

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON SECURITY FOR COSTS

Case No: HC-MD-CIV-ACT-CON-2022/00944

In the matter between:

WUM PROPERTIES (PTY) LTD

PLAINTIFF / APPLICANT

and

PROMETHEUS INVESTMENTS CC

1ST DEFENDANT / 1ST RESPONDENT

MICHAEL PETER OTT

2ND DEFENDANT / 2ND RESPONDENT

CONSTANZE PIMETA

3RD DEFENDANT / 3RD RESPONDENT

Neutral Citation: *WUM Properties (Pty) Ltd v Prometheus Investments CC* (HC-MD-CIV-ACT-CON-2022/00944) [2023] 470 (04 August 2023).

CORAM: MASUKU J

Heard: 25 July 2023

Delivered: 04 August 2023

Flynote: Civil Procedure – Security for costs – Rule 59 of the High Court Rules – Legislation – Section 8 of the Close Corporations Act 26 of 1988 – Considerations taken into account by the court in requiring a party to pay costs during the course of the trial.

Summary: The applicant sued the respondents for payment of N\$2 489 843, 30 as a result of an alleged breach of a lease agreement between the applicant and the first respondent. The second and third respondents were sued in their capacity as sureties and co-principal debtors with the first respondent. The respondents defended the proceedings and filed a

plea and counterclaim. The applicant pleaded to the counterclaim, after which the matter was referred to mediation, which failed. The applicant thereafter launched an application for security for costs in terms of rule 59 of the High Court Rules, read with s 8 of the Close Corporations Act 26 of 1988, ('the Act'). The applicant claimed that there is reason to believe that the respondents would not be able to pay its costs in the event the defence to the respondents' counterclaim succeeded. The application was opposed by the respondents.

Held: That an application for security for costs is not lightly granted for the reason that it may interfere with the opposing litigant's right to a fair trial and to fully and comprehensively prosecute its case to finality. This is more so the case where the party from whom security is required, is an *incola* of the court.

Held that: The court will order a party to pay costs where there is reason to believe that the respondent will not be able to pay the applicant's costs at the end of the trial.

Held that: There is 'reason to believe' when facts are placed before the court and on which the court can conclude that the plaintiff corporation will be unable satisfy an adverse costs order issued against it.

Held: That for the court to order security for costs, the applicant must place creditworthy evidence before the court. Such evidence must be placed on oath and should not be unconvincing, impoverished, vacillating, contrived or the offspring of romanticism.

Held that: The onus is on the applicant for security to persuade the court that the case is a proper one for the court to exercise its discretion in the applicant's favour. In the instant case, the applicant relied, for its contention that there is reason to believe, on out-dated financial statements, which were about four years old. That fell below the standard of 'reason to believe' required in s 8 of the Act.

The applicant's application was thus dismissed with costs.

ORDER

1. The applicant's application for the first respondent to furnish security for costs in respect of the respondent's counterclaim, is hereby dismissed.
2. The applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner, subject to the provisions of rule 32(11).
3. The matter is postponed to **17 August 2023**, at **08h30**, for a case management conference.
4. The parties are ordered to file a joint case management report, together with a proposed draft case management order on or before **14 August 2023**.

RULING

MASUKU J:

Introduction

[1] The crisp question falling for determination in this ruling acuminates to this – is the current application, an appropriate one in which to order the first respondent to pay security for costs?

[2] The question arises because the applicant, WUM Properties, has filed an application in terms of which it seeks an order directing the first respondent to furnish security for costs to the applicant in respect of the first respondent's counter-claim against the applicant.

[3] Needless to mention, the application for payment of security for costs is vehemently opposed by the first respondent. This results in the court having to cut the Gordian Knot therefor and to decide, after taking into account the applicable considerations, whether or not the application is meritorious.

The parties and representation

[4] For purposes of this ruling, I will refer to the parties using the appellations applicant and respondents, respectively. Because the first respondent is the main protagonist in this matter, I will refer to the first respondent as 'the respondent'. Where a need arises to refer to any other respondent, the said respondent will be referred to as the second or third respondent, as the case may well be.

