CASE NO.: I 187/2010

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

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| **ATLANTIC MEAT MARKET (PTY) LTD** | **APPLICANT** |
| and | |
| **ERIKA ELIZABETH HERZBERG N.O.** | **1ST RESPONDENT** |
| **ALFRED HERZBERG N.O.** | **2ND RESPONDENT** |
| **ALFRED HERZBERG** | **3RD RESPONDENT** |

**CORAM:** **DAMASEB, JP**

Heard on: **3 November 2011**

Order delivered on: **7 November 2011**

Reasons released on: **16 November 2011**

**REASONS**

**DAMASEB, JP**: [1] After hearing oral argument I disposed of this matter by way of an order, with reasons to follow, in the following terms:

> 1. Condonation of the late filing of the Respondents' heads of argument is allowed.
>
> 2. The application for security for costs in terms of Rule 47(1) read with (3) is allowed in such amount to be determined by the Registrar.
>
> 3. The Applicants for security for costs are granted costs for their opposition to the application for the condonation of the late filing of the Respondent's heads of argument in the condonation application, as well as costs for their successful application for security for costs in terms of Rule 47(1) read with (3) – in both respects on party and party scale but limited to costs of one instructed counsel.
>
> 4. The reasons for the order will be given in due course and in any event within (seven) 7 days of a written request for reasons."

[2] When the application for security became ripe for hearing, and at my invitation, the parties waived their rights to oral argument and consented to my making an order requiring them to file written heads of argument; and that upon the last of them filing their heads, 'judgment will be deemed to have been reserved'. The effect of the order was

that since oral argument was no longer necessary, costs associated with oral argument were to have been avoided. That was not to be because the plaintiff in the main action (respondent in the security for costs application) filed its heads of argument 2 days late, resulting in the applicants for security opposing the same and thus requiring oral argument on condonation for late filing of the heads of argument. Special arrangements had to be made to assign a date for argument within the Court's tight schedule; and as adjudicating such an application, of necessity, requires consideration of the prospects of success of the application on the merits, the Court had to hear full argument. The very outcome we all sought to avoid therefore happened.

[3] Mr Barnard for the applicants has urged me to make a special costs order against the respondent because, as he put it, the application for condonation is not *bona fide* and that no good cause was shown for the delay to justify the Court's indulgence. He scoffed at the reason provided for the delay as not constituting good cause in that the deponent to the affidavit for condonation, a director of the respondent, being the lay client, attributes the delay in

the filing of the heads of argument to the fact that he had been travelling at the time between Namibia and South Africa. Mr Barnard submitted, correctly in my view, that since the filing of the heads of argument was a matter that fell squarely within the competence of his legal practitioners, there was no rational basis given for what the travel commitments of the lay client had to do with the failure to file the heads of argument on time. When I asked him to comment on that, Mr Small, for the respondent, suggested he could not be of any assistance to the Court in that regard. I took that as a concession that the reasons given for the late filing of the heads of argument do not stand up to scrutiny.

[4] Accordingly, I find that the respondent did not comply with an order of this Court and failed to give a satisfactory explanation why it did not. The order was intended to limit costs and to avoid the court having to hear oral argument. Special arrangements had to be made to set the matter down for oral argument. The Court was therefore inconvenienced. It is only because I am satisfied that the applicant was not inconvenienced by the 2 days

delay in the filing of the heads of argument that I am prepared to condone their late filing. That said, the absence of *bona fides* for the delay and the inconvenience caused to the Court justify that the respondent be made to bear the costs of the applicants' opposition to the condonation application. In the remainder of the judgment I will refer to the applicants for security as defendants and the respondents in the security application as the plaintiffs.

