

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Pro Housing CC And Grant Cloete	Case No: HC-MD-CIV-ACT-CON- 2021/00912 Division of Court: Main Division Heard on: 09 September 2021
Plaintiff	Defendant
Heard before: Honourable Mr. Justice Usiku, J	Delivered on: 30 September 2021
Neutral citation: <i>Pro Housing CC v Cloete</i> (HC-MD-CIV-ACT-CON-2021/00912) [2021] NAHCMD 442 (30 September 2021)	
Order:	
<ol style="list-style-type: none">1. The plaintiff is ordered to furnish security for costs to the defendant.2. The nature, form, manner and amount of the security to be furnished, shall be determined by the Registrar.3. The parties shall, within 14 days of the date of this order, approach the office of the Registrar to request a meeting where the assessment of such security shall be made.4. The plaintiff's action is hereby stayed forthwith, until such time as security shall have been furnished, as directed above.5. The plaintiff is ordered to pay the defendant's costs of this application.	

6. The matter is postponed to 17 November 2021 at 15h15 for status hearing.

7. The parties shall file a joint status report on or before 10 November 2021.

Reasons for order:

USIKU, J:

Introduction

[1] In this matter, the defendant seeks an order in the following terms namely that:

- (a) the plaintiff be ordered to provide security for costs in the amount N\$150 000, and,
- (b) the plaintiff's claim be stayed until such security is provided.

[2] The plaintiff contests its obligation to give security for costs.

Background

[3] On 9 March 2021 the plaintiff instituted action against the defendant, claiming payment in the amount of N\$511 877.50 allegedly payable in terms of a building contract entered into by parties, plus payment in the amount of N\$483 705.62, being damages arising from the breach of the contract, plus ancillary relief.

[4] The defendant entered appearance to defend. Thereafter, the defendant launched the present application for security for costs.

Application for security for costs

[5] The defendant seeks security for costs from the plaintiff on the basis that:

- (a) the plaintiff is a close corporation duly incorporated and registered in Namibia;
- (b) in terms of s 8 of the Close Corporation Act 26 of 1988, the court may at any time during the proceedings, if it appears that there is reason to believe that the corporation will be unable to pay the costs of the defendant, 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;

- (c) the plaintiff is indebted to SA Scale Company (Pty) Ltd, in respect of a loan agreement, in the amount of N\$250 000 plus interest;
- (d) notwithstanding demand, the plaintiff has failed to pay the debt owed and legal action was instituted against the plaintiff in a matter pending before this court;
- (e) in the light of the abovementioned, the defendant has reason to believe that the plaintiff will be unable to pay the costs of the defendant.

[6] On the basis of the abovementioned information, the defendant prays for an order as set out in the notice of motion.

[7] In opposition, the plaintiff denies that there are grounds to believe that it will be unable to pay the costs in the event of its being ordered to do so in the action. The plaintiff contends that its assets are substantial and exceed its liabilities.

[8] The plaintiff argues that the application for security for costs was brought *mala fide* and with the sole aim to delay the action, since defendant's financial position is such that it cannot pay for the building works done by the plaintiff.

[9] In regard to the alleged indebtedness to SA Scale Company (Pty) Ltd, the plaintiff asserts that it does not agree with the balance claimed and will tender what is truly due.

[10] The plaintiff prays that the defendant's application be dismissed with costs.

Legal principles

[11] Section 8 of the Close Corporations Act 26 of 1988 ("the Act") provides that:

'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.'

[12] The above section requires a two stage enquiry. At the first stage, the question is whether an applicant for security has established that there is 'reason to believe' that the body corporate, if unsuccessful, will not be able to pay the applicant's costs in the main

proceedings. If the court is not so satisfied, that is the end of the matter and the application is bound to be refused. However, if the court is satisfied that such 'reason to be believe' exists, it must, at the second stage, decide, in the exercise of the discretion conferred upon it by the section, whether or not to compel security.¹

[13] In regard to when a court has 'reason to believe', there must be facts before the court on which the court can conclude that there is reason to be believe that the plaintiff body corporate will be unable to satisfy an adverse costs order. The onus of adducing such facts rests on the applicant.²

[14] Once the court is satisfied that there is reason to believe that plaintiff body corporate will not be able to pay a costs order, if unsuccessful, the court may order it to furnish security for such costs. In the exercise of such discretion, the court must decide each case upon a consideration of all the relevant features of that particular case.³

[15] The purpose of s 8 is to protect the public in litigation by bankrupt companies which may drag them from one court to the other without being able to pay costs if unsuccessful.⁴

Analysis

[16] In the present matter, the first issue for consideration is whether there is evidence that 'reason to believe' exists that the plaintiff will be unable to meet an adverse costs order against it.