[5] The applicant is WUM Properties (Pty) Ltd, a company, duly incorporated and registered in terms of the company laws of this Republic. Its place of business is situated at Upper Retail Level, Wernhil Park, c/o Fidel Castro Street & Mandume Ndemufayo Streets, Windhoek, Namibia.

[6] The first respondent is Prometheus Investments CC t/a Warehouse Theatre, a close corporation, duly incorporated and registered in terms of the close corporation laws of this country. Its place of business is cited as No. 3 Kerby Street, Windhoek. The second respondent is Mr Michael Ott, a member of the first respondent. He deposed to the affidavit resisting the application before court. The third respondent, Ms Constanze Pimeta is not described in the particulars of claim nor in the application presently serving before court.

[7] The applicant was represented by Mr Lochner, whereas the respondent was represented by Mr van Vuuren. The court records its indebtedness to both counsel for the assistance duly rendered.

Background

[8] This is a matter in which the applicant instituted action against the respondents, claiming payment of an amount of N\$2 489 843, 30, which the first defendant is alleged to have acknowledged liability for. It was claimed by the applicant that it let out premises to the first respondent in terms of a written lease agreement on or about 1 February 2016.

[9] The applicant avers that it complied with its obligations set out in the lease agreement. It further avers that the first respondent failed to comply with its obligations in terms of the said lease agreement. As a result of the breach alleged, the applicant instituted action under case no. HC-MD-CIV-ACT-CON-2022/02927. A judgment by default was obtained against the respondents in that matter on 5 June 2020. An application for rescission

of the judgment was obtained by the respondents on 11 August 2021, hence the present action, which is defended by the respondents.

[10] In the present claim, the plaintiff sues for payment of N\$2 489 843, 30, alleged to be moneys due to the plaintiff arising from a breach of the terms of the lease agreement. The applicant claims that the first respondent signed an acknowledgement of debt in relation to the said amount and the applicant accordingly sues thereon.

[11] In the alternative, the plaintiff claims payment of N\$2 203 922, 91 as being an amount claimed as a result of a breach of the lease agreement signed by the parties, ie the applicant and the first respondent. It is important to mention that the second and third respondents are sued as sureties and co-principal debtors with the first respondent, it being alleged that they signed suretyship agreements in relation to the first respondent's debts to the applicant.

[12] The claim was duly defended by the respondents, who in turn, filed a plea and a counterclaim on or about 1 July 2022. In the counter-claim, the respondent sued for payment of N\$600 000 for its property which it alleges was retained by the applicant in the leased premises after the respondent was evicted from the premises. In its second counter-claim, the respondent sued for payment of N\$23 085 720, being for loss of income resulting from the alleged retention of the first respondent's property by the applicant.

[13] The applicant filed its plea to the counter-claim and as would be expected, the respondents filed their replication to the applicant's plea. Discovery was done by both parties and it would appear that this was in August 2022. The matter was then referred to mediation in the same month of August 2022. The mediator filed a report dated 15 September 2022 to the effect that the mediation had failed. It was only on 27 January 2023 that the applicant decided to launch the present application.

[14] I have set out the litigation history and some of the relevant dates in the preceding paragraphs because they may prove to be important, if not decisive to some extent, in the determination of this application.

The applicant's case

[15] The applicant, in its notice requiring security for costs, dated 11 November 2022, and issued in terms of rule 59 of the High Court rules, requires security in the amount of N\$500

000. In support of the demand for security, the applicant states the following in the notice in terms of rule 59:

'2. The plaintiff is of the view that the first defendant's financial position is of such a nature that it will not be able to satisfy a cost order made against it in that the first defendant disclosed its Annual Financial Statements for the period ending 28 February 2017 to the plaintiff, its unaudited Management Statements up to February 2018; its Management Accounts YTD from 01 March 2018 until 31 July 2018 ('financials'); which financials reflected that the first defendant was operating at a loss most of the time and that the first defendant's liabilities exceeded its assets.

3. The plaintiff has reason to believe that there were no material changes in the financial position of the first defendant since the financials had been furnished, especially considering that the first defendant's business operations closed down during or about October 2019.