[5] The defendants seek an order for security for the costs of an action brought by the plaintiff, in terms of Rule 47(1) read with sub-rule (3). The application for security is contested. The plaintiff against whom security is sought, is a limited liability company incorporated in Namibia. Section 13 of the Companies Act states:

> 'Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the court may <u>at any stage</u>, <u>if it appears by credible testimony that there is reason to believe that the company or body corporate</u> or, if it is being wound up, the liquidator thereof, <u>will be unable to pay the costs of the defendant or respondent if successful in his defence</u>, require sufficient security to be given for those costs and may stay all proceedings till the security is given.' (My underlining for emphasis)

**WHAT IS IN ISSUE IN THE MAIN ACTION?**

[6] In terms of the Combined Summons, the plaintiff previously leased premises from the defendants to conduct a business therefrom. It then sold all the moveable assets at the leased premises to a third party for the consideration of N$750 000 and on the understanding that the third party would substitute the plaintiff as lessee in respect of the lease with the defendants. The third party reneged on the agreement and never paid the purchase consideration for the moveable assets as a result of which the moveable assets remained the property of the plaintiff as *roukoop*. The plaintiff maintains that the defendants wrongfully informed it that the moveable assets had been removed from the leased premises by the third party, when in truth and fact, those assets remained at the leased premises and were appropriated by the defendants. The plaintiff therefore seeks to recover N$750 000 from the defendants, jointly and severally, representing the value of the assets sold to the third party and now allegedly constituting its property as *roukoop*. The defendants have yet to file a plea.

**BASIS ON WHICH SECURITY FOR COSTS SOUGHT**

[7] After the plaintiff contested the security, the applicant for security brought an application as contemplated by rule 47 (3), setting out the following grounds for the belief that the plaintiff will not be able to pay the costs of the defendants in the event its claim is unsuccessful:

(i) The plaintiff was originally a close corporation owned by the defendants. The defendants sold the members' interest to inter alia Mr. Rudolf de Wet Moolman. The close corporation was then converted to a private company, Atlantic Meat market (PTY) Ltd. The only business of the plaintiff, at all relevant times, was the business and assets known as Atlantic Meat Market. The business *Atlantic Meat Market* was sold by the plaintiff as alleged in the particulars of claim. The plaintiff alleges that the purchaser of the business took over the business but has failed and/or refused to pay the purchase price. Plaintiff thus has neither its only business and assets nor the purchase price therefor. Plaintiff has thus lost its substratum.

(ii) In case no. (P)A 65/2005 the plaintiff, as far back as 8 March 2005, consented to providing security in a matter between the plaintiff and Standard Bank of Namibia Limited.

(iii) In case number, I 2175/2004 the plaintiff was ordered to provide security on 28 October 2009. The plaintiff has not provided security but is taking the determination of the amount by the taxing master on review. The order of 28 October 2009 was granted by default after an application for postponement was refused.

(iv) In case number I 3046/2007 , a claim by Namibia Pig Farm (Pty)Ltd against the plaintiff, a judgment was entered against the plaintiff on 12 October 2007 in the amount of N$ 542 064.00.

(v) There are claims pending against the plaintiff in an amount of N$ 892 254.30 made up as follows: by Basfour 2482 (Pty) Ltd in the amount of N$ 569 762.30; and by the estate of late Solomon Walter Hertzberg in the amount of N$ 323 492.00.

(vi) The plaintiff, by September 2008, had not prepared financial statements since 2002 and to the knowledge the deponent deposing the affidavit in support of the application for security, none had been prepared since.

[8] Based on the above facts and circumstances, the applicant for security maintains that the plaintiff: has lost its substratum; has lost its capital base; is not trading any longer; has no assets; is indebted in substantial sums of money and cannot pay its debts as and when same become due.

[9] *Shepstone And Wylie V Geyser No*[1]*,* is authority for the proposition that an application for security must be decided upon the facts of each case and in exercising its discretion, the Court must have regard to how its order will affect the parties; the nature of the claim as well as the defence raised. The court should also take into account equity and fairness to both parties.

