

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING

Case no: HC-MD-CIV-ACT-CON- 2016/02467

In the matter between:

MULTIBUILD CC

PLAINTIFF

and

BLUMFELDE MEAT CC

DEFENDANT

Neutral citation: *Multibuild CC v Blumfelde Meat CC* (HC-MD-CIV-ACT-CON-2016/02467) [2018] NAHCMD 372 (19 November 2018)

Coram: USIKU, J

Heard on: 19 November 2018

Delivered: 19 November 2018

ORDER

1. The application made on behalf of the Plaintiff for leave to be represented by Mrs Cornelia Harmse, in her capacity as member of the Plaintiff-Close Corporation is dismissed;
2. The Plaintiff is directed to engage services of an admitted legal practitioner to represent it in the present proceedings;
3. I make no costs order in relation to the application by the Plaintiff for leave to be represented by Mrs Cornelia Harmse;
4. In relation to the application for security for costs, the Plaintiff is hereby ordered to furnish security for costs to the Defendant;
5. The manner, form and quantum of the security for costs are to be assessed by the Registrar;
6. The parties are directed to approach the office of the Registrar on or before 07 December 2018, to request a meeting where the assessment of security for costs shall be made;
7. Should the Plaintiff fail or neglect to comply with the court order for security for costs as assessed by the Registrar within 10 days of the Registrar's decision, the proceedings shall be stayed pending such compliance;
8. The Plaintiff is directed to pay the Defendant's costs of the application for security for costs, subject to the provisions of Rule 32(11);
9. The matter is postponed to 27 March 2019 at 15:15 for status hearing;

10. The parties are directed to file a joint status report on or before 22 March 2019 at 15:15 for status hearing.

REASONS PD 61(11)

USIKU J:

Introduction

[1] Presently before court for determination are two applications, namely:

(a) an application by the Plaintiff for leave to be represented in the Mrs Cornelia Harmse, in her capacity as member of the Plaintiff-close corporation; and

(b) an application by the Defendant for an order in terms of which the Plaintiff is ordered to furnish security for the Defendant's costs. The Defendant also pays for an order for costs in respect of this application.

Background

[2] The Plaintiff is Multibuild CC, as Close Corporation registered and incorporated in accordance with the laws of Namibia. The Plaintiff instituted an action against the Defendant for payment of a total amount of N\$395 422.62 arising from an alleged breach of a written contract entered between the Plaintiff and the Defendant.

[3] The Defendant is Blumfelde Meat CC, a Close Corporation registered and incorporated in accordance with the laws of Namibia. The Defendant contests the Plaintiff's action and in turn launched a counterclaim against the Plaintiff for payment of a total amount of N\$344,970.18 arising out of an alleged breach of contract by the Plaintiff.

Application by the Plaintiff for leave to be represented by a non-legal practitioner

[4] On 06 February 2018, the Plaintiff's legal practitioner of record filed a notice of withdrawal as legal practitioners of record for the Plaintiff. On or about the 29 March 2018, Mrs Cornelia Harmse indicated that she intended to represent the Plaintiff in the proceedings before court. On that date the court made an order in the following terms:

'IT IS RECORDED THAT:

Ms. Harmse, not being legal practitioner, indicated that she intends to represent the Plaintiff (a close corporation) in the present proceedings.

IT IS HEREBY ORDERED THAT:

1. The case is postponed to 25 April 2018 at 15:15 for a Status hearing.
2. The Plaintiff (s) must file an application supported by an affidavit, showing cause why:
 - 2.1 the Plaintiff should not engage the services of an admitted legal practitioner to represent it in this matter;
 - 2.2 Ms. Harmse (not being an admitted legal practitioner) should be allowed to represent the Plaintiff in this matter (in view of the decision of the Supreme Court in the matter of Nationwide Detectives and Professional Practitioners CC v Standard Bank 2008(1) NR 290 SC) and why Plaintiff must be represented by one of its members and not by a legal practitioner.
3. The affidavit/application in order 2, must be filled on or before 19 April 2018.'

[5] In the affidavit in support of the application deposed to by Mrs Harmse, on behalf of the Plaintiff, it is indicated that:

- (a) the Plaintiff can no longer afford the services of a legal practitioner;

(b) the Plaintiff has suffered severe financial strain, as result of breach of contract alleged by the Plaintiff in the main action, and the Plaintiff is fighting to maintain its solvency.

(c) the Plaintiff is not, among the other things, able to meet its obligations to its suppliers as a result of the alleged breach of contract.

[6] From the documents filed of behalf of the Plaintiff, in support of the application for leave that Mrs Harmse be allowed to represent the Plaintiff, it is apparent that the Plaintiff has two members, namely: Mrs Cornelia Harmse and Mr Donovan Jacobus Harmse.

[7] In response to the foregoing application, the Defendant indicated that it would not oppose the application and would abide by the decision of the court.

[8] The Defendant then filed a notice of security for costs in terms of Rule 59(1), The Plaintiff contests its liability to pay security for costs. The court gave directions as to the exchange of further pleadings in respect of the application for security for costs.

Application by the Defendant for security for costs

[9] The Defendant prays for an order for security for costs in the following terms:

'1 The Plaintiff be ordered to furnish security for the Defendant's costs in the amount of N\$ 125 000.00 within 10 (ten) days, failing which that the Defendant may approach the Honourable Court on the same papers to stay the proceedings until such order is complied with.

2. Costs of the application to be paid by the Plaintiff.

3. Further and or alternative relief.'

[10] The Defendant contends that it is entitled to demand security for costs on account of the Plaintiff's admitted impecuniosity as more fully set out in the affidavit

deposed to by Mrs Harmse. From the content of that affidavit, the Defendant argues, it is apparent that the Plaintiff will not be able to pay the legal costs of the Defendant in the main action, if ordered by the court to do so.

