

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTIVE 61

Case Title: Afrihost Trading Group (Pty) Ltd Applicant and Charles Forsbrook Montgomery 1 st Respondent The Messenger of the Court Grootfontein 2 nd Respondent Enos Pendapala Anyolo 3 rd Respondent	Case No: HC-MD-CIV-MOT-GEN- 2021/00484
	Division of Court: Main Division
	Heard on: 14 March 2023
Heard before: Honourable Justice Usiku	Delivered on: 5 April 2023
Neutral citation: <i>Afrihost Trading Group (Pty) Ltd v Montgomery</i> (HC-MD-CIV-MOT-GEN-2021/00484) [2023] NAHCMD 172 (5 April 2023)	
Order: <ol style="list-style-type: none">1. The applicant is ordered to furnish security to the first respondent for costs incurred and to be incurred by him in the application instituted by the applicant against the first respondent under case number HC-MD-CIV-MOT-GEN-2021/00484.2. The nature, form, manner and amount of the security to be furnished, shall be determined by the Registrar.3. The parties shall, within 15 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 applicant's motion under case number HC-MD-CIV-MOT-GEN-2021/00484, is	

hereby stayed forthwith, until such time as security shall have been furnished, as directed above.

5. In the event of the security not being furnished as ordered, the first respondent is granted leave to apply to this court on the same papers, supplemented insofar as may be necessary, for the dismissal of the motion instituted by the applicant.
6. The applicant is ordered to pay the first respondent's costs of this application.
7. The matter is postponed to 17 May 2023 at 15h15 for Status Hearing.
8. The parties shall file a joint status report on or before 10 May 2023.

Reasons for order:

USIKU J:

Introduction

[1] For convenience sake, the parties are referred to as in the main action. The matter presently for determination is an interlocutory application by the first respondent against the applicant, for an order for security for costs.

[2] The first respondent seeks an order in the following terms:

'1. The Applicant is directed to furnish security to the First Respondent for costs incurred and to be incurred by him in the application instituted by the Applicant against the First Respondent in this court under case number HC-MD-CIV-MOT-GEN-2021/00484;

2. The security shall be furnished by way of payment to the Registrar of the High Court in the amount of N\$200,000.00, delivered within 15 days of date of this order;

Alternatively: the form, amount of and manner in which the security is to be furnished shall be fixed by the Registrar of this Court and shall be furnished within 15 days of it being so determined by the Registrar;

3. The action under case number HC-MD-CIV-MOT-GEN-2021/00484 is stayed until the Applicant has furnished the security for costs in the form, amount and manner stipulated by this order;

4. In the event of the security not being furnished as ordered, the First Respondent is given leave to apply to this Court on the same papers, supplemented insofar as may be necessary, for the dismissal of the action instituted by the Applicant under case number HC-MD-CIV-MOT-GEN-2021/00484;

5. The Applicant is directed to pay the costs of this application, the costs not to be limited in terms of Rule 32(11);

6. Such further and/or alternative relief be granted to the First Respondent as the court may deem meet.'

[3] The first respondent relies on the provisions of s 11 of the Companies Act¹ ('the Act') for its request for security for costs.

[4] The following are the grounds upon which the first respondent seeks security for costs, namely:

(a) the applicant is a juristic person with only one shareholder;

(b) the sole shareholder of the applicant, in his founding affidavit, in the main application, deposed among other things, that:

(i) soon after the applicant took occupation of the leased premises and started trading as a bakery, the Ministry of Defence withdrew the tender it granted to the applicant;

(ii) the tender (which was withdrawn) was the main reason why the applicant opened the bakery;

(iii) upon the withdrawal of the tender, the applicant lost their biggest client in the process;

(iv) the applicant's revenue decreased tremendously;

(v) the bakery was no longer a viable business and was closed by end of May 2021;

(vi) at that stage, the applicant was in arrears with two months rental amount, which was due to first respondent;

(viii) during July or August 2021, the applicant secured payment of the portion of the outstanding arrear rent through assistance of a friend and business partner;

(c) the sole shareholder of the applicant also deposed to a further affidavit on 5 July 2022, in which he averred that the applicant is struggling to pay its legal fees;

(d) during a rule 32(9) engagement on 26 September 2022, the legal practitioners of the first respondent addressed a letter to the legal practitioners of the applicant, requesting the applicant to indicate whether it has any:

(i) unencumbered immovable assets,

(ii) movable assets or;

(iii) any reliable income.

(e) for the purposes of establishing whether the applicant is in a position to satisfy an adverse costs order against it, the applicant was also requested, through its legal practitioners, to furnish financial statements, however, the legal practitioners did not furnish any of the requested

¹ Act 28 of 2004.

information;

(f) the first respondent instructed its legal practitioners to conduct a deeds search to establish whether the applicant has any immovable property registered in its name. They could not find any record of immovable property registered in the name of the applicant, and that,

(g) the first respondent's legal practitioners also did an online search to establish whether the applicant still trades but same could not be established.