[10] For an application for security to be granted, it is not necessary for the defendant to show that the plaintiff company is insolvent, provided that there is *reason to believe* that the company will be unable to pay the costs.

[11] In the case of *Northbank Diamonds Ltd V Ftk Holland Bv And Others 2003 (1) SA 189 (NmSc*) the Supreme Court held that a determination whether a plaintiff company was liable to pay security for costs in terms of sec. 13 requires a two-stage inquiry: Firstly, the Court must consider whether the applicant has by credible testimony established that there is *reason to believe* that the company, if unsuccessful, will not be able to pay the costs of the

[1] 1998 (3) SA 1036 (SCA)

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 on it by the section.[2]

[12] In regard to when the Court has 'reason to believe' that an applicant or plaintiff company will be unable to pay a costs order against it, the following was stated in the *Vumba Intertrade*[3] *(case references omitted)*, 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... Although the phrase “there is reason to believe” places a much lighter burden of proof on an applicant than, for instance, “the court is satisfied” the “reason to believe” must be constituted by facts giving rise to such belief and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice...’

[13] Although it may not always be easy to find facts which would support the 'reason to believe', surmise, speculation and even a belief, not supported by facts, would not

[2] P 194

[3] case supra at 1071E - H

suffice. Although the applicant bears the onus, he may be assisted in his task by material or facts put before the Court by the respondent company, and where the matter is peculiarly within the knowledge of a respondent, less evidence will suffice to establish a prima facie case than generally required.[4]

**OPPOSITION TO THE APPLICATION FOR SECURITY**

[14] The application for security is opposed. In the first place, the plaintiff's stance is that the defendants do not disclose the statutory basis for the application in their notice of motion or in the affidavit in support of the application but merely bring an application in terms of rule 47(1). According to the plaintiff, rule 47(1) merely deals with procedures for applications for security and does not set out the substantive basis for such applications. The plaintiff maintains that defendant's application should be dismissed with costs on that basis alone. I see no merit in this allegation and the conclusion of law advanced. It is the substance, not the form that matters. The applicant proceeded initially in terms of rule 47(1) and once the

[4](*See Gericke v Sack* 1978 (1) SA 821 (A) at 827E - G; *Monteoli v Woolworths (Pty) Ltd* 2000 (4) SA 735 (W) at 742D - G.)

respondent opposed the notice, filed an application supported by an affidavit deposed to by its legal practitioner of record setting out the basis on which security is sought. At page 63 of the record the 'notice in terms of rule 47(1)' states specifically that the defendants 'demand security ... in terms of the provisions of rule 47(1) read with section 13 of the Companies Act , 61 of 1973''. This objection fails.

[15] Next, the plaintiff points out that rule 47(1) requires a party entitled or desiring to demand security for costs from another to, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security and the amount is demanded. The plaintiff avers that the time-delay that had lapsed between the commencement of the action (summons issued on 30 March 2010); the filing of the notice (2 November 2010 - 8 months after); and the filling of the application (application filed on 24 March 2011) is not accompanied by a reasonable explanation for the delay.[5] It

[5] *ICC Car Importers (PTY) LTD v Hartrodt SA (Pty) Ltd* 2004 (4) SA 607 (WLD): In this case , a failure to properly explain the delay of 4 months in giving notice demanding security was a relevant factor in determining whether a party should be ordered to give security or not. The Court stated at 616B-C: 'The fact that s.13 provides that a court may at any stage order security does not remove the unfairness and oppression resulting from delay. Hence the section does not take away the right and duty of the court in exercising its discretion where s 13 confers on it to have regard to delay in bringing the application.'

is alleged and argued on behalf of the plaintiff that the failure to properly explain the delay in giving notice demanding security is a factor militating against the grant of security against the defendants.

