

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

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| Case Title: DISTELL LIMITED // FT NENTELE TRANSPORT CC | Main Case No.: HC-MD-CIV-ACT-OTH-2019/00562 |
| | Interlocutory Case No.: INT-HC-SECCOST-2020/00103 |
| Heard before: HONOURABLE MR JUSTICE MILLER, ACTING | Division of Court: HIGH COURT (MAIN DIVISION) |
| | Date of hearing: 20 JULY 2020 |
| | Delivered on: 31 JULY 2020 |
| Neutral citation: <i>Distell Limited v FT Nentele Transport CC</i> (INT-HC-SECCOST-2020/00103) [2020] NAHCMD 324 (31 July 2020) | |
| The order: Having heard Ms Garbers-Kirsten , counsel for the applicant/defendant and Mr Silungwe , counsel for the respondent/plaintiff and having read documents filed of record: IT IS ORDERED THAT: The interlocutory application for the plaintiff to furnish security for costs is dismissed with costs, limited to N\$20 000. | |
| Following below are the reasons for the above order: | |
| <p>[1] In this interlocutory application, the applicant is the defendant in the main matter and the respondent is the plaintiff in the main matter. The parties will be referred to as they appear in the main matter.</p> <p>[2] On 24 February 2019, the plaintiff instituted action against the defendant seeking an order directing the defendant to reinstate the plaintiff as a contractor in terms of the Owner Distribution Agreement concluded between the plaintiff and the defendant, and an order directing the defendant to remit payment to the plaintiff in an amount equivalent to the three months payment</p> | |

to the plaintiff in the amount of N\$390 000.

[3] Before me now is an interlocutory application brought by the defendant on 12 May 2020 seeking an order that:

- (a) The plaintiff is required to furnish security for costs in the form of a bank guarantee or funds held in the plaintiff's attorneys' trust account, or in such other form as may be determined by the registrar, in the sum of N\$300 000, or such sum as is set by the registrar, within ten days of the determination of the amount of the security.
- (b) The action is stayed pending the granting of such security.
- (c) The plaintiff pays the costs of this application.

[4] The Notice of Motion was accompanied by the founding affidavit of Soritha Botha and the confirmatory affidavit of Nangula Hilja Tuutaleni Nafuka was used in support of the application.

[5] In her founding affidavit, Soritha Botha stated that the plaintiff is a close corporation established and registered under the Close Corporation Act 26 of 1988 as amended, and that 'the defendant is of the reasonable belief that the plaintiff does not have any realisable property situated within the jurisdiction of Namibia which may serve to satisfy any cost award which the defendant may secure in its favour should the defendant succeed with its defence. Alternatively; the defendant is entitled to demand security for costs from the plaintiff under s 8 of the Act, alternatively the common law'¹.

[6] Section 8 of the Close Corporations Act 26 of 1988 reads as follows:

'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.'

[7] Section 8 of the Close Corporations Act 26 of 1988 gives the court discretionary power to grant or refuse an application for security for costs.

[8] In her founding affidavit, Soritha Botha submitted that 'the factual circumstances demonstrate

¹ Para 6 of the Defendant's Founding Affidavit.

that there is reason to believe that the plaintiff is unable to pay security for costs'² and further stated that from the circumstances she has explained in her affidavit, it appears that 'if the defendant is successful in its defence of the action and the plaintiff is ordered to pay the costs, there will no funds available in the Republic of Namibia upon which the defendant can levy execution to recover such costs'.³

[9] In his answering/opposing affidavit on behalf of the plaintiff, Phillipus Twelimangulula Mentele stated that the plaintiff fell on hard times financially and was forced to cease operations shortly after the defendant terminated the agreement in question between the parties, and that it would be unfair in the circumstances to require the plaintiff to furnish security for costs.⁴

[10] Phillipus Twelimangulula Mentele further stated in his answering/opposing affidavit that the order sought by the defendant in its notice of motion will have an adverse financial impact on the plaintiff, especially in view of the fact that the defendant is in a better financial position than the plaintiff. He further stated that the defendant is a multinational company and a *peregrinus*, while the plaintiff is an *incola* in the Republic of Namibia. He further submitted in that affidavit that the defendant waived his right to claim security for costs from the plaintiff and the matter continued, and went past the close of pleadings, and as a result the plaintiff has incurred considerable expenses in legal fees as a result of instituting the proceedings, which are due and payable to his former and current legal practitioners.⁵

[11] In her answering affidavit, Sorita Botha stated that the plaintiff, on its own admission is unable to pay an adverse costs order in the event that it is unsuccessful with the main action, and that solely for that reason the court should grant an application for security for costs against the plaintiff.⁶ She further submitted that the defendant is in a dire financial position, and needs the court's protection from the plaintiff and a legal entity that admits that it is 'a man of straw' and who is facing a claim that is disputed on reasonable grounds, and that the plaintiff should be called upon to pay security for costs in the event that it wants to proceed with its meritless action, and that the plaintiff has bad prospects to be successful in its action.⁷ She submitted that 'it is intolerable for courts to allow a person who is 'a man of straw' to proceed with legal action in which it is clear that the action is properly disputed.'⁸ She further stated that the agreement in question between the parties was duly cancelled by following due process⁹, and that the defendant is not the cause of any financial difficulties of the respondent.¹⁰ She also denied that

² Para 20 of the Defendant's Founding Affidavit.

