REPUBLIC OF NAMIBIA REPORTABLE

IN THE HIGH COURT OF NAMIBIA

JUDGMENT

Case no: I 4161/2011

In the matter between

FRANZ MAXIMILIAN OEHL N.O. **PLAINTIFF**

and

COENRAAD BAREND NOLTE **1ST DEFENDANT**
THE MASTER OF THE HIGH COURT **2ND DEFENDANT**
THE REGISTRAR OF DEED **3RD DEFENDANT**

Neutral citation: *Oehl N.O. v Nolte (I 4161/2011) [2013] NAHCMD 13 (24 January 2013)*

Coram: **Smuts, J**
Heard on: 16 January 2013
Delivered on: 24 January 2013

Flynote: Application for security for costs in respect of an incola plaintiff on the basis of being a nominal plaintiff. The plaintiff is an executor of a deceased estate. That estate would not be able to pay the costs of the first defendant if successful in his defence. Security granted but costs of application refused by reason of the way in which application was brought.

ORDER

(a) The plaintiff is directed to furnish security for the first defendant's costs in the amount of N$110, 000 within 30 days from the date of this order.
(b) The plaintiff's action initiated against the first defendant is stayed until paragraph (a) of this order is complied with.
(c) No order as to the costs of this application is made.

JUDGMENT

SMUTS, J

[1] In this application for security for costs in terms of Rule 47(3), the first defendant in an action seeks security in the sum of N$300, 000 against the plaintiff. As is customary in applications of this nature, the first defendant seeks a stay of the action pending the provision of security.

[2] The plaintiff is the executor of a deceased estate and has instituted the action in that capacity. He is an incola of this court.

[3] The general rule regarding security for costs is that a plaintiff who is an incola of this court would not be required to furnish security for costs. But there are exceptions to this rule. The applicable principles were recently summarised with reference to early authorities by the Supreme Court[1] in the following way:

"[23] Our common law recognises, as a general rule, the immunity enjoyed by an incola plaintiff or applicant from having to provide security for costs. The ratio behind this rule is that every citizen should have uninhibited access to the courts: Vanda v Mbuqe and Mbuqe; Namoyi v Mbuqe 1993 (4) SA 93 (TK) 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 and Shartin 1911 WLD 158; Vanda v Mbuqe 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

[1] In Hepute and Others v Minister of Mines and Energy 2008(2) NR 399 (SC)

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 for another party. If the jurisdictional facts are established for the invocation of the exception, the court may order security for the costs of the defendant/respondent upon application therefore"[2].

[4] There are thus two requirements which an applicant for security would need to meet in an application of this nature. Firstly it would need to be established that the plaintiff is either a nominal plaintiff or a front for another party and secondly that the plaintiff is a "man of straw".

[5] The first defendant contends that, in an action by an executor of a deceased estate, the plaintiff is a nominal plaintiff. As far as the second requirement is concerned, the first defendant contends that the estate would be unable to pay the legal costs of the action if unsuccessful and that this would meet the requisite of the plaintiff being a "man of straw".

[6] Mr P. Barnard who represents the plaintiff submitted that neither requisite has been met. The plaintiff also placed in issue the amount of security claimed.

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[2]Supra at 409-410

[7] The facts pertinent to this application are these. The action has been brought on behalf of the estate to set aside an agreement of sale of immovable property dated 29 March 2011 in which the deceased sold and transferred immovable property to the first defendant. The plaintiff alleges that the deceased was mentally incapacitated at the time and unable to perform juristic acts. The purchase price was N$100, 000. It is common cause that the actual value was considerably more.

[8] The total value of the estate assets (excluding the claim) amounts to N$312, 902-90. The administration costs amount to of some N$15, 000. Provision is made for an estimated tax liability of N$10, 000 and there were funeral costs of some N$6, 000. After legal costs up to the stage of argument of this application, the estate's net asset worth is N$218, 775-50. The plaintiff estimates that the further legal costs to pursue the claim would amount to some N$150, 000.

[9] The first defendant, aware that the total assets are little more than N$300,000 however applied for security for costs in the sum of N$300, 000. This would on a conservative assessment of administration costs mean that the plaintiff would obviously not be able to continue with the action if the application for security were to be granted in that amount. This point was expressly made in opposition to the application. Despite this, the first defendant in reply did not retreat from the amount sought but merely responded that the amount would within the court's discretion. Heads of argument filed on behalf of the first defendant persisted in seeking an order in terms of the notice of motion. But when the matter was argued, Mr Totemeyer SC, who together with Ms C. Van der Westhuizen, appeared for the first defendant, sought security in a lesser amount of N$140, 000. He correctly conceded that the order sought would have the effect of putting an end to the action. He thus sought a reduced amount on behalf of the first defendant.

[10] Mr Totemeyer submitted that the plaintiff, being the executor of a deceased estate, was clearly a nominal plaintiff for the purpose of the exception to the general rule. Mr Barnard on the hand took issue with this approach. He referred to the rationale underpinning the rule – being founded on the public policy consideration that abuse of process should be frowned upon. He submitted that an executor was under a statutory duty to recover assets for an estate and that this could not be affected by the purpose for the exception as doing so could not constitute an abuse of process.

