and taken certain material contained in those papers out of their context. He referred to the most recent financial statements which were attached to the applicant's founding papers and referred to the assets in the sum of N$26 million reflected in those statements. He submitted that these would be sufficient to cover any costs order and that the financial statements had shown more than sufficient assets which would be available for any costs order obtained against the applicant. As to the cash reserves, he submitted that there were two scenarios – either being depleted in their fourth or sixth months, when these cash reserves could run out. But, he submitted, that there were the assets of N$26 million against which a judgment for costs could be levied.

(ff) Mr Tötemeyer also took issue with the time within which a bill could be taxed and submitted that there was sufficient time for a bill to be taxed before the applicant's financial reserves would be depleted. He further submitted that the applicant was not a bankrupt company as contemplated by Strydom, CJ in *North Bank Diamonds Limited v FTK Holland BV and Others*.[9] He further submitted that in the balancing of the interests which is to occur in the exercise

[9]2002 NR 284 (SC).

of the court's discretion, the court should in any event not direct that security should be paid by the applicant as it could affect its continued existence and may result in the applicant's ceasing operations at an earlier date.

(gg)

(hh) Mr Tötemeyer contended that an application for security should be brought promptly and that the delay on the part of the respondents in bringing the applications should result in their dismissal, as I understood his argument. The authority relied upon by him[10] is entirely distinguishable on its facts. That matter had been set down for more than four and half months before an application was made for security. The plaintiff in that matter tendered to provide security and an order followed. On the very next day, the defendant applied for more security. The court refused the application for further security in the exercise of its discretion. Those facts are dissimilar to those encountered in this matter. The fourth respondent can hardly be said to have delayed this application as I have already pointed out. It gave notice on the very day after a mandate was obtained. It could not be obtained before that by virtue of the fact that its board was not properly constituted. There was thus no unreasonable delay on the part of the fourth respondent.

(ii) As far as the sixth respondent is concerned, the explanation for the notice in terms of rule 47 only having been given on 14 February 2014 is in my view adequate and not unreasonable. That respondent was focused on providing an answering affidavit under a tight deadline to a voluminous and complex application.

(jj) On the facts of this matter, I do not find that there was any undue delay in the bringing of the application for security.

(kk) As to the merits of the application, it is evident to me that the fourth and sixth respondents have established with reference to credible testimony which eminates from the applicant that there is reason to believe that if the applicant were to be unsuccessful then it would be unable to pay the respondents' costs. In the applicant's founding affidavit, its dire financial circumstances and

[10] *Wallace NO v RooibosTea Control Board* 1989 (1) SA 137 (C) at 144.

prospects are trenchantly spelt out at some length. These are confirmed in the applicant's replying affidavit in the main application. The point that these facts are raised in another context (and thus taken out of the context) cannot avail the applicant. Those facts, although raise to make any different point as to the consequences of conduct complained of, are however pertinent in other contexts as well, such as the present context and can be referred to in this context.

(ll)

(mm) In these applications for security, the applicant merely refers to assets worth N$26 million reflected in its audited financial statement attached to the founding affidavit for the financial year which ended on 28 February 2013. But no details are provided of these assets. It was in my view incumbent upon the applicant to have provided further detail concerning its financial position including addressing these assets and their market ability, in the context of the challenge to its ability to pay the fourth and sixth respondents' costs if it were unsuccessful in the main application. The financial statements relied upon reflect the position almost exactly a year before these applications were heard. No further detail of any kind is supplied as to the applicant's current or even more recent position or detail with reference to management or other forms of accounts. No further explanation is given as to the impact of recent developments upon its current position and the ability to pay those costs despite the period of more than a month after the founding affidavit in the main application.

(nn)

(oo) On the applicant's own version, its cash reserves would run out within four to five months of the founding affidavit having been made in mid January 2014. It is unlikely that the main application would be heard and determined by then. Even if it were, there is the further period needed to have a bill prepared and then taxed. Whilst the parties disagree upon that period, it is clear that by taking middle ground between the two projections, the cash reserves would be depleted by the time the main application is reasonably expected to be determined and bills of costs prepared and taxed. The total period would in by view well exceed 6 months.