[16] I am satisfied that the defendants fully and satisfactorily explained the timing of the present application for security. Instructing counsel for the defendants(Pieter Hamman) who deposed to the affidavit in support of the application for security, explained that since receiving instructions to oppose the combined summons brought by the plaintiff against the defendants, he had been conducting research on, and investigation into the affairs of, the plaintiff as he and the clients had no first-hand knowledge about the inability of the plaintiffs to meet an adverse court order and that the reports they had on the issue were hearsay only. He gives an account of the steps he had taken to garner the information and goes on to explain the reason why the application was brought when it was.[6] The respondent really does not meaningfully or seriously counter that explanation and in the most general terms either puts

[6]Vide, Record pp.98-99, Paras: 3-6; and p101, Paras: 12-14.

the defendants ‘to the proof’ or merely takes ‘note’ of the crucial averments explaining the timing of the application.

[17] With regard to whether the defendants have discharged the *onus* that there is *reason to believe* the plaintiff company will be unable to pay an adverse costs order if unsuccessful, the plaintiff states that there is no credible evidence to support any of the bases put forward by the applicants as justifying such an order and that the application is based on speculation. The denials are either bare, merely put the defendants ‘to the proof’ or simply ‘take note’ of what are otherwise credible allegations based, in significant part, on court documents of which case numbers are even provided.

[18] Firstly, the respondent denies that its operations in Walvis Bay have been shut down and maintains that the contract of sale in respect of Karsfeld Meat CC and Namib Meat CC was only in respect of its movables and not an outright sale of the business. The plaintiff accordingly denies that it has lost its substratum. I will for present purposes assume, without deciding, that the respondent had

not made an outright sale of its business although I find it difficult to understand what ‘business’ remains if the moveables are sold. Since no supporting documents are provided or the source of the information stated, I will, for present purposes, disregard the alleged indebtedness in the amount of N$ 892 254.30 to Basfour 2482 (Pty) Ltd and the estate of Salomon Walter Hertzberg.

[19] Further, the respondent maintains that the judgement referred to - *Standard bank of Namibia Ltd v Atlantic Meat Market (Pty) Ltd* - is irrelevant as in that case court’s judgement dealt with an application for the postponement of the application for security of costs, and not a judgement in terms whereof the plaintiff was ordered by the Court to provide security. I find this reasoning somewhat convoluted: The point is that the respondent in that matter wanted to have postponed an application in terms of which the Bank wanted the Court to make an order for security in similar terms to the present. It failed to have the application postponed and the Bank proceeded to obtain an order for security against it by default. The Registrar determined security and that determination has since been taken on

review by the plaintiff. That the defendants do not give the amount of security payable to Standard Bank may be so – and with good reason - because until the review is completed - that amount will not be known with any certainty. What admits of no doubt is that the plaintiff would in the fullness of time have to pay security either in the amount already determined by the registrar or that to be determined by the Court on review. There is therefore a contingent liability arising from the Court's order in favour of Standard Bank that it must pay security. This defence is therefore bogus.

[20] As regards the alleged failure to release financial statements, it is stated by the plaintiff that no approaches were made to the plaintiff for it to furnish the defendants with financial statements or any financial information to ascertain the true position. The defendants have alleged that the plaintiff has not produced financial statements over an extended period of time (2002- 2008). All the plaintiff says is that the defendants never asked for it. What could have been easier than the plaintiff providing proof of the existence of such statements? The defendants

could not have been expected to proof a negative! All they could reasonably do is state that they have not seen such statements and by so doing imply that they do not exist. I am satisfied that the defendants have established that the plaintiff has between 2002 and 2008 not produced financial statements.

[21] The plaintiff further states that no facts are placed on record as to the amount of security required in case no. (P) A 645/2005. The point, rather, is that the plaintiff bears liability in respect of an order requiring it to provide security. That liability does not stand alone and is not isolated and must be seen as being part of the respondent’s list of liabilities which, significantly, include court orders requiring it to provide security for costs in connection with litigation instituted by it. Such orders are granted, as the present analysis of the law shows, because the court is satisfied that there is reason to believe that the plaintiff company will not be able to pay an adverse costs order if unsuccessful in its claim.