[17] The defendant adduced evidence to the effect that the plaintiff is indebted to SA Scale Company (Pty) Ltd and that such debt is due, owing and payable and that the plaintiff has refused and/or failed to meet its obligations in respect of that debt. In response, the plaintiff does not deny the indebtedness. However, it only disputes the balance claimed and promises to tender what is truly due, in future.

[18] On the basis of the aforesaid evidence, the defendant contends that there is a probability that if the defendant is successful in his defence to the action, it will be difficult or

¹ *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 622 I-623A.

² *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 at 1071 E-H.

³ *Shepstone & Wylie and Others v Gyzers* NO 1998 (3) SA 1036 at 1045 I-1046C.

⁴ *Lappman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd* 1997 (4) SA 908 at 919G-H.

impossible for him to recoup his costs.

[19] On all the evidence placed before the court, I am satisfied that there is reason to believe that the plaintiff will be unable to comply with a costs order against it.

[20] The next stage of enquiry is to consider whether or not the court should in the exercise of its discretion, compel the furnishing of security.

[21] In opposing the application for costs the plaintiff argues that the application was launched mala fide and with the sole aim to delay the action, since the defendant's financial position is such that he cannot pay for the building works done. There is no evidence supporting this contention and that contention is therefore rejected.

[22] Another ground advanced by the plaintiff is that the amount claimed as security is unreasonable in the circumstances where court connected mediation is compulsory and the dispute is likely to be resolved at mediation. Since this court will not determine the amount of security, as explained more fully later herein, I would not deal with the issue of the reasonableness of the amount of security demanded.

[23] The plaintiff does not state whether or not it will be able to furnish any security. However, the plaintiff attached a 'management statements' to its answering affidavit, setting out its assets and liabilities for the period ended 28 February 2021. The defendant contends that such document is unsigned and does not comply with the requirements of the Act. I agree with the plaintiff's contention and I attach no weight to the 'management statement' for the present purposes.

[24] It is common cause that the plaintiff does not allege that a security order could effectively deprive it of the opportunity to proceed with its claim. Had such allegation been made and established, that would have been considered, in the balancing exercise, when the court decides whether not to grant a security order.

[25] On all the evidence before the court, I am of the view that the defendant is entitled to an order of security for costs against the plaintiff and that the court should, in the exercise of its discretion, compel the furnishing of such security. I shall therefore, grant an order to that effect.

[26] As regards the issue of the nature, form and amount of security, it is trite law that such is ordinarily a matter exclusively for the decision of the Registrar.⁵ I shall therefore direct that the nature, form and amount of security be determined by the Registrar.

[27] As regards the issue of costs, I am of the opinion that the general rule that costs follow the result must find application.

[28] In the result, I make the following order:

1. The plaintiff is ordered to furnish security for costs to the defendant.
2. The nature, form, manner and amount of the security to be furnished, shall be determined by the Registrar.
3. The parties shall, within 14 days of the date of this order, approach the office of the Registrar to request a meeting where the assessment of such security shall be made.
4. The plaintiff's action is hereby stayed forthwith, until such time as security shall have been furnished, as directed above.
5. The plaintiff is ordered to pay the defendant's costs of this application.
6. The matter is postponed to 17 November 2021 at 15h15 for status hearing.
7. The parties shall file a joint status report on or before 10 November 2021.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
Mr Olivier Of Ellis Shilengudwa Inc. Windhoek	Mr Swanepoel Philip Swanepoel Legal Practitioners Windhoek

⁵ *Martucci v Mountain View Game Lodge (Pty) Ltd* I 2295/2015 [20016] NAHCMD 217 (22 July 2016).