4. Action proceedings are expensive in its (*sic*) very nature and based on the first defendant's financials, the plaintiff is of the view that the first defendant does not have the necessary funds to satisfy a cost order against it, should the plaintiff be successful in its defence to the first defendant's counterclaim.

5. In the circumstances, Section 8 of the Close Corporations Act 26 of 1988 is applicable and the plaintiff requests security for the costs in terms thereof.'

[16] Because the application in terms of the notice in terms of rule 59 was opposed, the applicant was compelled to file an application in support of the relief it seeks. In this connection, an affidavit was deposed to by Mr Jan Brand, the applicant's General Manager. In justifying the application for security for costs, Mr Brand, at para 9 of the founding affidavit, relied on the averments made in the rule 59 notice quoted liberally above.

[17] The only difference, is that the applicant filed some of the documents relating to the first respondent's financial position, including the management accounts up to February 2018, an email from O&L Senior Group financial controller, which the applicant claims showed that the first respondent was operating at a loss most of the time and as its liabilities exceeded its assets.

The respondents' case

[18] In its answering affidavit, the respondents state that the applicant did not comply with rule 59 in making the application because this application was not filed 'as soon as

practicable after the commencement of the proceedings.’ It is alleged in this connection that the applicant unreasonably delayed in seeking security for costs despite the knowledge alleged in para 9 of the founding affidavit and to which I have referred above. It was therefore contended that the application could be dismissed on that very issue alone.

[19] In dealing with the contents of the founding affidavit, the second respondent deposed that the applicant unlawfully retained respondent’s property worth more than N\$500 000, when it evicted the respondent from the leased premises. It claims that it is entitled to the return of that property. It is also averred that the respondent suffered damages as a result of the unlawful retention of its assets by the applicant, hence the counter-claim it instituted. It is the respondent’s case that the property in the applicant’s possession is in any event, worth the amount sought as security by the applicant.

[20] Regarding the financial statements relied on for the belief that the first respondent will not be able to pay the applicant’s costs of suit, it is the respondents’ case that the documents relied on by the applicant, are out-dated as they relate to the years 2017 and 2018. The respondents reiterate that in any event, if security for costs is required, there is the respondent’s property in the applicant’s hands that would suffice as security. The respondents point out, however, that the amount of N\$500 000, required by the applicant is in any event, exorbitant.

The issues and the applicable law

[21] From the papers, it appears that there are two legislative instruments that find application to the present dispute. First, it is the provisions of s 8 of the Close Corporations Act 26 of 1988, (‘the Act’). Second, it is subordinate legislation, in the form of the High Court Rules, rule 59, being the relevant one in the present case. It is important that I first deal with the provisions of the Act.

[22] The relevant provision is s 8 of the Act, whose rendering is quoted below:

‘When a corporation in any legal proceedings is a plaintiff or brings a counterclaim or counter application, the Court 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.’

[23] Rule 59(1), on the other hand, provides that, 'A party entitled to demand security for costs from another must, if he or she so desires, as soon as practicable after the commencement of proceedings, deliver a notice setting out the grounds upon which security is claimed and the amount demanded.'

[24] It will be clear, from reading the above quoted provisions that it would be necessary, in the instant case, to deal with the law applicable to s 8 of the Act first. This is so because when proper regard is had to rule 59, it deals with a situation where the applicant for security is 'entitled to demand security for costs.' That being the case, the answer as to whether the present applicant is entitled to demand security for costs in the instant case, might be resolved by dealing with s 8 and the interpretation that has been accorded to it by the courts.

[25] First, it is clear from s 8 of the Act that the applicant for security for costs must either be a plaintiff or applicant in proceedings, or must have defended a counterclaim and there is in addition, a reasonable belief that the respondent or defendant will be unable to pay the plaintiff's or defendant in reconvention's costs, if the defence to the counterclaim succeeds.

[26] I am satisfied that the applicant in the instant case, qualifies to bring the application, regard had to the fact that it is a defendant in reconvention and claims that it has reason to believe that the respondent will not be able to pay its costs if it successfully defends the respondent's counter-claim.