[11] The Plaintiff opposes the application for security for costs and the amount demanded as security, arguing that the application for security for costs is an abuse of the current financial position of the Plaintiff.

Analysis

Application for leave to represent the Plaintiff – close corporation

[12] In the matter of *Nationwide Detectives CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 at 295 E-G, it was observed that the rule of practice is that a close corporation must be represented by a legal practitioner in court proceedings. The Supreme Court in that matter went further and observed that, in instances where it is apparent that a non-legal practitioner seeking to represent a small, one-person corporation, that either prefers to litigate without legal representation or is unable to do so due to costs, such non-legal practitioner may be allowed to do so if he is the alter ego of that small corporation. To deny such person audience in the circumstances, would result in the corporation being denied its constitutionally guaranteed right of access to the court.¹

[13] Shivute CJ made the following remarks in *Nationwide Detectives CC v Standard Bank of Namibia Ltd*²:

[35] In any event, as Gubbay CJ observed in the *Lees Import and Export* case (supra) and which view I share, allowing an alter ego of a corporation to represent the entity does not at all undermine the rule of practice:

¹ *Nationwide Detectives CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 at 301 D-F.

² *Nationwide Detectives CC v Standard Bank of Namibia Ltd* para 35.

"It merely provides an exception to it. For it does not permit a company to appear before the superior courts through someone who is a mere director, officer, servant or agent....Companies, which cannot be said to be the embodiment of any human body, will not qualify under s18 (9) because no human being personifies the company 'in person'. In general, small companies should be able to avail themselves of the exception. ""(Reference to authorities omitted).

[14] It is common cause that in the present case, the Plaintiff is a close corporation having two members, as the members of the close corporation. It is also common cause that the aforesaid two members have passed a resolution authorising one of them, namely Mrs Cornelia Harmse, to represent the corporation in the present proceedings.

[15] The issue I must determine in this matter is whether, in the circumstances, Mrs Cornelia Harmse is an organ or the alter ego of the corporation, so as to fall within the exception recognised in the case of Nationwide Detectives CC cited above.

[16] I am of view that Mrs Cornelia Harmse has not been proved to be the alter ego or the organ of the Plaintiff. In other words Mrs Harmse has not been shown by the evidence to personify the Plaintiff. As was stated above, the Plaintiff consists of two members, of which Mrs Harmse is one of them. Allowing Mrs Harmse to represent the Plaintiff in the circumstances, would be to permit a close corporation to appear before the court through someone who is a mere member of the close corporation and who cannot be said to personify the corporation 'in person'.³

[17] For the foregoing reason, I hold that Mrs Harmse does not fall within the exception recognised in the case of the Nationwide Detectives CC, and I would not allow her to represent the Plaintiff-close corporation, in this matter.

³ *Nationwide Detectives CC v Standard Bank of Namibia Ltd* at p 302 C-D.

Application for security for costs

[18] In the matter of *Martucci v Mountain View Game Lodge (Pty) Ltd* I 2295/2015 [2016] NAHCMD 217 (22 July 2016) para [28], the court quoted the following remarks as to what has to be considered when dealing with an application for security for costs:

‘The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff’s claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.’

[19] As was stated earlier, the Defendant applies for security for costs on the basis of the averments made by Mrs Harmse in her affidavit to the effect that the Plaintiff is presently in precarious financial state.

[20] On the basis of the evidence available, I am of the view that the present matter is a proper one in which security for costs should be ordered in favour of the Defendant. I say so because in the present matter there is evidence that there is a probability that if the Defendant happens to be successful in opposing the Plaintiff’s claim, it may be difficult or impossible, for the Defendant to recoup its costs, in view of the Plaintiff’s avowed precarious financial situation.

[21] Insofar as the quantum of the security for costs is concerned, I support the view expressed in the *Martucci*’s case (*supra*) that the nature, form and amount of security is ordinarily a matter exclusively for the decision of the registrar. I would therefore make an order that the nature, form, and amount of the security for costs should be determined by the registrar.

Conclusions

[22] In conclusion, I am of the view that the Plaintiff has not established that it falls within the category of a one-person company, qualifying it to be represented by its alter ego. For that reason the Plaintiff's application to be represented by Mrs Harmse in her capacity as one of the members of the corporation, stands to be dismissed.

[23] In regard to the application by the Defendant for security for costs, I am of the view that the Defendant has established basis for the entitlement to the relief it claims, subject to the considerations expressed above to the effect that the nature, manner and quantum of the security for costs shall be determined by the registrar.

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

1. The application made on behalf of the Plaintiff for leave to be represented by Mrs Cornelia Harmse, in her capacity as member of the Plaintiff-close Corporation is dismissed;
2. The Plaintiff is directed to engage services of an admitted legal practitioner to represent it in the present proceedings;
3. I make no costs order in relation to the application by the Plaintiff for leave to be represented by Mrs Cornelia Harmse;
4. In relation to the application for security for costs, the Plaintiff is hereby ordered to furnish security for costs to the Defendant;
5. The manner, form and quantum of the security for costs are to be assessed by the Registrar;

6. The parties are directed to approach the office of the Registrar on or before 07 December 2018, to request a meeting where the assessment of security for costs shall be made;
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8. The Plaintiff is directed to pay the Defendant's costs of the application for security for costs, subject to the provisions of Rule 32(11);
9. The matter is postponed to 27 March 2019 at 15:15 for status hearing;
10. The parties are directed to file a joint status report on or before 22 March 2019 at 15:15 for status hearing.

B Usiku
Judge

APPEARANCES:

PLAINTIFF:

In-person

DEFENDANT:

JC Van Wyk

of JC Van Wyk Attorneys, Windhoek