(pp)

(qq) Given the dearth of further financial information provided by the applicant in response to these applications, it is clear that the fourth and sixth respondents have established the first leg of the enquiry posited by s11 of the Companies Act, particularly when bearing in mind that the basis for bringing the application arises from the statements made on behalf of the applicant under oath in support of the main application. The respondents' case was further supported by the applicant's submission concerning the exercise of discretion which I refer to below.

(rr)

(ss) I accordingly conclude that the fourth and sixth respondents have established reason to believe that the applicant would be unable to satisfy a costs order in favour of the two respondents in the main application.

(tt) As to the exercise of my discretion, Mr Tötemeyer submitted that regard should be had to the nature of the application and that the existence of the applicant depends upon it. He further submitted that should an order for security for costs be granted, it may have the effect of hastening the demise and closing down of the applicant by depleting its cash reserves quicker and disabling it from continuing. This submission would appear in my view to counter the approach of the applicant with regard to the first leg of the enquiry where it denied that it would be unable to pay the respondents' costs and made much of the value of its assets referred to in its financial statements.

(uu) In *Shepstone and Wylie v Geyser N.O.*[11] followed by the Supreme Court in the *Northbank Diamonds* matter,[12] the nature of the discretion to be exercised when dealing with a similarly worded provision in the South African Companies Act was referred to in the following terms (in approving of decision of the Court of Appeals in England):

> '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

[11] 1998 (3) SA 1036 (SCA).

[12] Supra.

> consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security. . . I prefer the approach in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 (CA) at 540a-b where Peter Gibson LJ said:
>
> > "The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.'"

(vv) Taking into account the financial position of the applicant which it has itself described as precarious and the further factors raised, I would, in the exercise of my discretion, direct that the applicant provide security for costs.

(ww)

(xx) The question arises as to the quantum of that security. Both respondents applied for security in the amount of N$500 000. They both pointed out that two instructed counsel are engaged in the defence of the main application. They also correctly point out that the papers are voluminous the issues are of some complexity. They each provided some breakdown of how the amount would be constituted, either with reference to what is already been spent (in the case of the sixth respondent) or with reference to the number of days already spent thus far in resisting the main application including the application for interim relief. The latter approach would seem, to be preferable in justifying the claimed amount. And from which a projection of days needed to prepare for and argue the main application can be made. The sum of N$500 000 however appears to me to be somewhat excessive at this juncture. Should the main application become protracted, then the applicants' may approach the court for further security, if justified. Taking into account the evidence of the respondents as far as costs and the period of time used are concerned and the failure on the part of the applicant to specifically address either issue or make any alternative suggestion or projection or put up any contrary material as to what was reasonable in terms of time to be spent and amounts, it would seem to me that the sum of N$350 000 would be more than reasonable and adequate in respect

of security for costs for each of the fourth and sixth respondents.

(yy) The question of the costs of this application remains for consideration. When questioned on this issue, both sets of respondents conceded that costs should be limited to one instructing and one instructed counsel. This concession was in my view rightly made.

(zz)

(aaa) It would follow in my view that the costs of this application are to be borne by the applicant (in the main application) in respect of each of the respondents' applications for security for costs on the basis of one instructing and one instructed counsel.

(bbb) I accordingly make the following order:

a) The applicant (in the main application) is to provide security for the fourth and sixth respondents costs in the form and a manner as approved by the registrar in the amount of N$350 000 for each such respondent within 5 days from the date of this order;

b) The main application initiated by the applicant under case number A 07/2014 is stayed pending compliance with paragraph (a) of this order;

c) The fourth and sixth respondents are granted leave in the event of the applicant not complying with the order set out in paragraph (a) to apply to this court on the same papers duly amplified as may be necessary, for the dismissal of the applicant's main application on the above basis;

d) The applicant in the main application is to pay both the fourth and sixth respondents' costs of their applications. These costs include the costs of one instructing and one instructed counsel.

_____

D SMUTS

1414141414

Judge

APPEARANCES

FOURTH RESPONDENT:	A Van Vuuren Instructed by Theunissen, Louw and Partners
SIXTH RESPONDENT:	R Heathcote SC (with him D Obbes) Instructed by LorentzAngula Inc.
APPLICANT:	R Totemeyer SC Instructed by Mueller Legal Practitioners