[27] The main question, to determine, in the instant case, is whether the applicant, in the instant case, indeed does, as it claims, in terms of the applicable standards, have a 'reasonable belief' that the respondent will not be able to pay its costs for successfully defending the counterclaim. From a consideration of the matter, it seems to me that the key to resolving the issue will lie in a determination of what a 'reason to believe' means in the context of the Act.

[28] Once that is done, it will be necessary to have regard to the allegations made by the applicant in this application and to test whether it meets the litmus test. If it does, the question whether it is entitled to demand security, as envisaged in rule 59 will have been answered positively. It will then be rendered necessary, to consider the argument advanced by the respondent, to the effect that the application should be dismissed for the reason that the applicant took an inordinately long time to bring the application. This is particularly so,

when regard is had to rule 59, which in the respondent's submission, requires expedition in bringing the application.

Determination

[29] I should preface the determination by stating that in my considered view, parties in litigation, are entitled to a fair trial. This includes them approaching the court without let or hindrance. There are situations where some extra caution is needed in relation to costs, where a party may be required to pay security for costs in the course of the proceedings, thus titling the scales of access, possibly against it. This will normally be in cases where the party in question, whether instituting or defending proceedings, is a foreigner or *peregrinus* of the court and is not possessed of property against which to execute an adverse order for costs.

[30] It is accordingly in very unusual circumstances that a party, which is an *incola* of the court, is required to pay security for costs as the proceedings unfold. This is so because the requirement to pay costs for on-going litigation, may have detrimental consequences for that party's ability to access justice and to properly and fairly prosecute its case. This is largely due to the fact that the issue of costs is ordinarily supposed to be taken care of at the end of the trial. Once an application for security for costs is granted, liability to pay security for costs is brought forward and is required even before the final verdict on the matter is rendered.

[31] It will be clear, from the foregoing that s 8 of the Act does upset the apple cart in that the ordinary application of the procedures for trial are turned on their head. This is because the granting of the order entitles the court, even before the matter is concluded, to compel a party to pay the other's costs where there is reason to believe that it will be unable to do so at the end of the trial.

[32] I need not move the heavens in order to decide what the applicable considerations and standards are in dealing with the question before court. I say so for the reason that the Supreme Court has spoken loudly on the issue in *Northbank Diamonds Ltd v FTK Holland BV and Others*¹. I should mention however, that the provision dealt with in that case, was s 13 of the Companies Act, which was eventually repealed but with no effect on the applicable law, regard had to the amendment.

[33] At p287, the Supreme Court expressed itself in the following manner:

¹ *Northbank Diamonds Ltd v FTK Holland BV and Others* 2002 NR 284 (SC).

‘Both counsel submitted, and correctly in my view, that s 13 requires an investigation in two stages. Firstly, the Court must consider whether the applicant has established by credible testimony that there is reason to believe that the company or body corporate, if unsuccessful, will be unable to pay the costs of the defendant. If the Court is not so satisfied, that is the end of the matter. However, if the Court is satisfied that a case was made out, it must then exercise the discretion conferred upon it by the section.’

[34] I am fully alive to the fact that the Supreme Court, in the above matter, dealt with the provisions of the Companies Act and not the provisions of the Act currently under consideration. I am, that notwithstanding, of the considered opinion that the reasoning of the Supreme Court is equally applicable to the provisions of s 8 as they are largely *in pari materia* with the applicable provisions of the Companies Act.

[35] That being the case, it appears to me that the first task of the court, is to determine whether there is ‘reason to believe’ that the respondent, in the instant case, will not be able to pay the applicant’s costs if the defence to the respondent’s counterclaim succeeds. In the language of the Supreme Court, what I have to determine, is whether the applicant ‘has established by credible testimony’ that there is reason to believe that the respondent will not be able to pay its costs at the end of the trial.