[22] The respondent next states that the applicant does not allege that the judgement handed down under case no.3046/2007 remains unpaid. That there was such a judgment patently remains undisputed. It falls peculiarly within the knowledge of the plaintiff whether or not such a judgment was paid. It was the easiest thing to say if it was. The applicant therefore has discharged the onus that it constitutes a continuing liability against the respondent.

[23] The plaintiff, as I have demonstrated, opposes the application for security, not because the actions of the defendants in allegedly unlawfully appropriating its property had the result that it has fallen on hard times financially, but because according to it, it is in fact able - contrary to the defendants' suggestion otherwise - to meet any cost order in the event it is unsuccessful with its claim. It is clear from the affidavit in opposition to the application for security that the plaintiff's position is that it is financially able to meet an adverse costs order. The facts presented by the defendants, which the plaintiff has hardly displaced, points in the opposite direction. I am satisfied that the defendants have by credible evidence

established that the plaintiff has liabilities arising from orders for security granted against it in other cases; is unable to produce financial statements; and has had judgment entered against it by Namibia Pig Farm (Pty) Ltd in the amount of N$ 452 064.00. Given that it is peculiarly within the knowledge of the plaintiff if it paid the latter debt but does not say so, no greater evidence was required from the defendants than that which they have provided. On the face of it therefore, in addition to the court orders requiring it to pay security for costs as a plaintiff company, the plaintiff in the present case is unable to redeem a judgment debt obtained by Namibia Pig Farm.

[24] Once the Court is satisfied that there is credible testimony which shows that there is reason to believe that a plaintiff company will not be able to pay a costs order, if unsuccessful, the Court may order it to furnish security for such costs. It was stated in *Lappeman Diamond Cutting Works (Pty) Ltd V Mib Group (Pty) Ltd*[7] that the purpose of sec. 13 is to protect the public against litigation by bankrupt companies which may drag them from one court to the other without being able to pay costs if unsuccessful.

[7] (No 1) 1997 (4) SA 908 (W) at 919G - H

[25] Having regard to the totality of the evidence placed before me, and especially in light of the rather evasive way in which the plaintiff deals with what is otherwise credible evidence by the defendants that the plaintiff has extensive debts which remain unpaid and tending to show that it is unable to meet them, I am satisfied that there is credible evidence that if unsuccessful in its claim against the defendants, the plaintiff will be unable to meet an adverse costs order in favour of the defendants. In exercising my discretion to grant a security for costs order, I am mindful of the fact that what appears to be the plaintiff's inability to meet its debts is not attributable directly to the fact that the defendants are alleged to have appropriated for themselves what the plaintiff alleges are its assets.

[26] I had, before the matter was argued, informed the parties that they should address me on why in a simple matter such as the present, I should order costs in favour of either party to include the costs of both instructing and instructed counsel. None of the parties addressed me on

that issue and I remain unconvinced that the present matter was of such complexity as to have required the employment of instructed counsel. The successful party is accordingly only entitled to costs of one counsel. Although I granted condonation to the plaintiff for the late filing of its heads of argument, the circumstances I set out in my written reasons show that there are special circumstances for making an adverse costs order against the plaintiff in favour of the defendants for their opposition to the condonation application.

[27] It is for the above reasons that I granted the order previously mentioned. In error, I omitted to add to that order that the action instituted by the plaintiff is to be stayed until sufficient security as determined by the Registrar is provided by the plaintiff. I accordingly order that such an order be added to the one granted on 7 November 2011.

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**DAMASEB, JP**

ON BEHALF OF THE APPLICANT: **Mr Small**

**Instructed By:** **Behrens & Pfeiffer**

ON BEHALF OF THE RESPONDENTS: **Mr Barnard**

**Instructed By:** **Kirsten & Co.**