³ Para 21 of the Defendant's Founding Affidavit.

⁴ Para 8.6 of the Plaintiff's Answering/Opposing Affidavit.

⁵ Para 8.7 of the Plaintiff's Answering/Opposing Affidavit.

⁶ Para 15.1 of the Defendant's Replying Affidavit.

⁷ Para 15.3 and 15.4 of the Defendant's Replying Affidavit.

⁸ Para 15.5 of the Defendant's Replying Affidavit.

⁹ Para 14.4 of the Defendant's Replying Affidavit.

the applicant has caused unnecessary costs to the plaintiff by waiving 'its right to claim security for costs at the outset just after the action was instituted'.¹¹

[12] In *Hepute and Others v Minister of Mines and Energy and Another*¹² the Supreme Court held that:

[23] Our common law recognises, as a general rule, the immunity enjoyed by an *incola* plaintiff or applicant from having to provide security of costs. The *ratio* behind this rule is that every citizen should have uninhibited access to the courts: *Vite v Mbuque; Namoyi v Mbuque* 1993(4) SA 93 at 94F-95B. One exception to this general rule, founded in my view on the principle that the process of the court should not be abused, is that an *incola* who is a man of straw and litigates in a nominal capacity, or as a front for another may be ordered to furnish security: *Pillemer v Israelstam Shartin* 1911 WLD 156; *Vanda v Mbuque, supra* at 94J-95A, and the *obiter dictum* in *Mears v Brook's Executor and Mears's Trustee* 1906 TS 546 at 550.

[24] I agree with Muller J that the implicated exception creates two discrete categories: while being a man of straw litigating in a nominal capacity, or while being a man of straw being put up as a front for another. Both instances would amount to an abuse of the process of the court. There is, or ought to be, a distinction between being a nominal plaintiff and being a front. In my view, a nominal plaintiff/applicant is one who, although he might be entitled to maintain the action, has no interest in the subject matter of the cause such as the case was in *Mears'* case, *supra* at 550. A front, on the other hand, is one who is being used to shield another from the adverse consequences of litigation. In both respects, the principle underlying the rule is sound and is founded on the public policy consideration that the abuse of the process of the court should be frowned upon: it is not fair to allow a plaintiff with no real interest in the litigation to drag another through litigation while being unable to meet an adverse costs order at the end of the day; and it is equally unfair to allow a party who has an interest in the litigation to use a poor man (who also has an interest) and in so doing hedge itself against an adverse costs order. It needs to be understood very clearly that in the application of the exception, a person is not ordered to pay costs because he or she is poor but because, while being impecunious, he or she is either a nominal plaintiff/applicant or is being used as a front by another. Poverty, without more, is no bar to seeking justice.

[25] A defendant/respondent who wishes to obtain security for costs on the strength of the implicated exception should, on balance of probability, show that the plaintiff/applicant is poor and is, in addition, a nominal litigant or a front of another party. If the jurisdictional facts are

¹⁰ Para 14.3 of the Defendant's Replying Affidavit.

¹¹ Para 15.8 of the Defendant's Replying Affidavit.

¹² *Hepute and Others v Minister of Mines and Energy and Another* 2008 (2) NR 399 (SC) at 409-10.

established for the invocation of the exception, the court may order security for the costs of the defendant/respondent upon application therefor.'

[13] The main matter arises from a written Owner-Driver Distribution Agreement that was entered into between the plaintiff, represented by Nentele Filipus Twelimangulula and the defendant, represented by Viian Govender, in Windhoek, Republic of Namibia. In terms of that agreement, the plaintiff would render cartage services for the defendant to and from the defendant's customers. The plaintiff approached the court because, according to him, the defendant invalidly and without cause terminated that agreement, resulting in the plaintiff falling on hard times financially, while the defendant is saying that the agreement was duly cancelled by following due process as a result of the dishonesty of the plaintiff and its representative.

[14] In the present matter, it is apparent from the papers filed that the parties are in agreement that the plaintiff is not in a good financial position to furnish security for costs. The defendant showed on a balance of probability that the plaintiff is poor but failed to show in addition, on a balance of probability, that the plaintiff is a nominal litigant or a front for another party. The plaintiff has shown that it is entitled to maintain the action and that it has real interest in the subject matter of the cause, and therefore it cannot be said that its conduct amounts to abuse of the process of the court nor can it be said that the claim is frivolous.

[15] Our courts will be slow to close the doors of the court to a plaintiff who, although poor, needs to pursue a claim which may be meritorious. To do so may well result in an injustice in itself.

[16] In the exercise of the discretion I have, I am inclined not to grant the relief being sought.

[17] The application is dismissed with costs, limited to the amount of N\$20 000.

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| Judge's signature: | Note to the parties: |
| | Not applicable. |
| Counsel: | |
| Applicant/Defendant | Respondent/Plaintiff |
| H Garbers-Kirsten <i>instructed by</i> Koep & Partners, Windhoek | R Silungwe <i>of</i> Silungwe Legal Practitioners, Windhoek |