[36] In dealing with the words, ‘reason to believe’ the Supreme Court stated the following in the *Northbank* case (*supra*):

‘In regard to when the Court has ‘reason to believe’ that an applicant or plaintiff company will be unable to pay the costs order against it, the following was stated in the *Vumba Intertrade* case (*supra*) at 107E-H, namely:

“It is necessary to emphasise that, before a Court can decide how to exercise the discretion vested in it by s 8 of the Close Corporations Act, there must be ‘reason to believe’ that the respondent close corporation will be unable to pay the costs of the defendant/applicant if successful in its defence . . . In short, there must be facts before the court on which the court can conclude that there is reason to believe that a plaintiff close corporation will be unable to satisfy an adverse costs order; and the onus of adducing such facts rest on the applicant.”

[37] The issue was recently dealt with, although in the context of the Companies Act, in *Krucor Investment Holdings (Pty) Ltd t/a Professional Farming v Kwenani*². There, the court reasoned as follows at paras 45 to 48:

² *Krucor Investment Holdings (Pty) Ltd t/a Professional Farming v Kwenani* (I 427/2013) [2021] NAHCMD 262 (27 May 2021).

[45] It would appear to me that the word “testimony”, as employed in the provision, must not be allowed to vanish in significance. According to the Oxford Advanced English Dictionary. The word means “a formal written or spoken statement saying what you know to be true, usually in court”. It would therefor appear that the word “evidence” could be used as a synonym therefor.

[46] It would, for that reason require that the applicant for security for costs in terms of s 11, should place credible or reliable, trustworthy or believable and admissible evidence on oath, which can stand up to scrutiny. That evidence must of necessity show and serve to convince the court that the applicant or plaintiff company will not be able to pay the costs of the suit if unsuccessful. It should be recorded in this regard that the test is not low, namely that the applicant or plaintiff company may not be able to or is unlikely to be able to pay the costs if unsuccessful.

[47] There must, from a close consideration of the nomenclature employed, be an element of certainty about the inability to pay the costs. That should be reasonably drawn from the facts stated on oath and should serve to convince the court that the right of that party to access the court without let must necessarily be interfered with by ordering security for costs.

[48] In this connection, it would appear to me that the evidence, or testimony placed before the court must not be unconvincing, impoverished, vacillating, contrived or the offspring of romanticism. It must be testimony that the court can accept without hesitation as inherently convincing and truthful and thus fit to require the court to place an unusual burden of costs on an *incola* company, even before the conclusion of the proceedings has been reached . . .’

[38] What needs to be considered now, in the light of the requirements that an applicant for security for costs must meet as discussed above, is whether the applicant in the instant case, has placed facts before this court from which the court can conclude that there is reason to believe that the respondent will be unable to pay the applicant’s costs if the counterclaim does not succeed.³ Put differently, has the applicant in the instant case, placed evidence on oath that stands up to scrutiny - evidence which is convincing, and not vacillating, impoverished, contrived or of a romancing character and on which the court can properly, and without blinking, base its belief that the respondent cannot pay the applicant’s costs?

[39] In the instant case, the applicant placed evidence in the form of financial statements of the respondent relating to the years 2017 to 2018. It is claimed that these financial statements show indubitably that the respondent was operating at a loss at the time. The applicant further states that it does not have reason to believe that the

³ *Vumba Intertrade CC v Geometric Intertrade CC* 2001 SA 1068 (W) at 1071.

respondent's financial doldrums are a thing of the past, so to speak. Does this suffice to meet the high standards required for the court to order the respondent to pay the security for costs?

[40] I think not. As indicated above, the financial statements referred to by the applicant, related, at the latest, to the year 2018. They show that the respondent at the material time, had liabilities which exceeded its assets and the respondent does not quibble with those financial statements. The question is whether this court would be correct, in 2023, some four or so years later, to place reliance on the 2018 financial statements in order to require the respondent to pay the applicant's costs at this stage of the proceedings? My answer is an unequivocal NO!

[41] The financial statements and other documents placed before court, relating to the respondent's financial health of more than four years ago, cannot properly serve as a credible basis to have reason to believe at this present juncture that the respondent will not be able in 2023, to pay the applicant's costs if the counterclaim is dismissed. I am accordingly of the considered view that the applicant has failed to place credible and admissible evidence that is required for the court to take the serious step of ordering the respondent to pay the applicant's costs at this juncture of the proceedings, even before case management stage.

