

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION

JUDGMENT

CASE NO. I 545/2011

In the matter between:

PROFESSOR KURT W BUROW
MEDICAL AND DENTAL COUNCIL
OF NAMIBIA

APPLICANT/FIRST DEFENDANT

and

SECOND DEFENDANT**DR PANDULENI FILEMON BANGO ITULA****RESPONDENT/PLAINTIFF****Neutral citation:** *Burow v Itula* (I 545/2011)[2013] NAHCMD 26 (31 January 2013)**CORAM:** UNENGU, AJ**HEARD:** 27 November 2012**DELIVERED:** 31 January 2013

Flynotes: Civil Procedure – Security for costs in terms of rule 47 – Respondent a resident of the United Kingdom – Having no fixed property within the area of Jurisdiction of the court – Respondent ordered to furnish security for costs.

Summary: The respondent has sued the applicant and another for defamation and is claiming damages in the amount of N\$ 5 000 000 (five million Namibian Dollars). The applicant has requested the court to order the respondent to furnish security for costs,

as he is a resident of the United Kingdom without fixed property within the area of jurisdiction of this court. Respondent has contested liability to give security but was ordered by the court to provide security for costs as requested by the applicant and his action for defamation stayed pending the furnishing of the security.

ORDER

1. The application is granted with costs, which costs to include costs of one instructed counsel;
 2. The respondent is ordered to provide security for costs in the amount of N\$ 150 000 within 30 days from the date of this order;
 3. The action against the applicant be stayed until security for costs have been furnished in terms of rule 47(3);
 4. The applicant is granted leave, in the event of the respondent not complying with the order in paragraph 2, to apply to this court on the same papers, duly amplified as may be necessary, for the dismissal of the respondent's action initiated against the applicant and second defendant.
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RULING

UNENGU, AJ:

[1] In this application, the first defendant, by way of notice in terms of rule 47(1) and (2) of the Rules of Court is requiring the plaintiff to furnish security for costs of the defamation proceedings in the amount of N\$ 150 000 (one hundred and fifty thousand Namibian dollars) on the grounds that the first defendant is an *incola* of Namibia and the plaintiff a *peregrinus* who does not own un-mortgaged immovable property in the Republic of Namibia.

[2] As stated, the application is a consequence of a defamation claim instituted by the plaintiff against the first and second defendant, claiming N\$ 5 000 000 (five million Namibian dollars) for damages allegedly suffered by him as a result of the conduct of the defendants. The plaintiff is contesting the application on the basis, amongst others, that he is not a *peregrinus* of the Republic of Namibia. As the plaintiff is not contesting the amount of security only, but also the liability to give such security, the matter was placed on the roll of 27 November 2012 for hearing (rule 47(3)).

[3] For the sake of convenience, the plaintiff hereafter will be referred to as the respondent, the first defendant as the applicant and second defendant will remain as the second defendant.

[4] At the hearing of the application, the applicant was represented by Ms. Van der Westhuizen while Mr. Conradie acted on behalf of the respondent. The second defendant did not form part of the proceedings and it was therefore not necessary for it to be represented at the hearing. Counsel for the applicant prepared written submissions for the court which she amplified with oral arguments at the hearing while counsel for the respondent only gave oral submissions. I am grateful to counsel for the applicant for providing the court with written heads of argument.

[5] As previously stated, the applicant is asking for security of costs on the ground that the respondent is a *peregrinus* of the Republic of Namibia who does not possess unencumbered or un-mortgaged immovable property within the Republic. It is common knowledge between the parties that the respondent is a resident of the United Kingdom and is married to a citizen of that country. According to the founding affidavit and the answering affidavit, the residential address of the respondent is given as 41/43 Avenue Road, Seaton Delaval: Whetley Bay, Tyne and Wear, in the United Kingdom. Similarly, it is not denied or disputed by the respondent that he has resided at the aforesaid residential address for the past 30 years uninterruptedly.

[6] Counsel for the applicant argued that in order to avoid an order for costs for security in the main action, in favour of the applicant, the respondent should have unencumbered immovable property within the area of jurisdiction of the court to satisfy any costs order. In amplification of her contention, Ms.van der Westhuizen relied on

Herbstein and Van Winsen, *The Civil practice of the Supreme Court of South Africa*, 4th Ed, at 328 and cases cited therein.