[5] In light of the above, the first respondent submits that, the unavoidable conclusion to be drawn is that the applicant is impecunious and will not be in a financial position to satisfy an adverse costs order against it.

[6] The applicant contests its obligation to give security for costs. The following are the grounds upon which the applicant opposes the application:

(a) the first respondent does not have any reasonable grounds to believe that the applicant will not be able to satisfy an adverse costs order;

(b) the first respondent's request for the applicant to furnish financial statements within four days was unreasonable;

(c) the first respondent requested that the applicant provides a list of its movable property, when they knew that they had sold applicant's movables at an unlawful sale in execution;

(d) the fact that the applicant stated that it was going through a rough financial path, should not be used to shut the court's door on it, as it is the first respondent who is the cause of its financial problems;

(e) the applicant has a constitutional right to access the court and to have its dispute adjudicated;

(f) the applicant disputes that first respondent's legal practitioners conducted a diligent online search and no proof has been furnished in that regard, and;

(g) the fact that applicant sourced its funds from its business partners in the previous matter does not justify closing the court's door on the applicant.

[7] In light of the foregoing grounds, the applicant submits that the first respondent's application for security for costs be dismissed with costs.

Analysis

[8] Section 11 of the Act provides as follows:

'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 is being wound 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, require sufficient security to be given for those costs and may stay all proceedings until the security is given.'

[9] The first issue for consideration is whether there is evidence that there is reason to believe that the applicant will be unable to meet an adverse costs order against it.

[10] The first respondent has adduced evidence to the effect that based on allegations founded upon the applicant's founding affidavit in the main application, there is reason to believe that the applicant will be unable to meet an adverse costs order against it.

[11] The applicant does not deny that it has made the assertions relied upon by the first respondent in its affidavit(s), but denies that it will not be able to satisfy an adverse costs order against it. The thrust of the applicant's complaint being that its acknowledged financial straits should not be used as a reason to shut the court's door on it.

[12] I am of the opinion that the fact that the applicant has admitted being in financial difficulties, is a relevant consideration in the present proceedings. Furthermore, the applicant's reluctance to make any disclosure of its assets and/or liabilities, in the present proceedings, is in my view, a further factor that weighs in favour of granting an order for security for costs, in the circumstances.

[13] On the basis of all the evidence before court, I am of the opinion that there is reason to believe that the applicant will be unable to comply with a costs order, should such order be granted against it.

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

[15] Upon the assessment of the evidence before the court, I am of the view that the considerations of fairness favour the granting of security for costs. From the papers filed in this matter, it is apparent that the applicant does not own significant movable property. If the first respondent is successful in the main application, any award of costs in its favour will be a hollow victory, as it will not be able to recover its costs.

[16] I am therefore, of the view that the first respondent is entitled to an order for security for costs against the applicant and that the court should, in the exercise of its discretion, compel the

furnishing of such security.

[17] As regards the issue of the nature, form and amount of security, it is trite law that such is ordinarily a matter for the decision of the Registrar².

[18] In so far as costs are concerned, I am of the view that the general rule that costs follow the event must find application. The first respondent requests that the costs to be granted should not be subject to the limitation imposed under rule 32(11). I am of the opinion that the first respondent has not placed evidence before court to satisfy me that a normal costs order will not be sufficient to meet its costs in the present proceeding. I will, therefore, grant an ordinary costs order.

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

1. The applicant is ordered to furnish security to the first respondent for costs incurred and to be incurred by him in the application instituted by the applicant against the first respondent under case number HC-MD-CIV-MOT-GEN-2021/00484.
2. The nature, form, manner and amount of the security to be furnished, shall be determined by the Registrar.
3. The parties shall, within 15 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 applicant's motion under case number HC-MD-CIV-MOT-GEN-2021/00484 is hereby stayed forthwith, until such time as security shall have been furnished, as directed above.
5. In the event of the security not being furnished as ordered, the first respondent is granted leave to apply to this court on the same papers, supplemented insofar as may be necessary, for the dismissal of the motion instituted by the applicant.
6. The applicant is ordered to pay the first respondent's costs of this application.
7. The matter is postponed to 17 May 2023 at 15h15 for Status Hearing.
8. The parties shall file a joint status report on or before 10 May 2023.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable

² *Martucci v Mountain View Game Lodge (Pty) Ltd* (I2295/2015) [2016] (NAHCMD) 217 (22 July 2016).

Counsel:	
Plaintiff:	Defendant:
K Kamuhanga Of Kamuhanga Hoveka Samuel Inc., Windhoek	F Pretorius Of Francois Erasmus & Partners, Windhoek