[11] There is much weight to this submission. It is certainly correct that an executor of a deceased estate is under a statutory duty to recover the assets of an estate, including rights of action[3]. This would include the duty to decide whether the estate has a claim against a third party and upon the advisability of instituting an action to recover it[4]. But I understand the reference to abuse of process by the Supreme Court (and the earlier authorities) to intend a very narrow meaning to the term in this context. It would be limited in the sense of a litigant, without a direct personal interest in the outcome of the litigation, proceeding with it with the knowledge that, if unsuccessful, there would be little or no prospect of the defendant recovering legal costs (because the nominal party would ordinarily not be liable for those costs). This consideration thus ties up with the second requisite which I refer to below. But this consideration would however not answer the question as to whether a plaintiff is a nominal plaintiff but rather when the exception to the general rule is to be invoked against a person who is found to be a nominal plaintiff.

[12] An executor is in my view par excellence a nominal plaintiff. The executor is the plaintiff in name only and by virtue of an office he or she occupies. In that capacity he or she represents the estate and has no personal interest in the outcome of the litigation even though entitled to pursue and maintain that litigation by virtue of that office. Mr Barnard referred to some early authorities in support of a contrary position. But these authorities are to be read in the context of the enquiry before those courts which at times was whether an estate or an executor was a *peregrinus* of that court. This court, as it was previously constituted, obiter appeared to accept with reference to authority that an executor is in this context a nominal plaintiff and that real plaintiff is the estate[5]. It proceeded to hold that security could be sought and granted where a foreign estate was a plaintiff even if an incola pursued a claim on its behalf as an executor or agent.

[13] The fact that an executor has a statutory duty to recover estate assets would not alter the position as being a nominal plaintiff. If the estate were to be vested with more than enough assets to cover the costs of another party if unsuccessful, then the question of establishing the second requisite would not arise and security for costs would not be directed.

[3]Lockhat's Estate v North British and Mercatile Insurance 1959 (3) 5A 295 (A) at 302
[4]Meyerowitz The Law and Practice of administration of Estate (5 ed, 1976) at 128
[5]Ginsberg v Estate Külf 1924 SWA 1 at 3

[14] Mr Totemeyer submitted that this is what an applicant would need to establish in an application for security for costs. I agree. Although there is reference to a “man of straw” or a plaintiff being poor by the Supreme Court[6], it would seem to me that an applicant for security would need to establish that the estate would not be able to pay a defendant’s costs if successful in defeating a claim. The *Hepute* matter concerned plaintiffs who acted as a front. But in this case, the task of determining whether the second requisite is met has been facilitated by reason of the fact that the net worth of the estate is capable of being established and its ability to meet the costs order can be readily assessed. In this matter, it is essentially common cause that there would be insufficient funds remaining in the estate to cover the defendant’s costs if the latter were to be successful, after the plaintiff’s costs have been taken into account.

[15] Given the availability of funds in the estate, it would not seem to me that security for costs should be reckoned on the basis of engaging two instructed counsel. The matter would not in any event seem to me to be of such complexity to justify that. Certainly the amount in dispute would not do so. Nor does the nature of the cause of action. Mr Barnard correctly concedes that the engagement of one instructed counsel would be justified.

[16] Taking into account the current net worth of the estate being N$218, 775-50, it would seem to me that security in the sum of N$110, 000 would be fair and equitable and should be granted as security for the first defendant’s costs. It represents approximately half of the current net value of the estate. In view of my ruling on the costs of this application which I deal with below, I consider that the amount is fair and equitable in the circumstances.

[17] There remains the question of the costs of this application. Mr Totemeyer argued that if an amount for a lesser amount of security is granted (than claimed), this would amount to substantial success and entitle the first defendant to the costs of this application. He argued along these lines because the plaintiff’s opposition had not been confined to contesting the amount but had largely been focussed on the liability to give security at all. Whist the plaintiff’s basis for opposition to this application on the merits has not met with success, the plaintiff did, as I have already said above, oppose the

[6]In the Hepute matter, supra at 416

application on the basis that the amount of security sought was excessive and would have the effect of putting an end to the litigation. As I have pointed out, the first defendant persisted with the excessive claim to the date of hearing. I consider that he was unreasonable in doing so as it would plainly have put an end to the plaintiff's pursuit of the action. The plaintiff was entitled to oppose the application on the basis of amount of security being both excessive and grossly unreasonable in the context of the net worth of the estate. The amount was persisted with even after the answering affidavit was filed and up to the date of hearing. This conduct in my view should, in the exercise of my discretion, disqualify the first defendant from being awarded costs in this application. In the exercise of my discretion, I make on order as to costs.

[18] I accordingly make the following order:

(a) The plaintiff is directed to furnish security for the first defendant's costs in the amount of N$110, 000 within 30 days from the date of this order.

(b) The plaintiff's action initiated against the first defendant is stayed until paragraph (a) of this order is complied with.

(c) No order as to the costs of this application is made.

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DF SMUTS

Judge

APPEARANCE

PLAINTIFF:	P. Barnard Instructed by Fisher, Quarmby & Pfeifer
DEFENDANT:	R. Totemeyer SC (with him C. Van der Westhuizen) Instructed by Nederlof Inc.