

**IN THE HIGH COURT OF NAMIBIA**

<p><b>Case Title:</b> <i>IBB Military Equipment and Accessory Supplies CC vs Namibia Airports Company Limited.</i></p> <p>(Application for security of costs)</p>	<p><b>Case No:</b> HC-MD-CIV-ACT-CON-2017/03477</p>
	<p><b>Division of Court:</b> High Court</p>
<p><b>Heard before:</b> Honourable Justice Herman Oosthuizen</p>	<p><b>Date of hearing:</b> 11 June 2018</p>
	<p><b>Delivered on:</b> 13 July 2018</p>
<p><b>Neutral citation:</b> <i>IBB Military Equipment and Accessory Supplies CC vs Namibia Airports Company Limited</i> (HC-MD-CIV-ACT-CON-2017/03477) [2018] NAHCMD 211 (13 July 2018).</p>	
<p><b>Result on application for security of costs:</b> Unsuccessful.</p>	
<p><b>The order:</b></p> <p>Having heard <b>Mssrs Heathcote</b>, counsel for the applicant, and <b>Corbett</b>, counsel for the respondent and having read the documents filed of record –</p> <p><b>IT IS ORDERED THAT:</b></p> <ol style="list-style-type: none"> <li>1. Applicant's application for security is declined with costs for respondent.</li> <li>2. Respondent's costs is subject to the limitation provided for in Rule 32(11) of the Rules of the Court and includes the costs of one instructing and one instructed counsel on a party and party scale.</li> </ol>	
<p><b>Reasons:</b></p> <ol style="list-style-type: none"> <li>1. Plaintiff sues for damages in excess of N\$144 million based on defendants' conduct of not adhering to a renovation agreement and a maintenance agreement at the Hosea Kutako International Airport.</li> <li>2. Plaintiff is a Namibian registered close corporation with one member, being an Egyptian National with residence in Namibia.</li> </ol>	

3. Defendant's reason for not complying with the contracts, is that the conclusion thereof was void or voidable in view thereof that its former Board did not follow the correct procedures in awarding the contracts to the plaintiff.

4. Defendant apparently reneged due to its own wrongdoing.

5. Defendant say that it has reason to believe that plaintiff will not be able to meet possible adverse costs orders in the event of it not succeeding with its claims.

6. The Court is entitled to consider the nature of the claim in broad terms when adjudicating the request for security.

7. Defendant rely on section 8 of the Close Co-operation Act, Act 26 of 1988 which provide for a reason to believe that if a close corporation is unsuccessful in its claim, it will be unable to pay adverse costs orders.

8. *In Northbank Diamonds Ltd v FTK Holland BV and others* 2003(1) SA 189 (NmS) at 193 and 194, the Namibian Supreme Court found that credible testimony should underpin the reason to believe and surmise, speculation and belief, not supported by necessary facts, would not suffice. The onus to prove rests on the applicant for security. Where the financial ability of the respondent is peculiarly in its knowledge, less evidence will suffice to establish *prima facie* that the reason to believe is well grounded. Less evidence should not open the door for surmise and speculation.

9. I accept the contention that the applicant should not benefit from its own wrongdoing. The wrongs of the applicant, if so found at a later stage, can however not assist the court now for the very fact that it is yet to be proved, and importantly in an application for security for costs, is less applicable because if security is ordered, the security remains as a distinct guarantee for costs in the event the respondent is unsuccessful. It does not benefit the applicant's pocket/patrimony and does not vest in the applicant. Security for costs is to guarantee against possible empty adverse costs orders only. If respondent is successful, respondent will still have the security for its disposition. The concern of the respondent is the quantum of security claimed, because it may in the interim have an adverse impact on its cash flow and available resources to carry on business as usual and limit available resources to pay its own ongoing litigation. The quantum of security requested in my view is not exorbitant.

10. That said, the court should first consider whether the applicant has indeed made out a case for security.

11. Applicant made two founding affidavits in support for its application and on 11 June 2018 request the court to order Mr Omar of the respondent to be cross examined.

12. The court is not inclined in the circumstances of this application for security, after two main affidavits by the applicant in an attempt to put credible evidence before the court to prove its reasonable belief of inability to pay adverse costs orders on the respondent's part. Applicant had ample opportunity to make its case.

13. Applicant's evidence in support of its application is mainly based on assumptions, speculation, hearsay and inferential reasoning based on the aforementioned. Its belief should be based on acceptable evidence supported by facts and confirmatory evidence tendered by somebody having personal knowledge. For instance and concerning the extensive searches by its legal practitioner, a confirmatory affidavit was filed which is not complete and consist only of page 1 and 3 of Clive Kavendjii's statement. There is therefore no confirmation of the applicable allegations by Mr Shipuata.

14. It is true however that the respondent, in answering the case of the applicant could easily have allayed the beliefs of the applicant by supplying evidence to the contrary in the form of financial statements. The onus is however not on the respondent.

15. Respondent testified in rebuttal that -

15.1. It is operationally active and in the process of finalising an agreement for the supply of military equipment in excess of one million Euro.

15.2 It has goods and accessories worth over N\$6 million at his warehouse in Windhoek.

15.3 It has an active bank account at Nedbank Namibia showing a credit in excess of N\$2 million as \_\_\_\_\_ at \_\_\_\_\_  
15 May 2018.

15.4 It was registered in 2005 for the supply and delivery of different types of goods to the

Namibian military and police.

15.5 It received high volume orders involving funds exceeding approximately N\$100 million since doing business in Namibia and neighbouring countries.

15.6 The nature of its supplies to the Government of Namibia is confidential.

15.7 It is in a position to pay any reasonable cost order against it.

16. Applicant may criticise the contents of paragraph 15 above, but is not in a position to assert that it is probably false, neither did applicant supply the court with acceptable credible evidence in support of its reason to believe respondent's inability to pay adverse cost orders.

17 In the result the court orders that -

17.1 Applicant's application for security is declined with costs for respondent.

17.2 Respondent's costs is subject to the limitation provided for in Rule 32(11) of the Rules of the Court and includes the costs of one instructing and one instructed counsel on a party and party scale.

**Judge's signature:**

**Counsel:**

**Plaintiff (Applicant)**

**Defendants (Respondents)**

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