[42] I am of the considered opinion that there must be some immediacy of the respondent's ill financial health at the time that the application is moved. It is not unknown that companies that were on the verge of or in the throes of liquidation, were in some cases restored to financial health as if they were never on the brink of 'death', so to speak. Historical facts, which are four years old, regardless of how true and convincing they may have been at the material time, cannot be allowed to be taken into account for purposes of informing the requirement that there is reason (now) to believe the respondent's inability to pay the applicant's costs.

[43] It was argued by Mr Lochner, for the applicant, that in the instant case, the respondent was required, in the face of the 2018 financial statements, considered *in tandem* with the applicant's allegation that it has no reason to believe that the respondent's financial position has improved, to disclose its bill of financial health at present. I respectfully disagree. It is plain from the authorities cited above, including the *Vumba* case, that the onus is on the applicant for security, to adduce facts that inform the court's reason to believe, as required by the provision in question.

[44] The applicant cannot, in my view, place what are currently irrelevant and out-dated documents before court and then argue that the respondent must produce relevant and current financial documents. The issue of onus is important and must be seen from the prism that the respondent is required to pay costs on a prophetic basis, namely, that the respondent's counterclaim will be dismissed.

[45] It is therefor the applicant's duty to satisfy the court that the application should be granted. The onus is not on the respondent to show that the application must not be granted. Nor, I should add, is the applicant required to make an assemblage of loose and unconvincing allegations to trigger a shifting of the onus to the respondent. The issue of the onus is key in adjudication. At times, it may be determinative of the dispute between the parties. The incidence of onus must always be observed in order for it to aid the resolution of the dispute. It must not be forgotten that the adage is, 'he who alleges must prove'.

Conclusion

[46] In view of the above discussion and conclusions, I am of the considered view that the application must fail. In the premises, it is rendered unnecessary for the court to consider whether it must exercise its discretion in the applicant's favour as the applicant fell at the first hurdle. It further appears to me that the determination above, in a sense, answers the question whether the applicant is a party that can properly demand security in terms of rule 59. It is clearly not entitled to demand security for costs.

[47] I am, in the circumstances, not called upon to determine the question whether there was any delay by the applicant in launching this application. It will further be unnecessary for the court to consider whether the delay, if any, was inordinate and prejudicial to the respondent. It will be recalled that the respondent had argued that rule 59 requires an applicant for security for costs, to bring the application 'as soon as practicable after the commencement of proceedings'.

[48] There is one further issue that is rendered unnecessary to decide. This relates to the respondents' contention that there is property that belongs to the respondent which is in the possession of the applicant and which is equivalent to the amount of security required by the applicant in these proceedings. I say nothing of that issue in the premises.

Costs

[49] The question of costs should not be difficult to resolve in the present matter. The ordinary rule applicable is that costs will normally follow the event. In the instant case, the applicant has been unsuccessful in its application. There is no reason suggested or apparent to the court, that would require a different order than the losing party having to pay the costs.

[50] The parties' representatives were, however, *ad idem* (at one), regarding the scale of the costs. It was accepted that costs in this matter, being an interlocutory matter, must be capped under rule 23(11). I agree and it will be so ordered.

Order

[51] A reading of the ruling above, shows that the application should, in my judgment fail. Consequently, the following order, which I consider condign, in the circumstances, will follow:

1. The applicant's application for the first respondent to furnish security for costs in respect of the respondent's counterclaim, is hereby dismissed.
2. The applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner, subject to the provisions of rule 32(11).
3. The matter is postponed to **17 August 2023**, at **08h30**, for a case management conference.
4. The parties are ordered to file a joint case management report, together with a proposed draft case management order on or before **14 August 2023**.

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFF/APPLICANT:

L Lochner

Instructed by:

Lubbe & Saaiman Incorporated,
Windhoek

DEFENDANTS/RESPONDENTS:

A Van Vuuren

Instructed by:

Behrens & Pfeiffer, Windhoek