[7] On the papers filed of record before the court, it has not been shown by the respondent that he owns any immovable property, encumbered or unencumbered, within the area of jurisdiction of the court. The only immovable property that the respondent owned was disposed off during 2010. Based on the arguments presented and the cases relied on by counsel for the applicant, it is undoubtedly clear that the respondent is a *peregrinus* of the Republic of Namibia. The term *Peregrinus*, which is the opposite of *incola* has been defined¹ as foreigner or litigant not residing within the jurisdiction of the court. The respondent, in the present matter does not reside within the jurisdiction of this court as his ordinary place of residence is the United Kingdom where he has resided for 30 years and still is residing at the same address indicated in paragraph 5 above.

[8] The principles and purpose for providing security are that the court has a discretion to grant or refuse such security and that this is a matter of practice and does not form part of substantive law. The principles underlying this practice is that in proceedings initiated by a *peregrinus* the court is entitled to protect an *incola* to the fullest extent before it will assist the *peregrinus* and allow him to use our process. At the same time, however, the court will see that justice shall not be denied by unreasonable obstacle being placed in the way of persons seeking redress. It has been initially set out in the old case of *Witham v Venables*² wherein the court took the view that an *incola* of a country should not, as plaintiff be compelled to furnish security for costs in an action. Meanwhile, a *peregrinus* as the plaintiff should be compelled to give security. These principles have been applied and referred to by our Namibian courts. One of the Namibian leading cases on security for costs is *Hepute and Others v Ministry of Mines and Energy and Another*³ where Muller J, once again confirmed the rule that an *incola* will only be required to furnish security if acting as a 'front' for others as a strategy to avoid being held liable for costs.

¹ Hiemstra VG & Conin HL, *Trilingual Legal Dictionary*, 3rd Ed.

² (1918) 1 Menz 291

³ 2007(1) NR 124 at 131E-F.

[9] An exception to the *peregrinus* as the plaintiff from furnishing security is to show that he has within the area of jurisdiction of the court immovable property with a sufficient margin unburdened to satisfy any costs that may arise. The doctrine is however not extended to movable property as yet. There is no onus on the applicant requiring security from a *peregrinus* to show that the latter does not own unburdened immovable property in the Republic but should prove that the plaintiff who instituted action is a *peregrinus* of the Republic of Namibia. The court exercises discretion in deciding whether to grant security or not.

[10] Counsel for the respondent was very critical about the cases referred to by his learned friend. He had referred to these cases as decided cases dating back to the medieval times of the 18 hundreds, dating back to prior the South African and the Namibian Constitutional dispensation. Mr. Conradie is of the view that the mere fact that the respondent is a Namibian citizen, a previously disadvantaged Namibian citizen with communal land allocated to him, should not be ordered to pay security for costs although not a resident of the Republic of Namibia. He further argued that rule 47 is sub-ordinate legislation which must yield to the provisions of article 12 of the Namibian Constitution. That I agree with but what Mr. Conradie should keep in mind is that Rule 47 is there for a purpose. There is nothing wrong for the applicant to apply for a costs order in terms of rule 47(3) of the Rules of court. I agree there is nothing in the rule that disqualifies the respondent from being demanded or required to provide security but disagrees that as a Namibian citizen residing in the United Kingdom permanently, without fixed property in this jurisdiction, he should not be compelled to furnish security for costs. Such an order per se does not necessarily make the application unfair as envisaged by article 12 of the Constitution.

[11] Article 12(1)(a) of the Namibian constitution reads:

‘(1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.’

[12] It is thus clear that not only is the respondent entitled to a fair trial in the present matter, but the applicant as well. In the circumstances, I am satisfied that the respondent is a resident of the United Kingdom with no fixed property in the Republic of Namibia and should therefore not escape an order to furnish security for costs in favour of the applicant.

[13] That being the case, I make the following order:

1. The application is granted with costs, which costs to include costs of one instructed counsel.
2. The respondent is ordered to provide security for costs in the amount of N\$ 150 000 within 30 days from the date of this order;
3. The action against the applicant be stayed until security for costs has been furnished;
4. The applicant is granted leave, in the event of the respondent not complying with the order in paragraph 2, to apply to this court on the same papers, duly amplified as may be necessary, for the dismissal of the respondent's action initiated against the applicant.

E P Unengu
ACTING

APPEARANCE:

APPLICANT

C VAN DER WESTHUIZEN

Instructed by Engling Stritter, Windhoek

RESPONDENT

D H CONRADIE

Of Conradie & Damaseb, Windhoek