

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: DISTELL LIMITED // NEPANDA TRANSPORT CC	Main Case No.: HC-MD-CIV-ACT-OTH-2019/00610
	Interlocutory Case No.: INT-HC-SECCOST-2020/00102
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE MILLER, ACTING	Date of hearing: 20 JULY 2020
	Delivered on: 31 JULY 2020
Neutral citation: <i>Distelle Limited v Nepanda Transport CC</i> (INT-HC-SECCOST-2020/00102) [2020] NAHCMD 325 (31 July 2020)	
The order: Having heard Ms Garbers-Kirsten , counsel for the applicant/defendant and Mr Silungwe , counsel for the respondent/plaintiff and having read documents filed of record: IT IS ORDERED THAT: The interlocutory application for the plaintiff to furnish security for costs is dismissed with costs, limited to N\$20 000.	
Following below are the reasons for the above order:	
<p>[1] In this interlocutory application, the applicant is the defendant in the main matter and the respondent is the plaintiff in the main matter. The parties will be referred to as they appear in the main matter.</p> <p>[2] On 15 February 2019, the plaintiff instituted action against the defendant seeking an order directing the defendant to reinstate the plaintiff as a contractor in terms of the Owner Distribution Agreement concluded between the plaintiff and the defendant, and an order directing the defendant to remit payment to the plaintiff in an amount equivalent to a payment of N\$120 000 for</p>	

each month spanning the period between 30 June 2018 and 22 February 2019.

[3] Before me now is an interlocutory application brought by the defendant on 12 May 2020 seeking an order that:

- (a) The plaintiff is required to furnish security for costs in the form of a bank guarantee or funds held in the plaintiff's attorneys' trust account, or in such other form as may be determined by the registrar, in the sum of N\$300 000, or such sum as is set by the registrar, within ten days of the determination of the amount of the security.
- (b) The action is stayed pending the granting of such security.
- (c) The plaintiff pays the costs of this application.

[4] The Notice of Motion was accompanied by the founding affidavit of Sorita Botha, who is employed by the defendant in the action as a Legal and Compliance Advisor and duly authorized by the defendant to depose to the affidavit in terms of a resolution.

[5] In her founding affidavit, Sorita Botha explained various reasons that the defendant has to believe that there are reasonable grounds why the plaintiff will be unable to meet an adverse costs order, should the defendant be successful in the action.¹ The defendant stated that despite a request to the plaintiff to provide its financial documents to their legal practitioner, it did not do so, and argued that that the only reasonable inference that can be drawn from that failure or refusal to submit the documents requested is that the plaintiff is not contesting the amount of security claimed, and its liability to set its security as prayed for.² Sorita Botha submitted in her founding affidavit that the circumstances indicate that if the defendant is successful in its defence of the action, and the plaintiff is ordered to pay the costs, there will be no funds available in the Republic of Namibia, upon which the defendant can levy execution to recover such costs.³

[6] In his opposing affidavit on behalf of the plaintiff, Joas Uahindua who is a sole member of the plaintiff explained that the plaintiff is not liable to furnish the defendant with security for costs for the grounds alleged by the defendant in its application,⁴ as an *incola* close corporation. He further stated that the defendant invalidly terminated the agreement and without cause, and as a result the plaintiff fell on hard times financially, and was forced to cease operations shortly after the termination of the agreement between the parties. He added that it would be unfair in the

¹ Para 18 of the Defendant's Founding Affidavit.

² Para 19 of the Defendant's Founding Affidavit.

³ Para 21 of the Defendant's Founding Affidavit.

⁴ Para 8 of the Plaintiff's Opposing Affidavit.

circumstances to require the plaintiff to furnish security of costs.⁵ He stated that the order sought by the defendant in this application will have an adverse impact on the plaintiff financially, especially in view of the fact that the defendant is in a better financial position than the plaintiff. He stated that the defendant is a multinational company and a *peregrinus*.⁶ He stated that the plaintiff has a good prospect of success in the main action, following the defendant's invalid termination of the agreement.

[7] In her replying affidavit, Soritha Botha stated that on the plaintiff's own admission, it is unable to pay an adverse costs order in the event that it is unsuccessful with the main action, and submitted that solely for that reason the court should grant an application for security for costs against the plaintiff.⁷ She submitted that the agreement in question was terminated by following proper procedure. She further added that the plaintiff does not have any prospect of success in the main action, and it is untenable for the court to allow an entity which outright admits that it is 'a man of straw' to proceed with the action against another entity. She said that it is clear from the pleadings exchanged that the plaintiff's action is opposed on valid grounds by the defendant.⁸

[8] In *Hepute and Others v Minister of Mines and Energy and Another*⁹ the Supreme Court held that:

[23] Our common law recognises, as a general rule, the immunity enjoyed by an *incola* plaintiff or applicant from having to provide security of costs. The *ratio* behind this rule is that every citizen should have uninhibited access to the courts: *Vite v Mbuque; Namoyi v Mbuque* 1993(4) SA 93 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 Shartin* 1911 WLD 156; *Vanda v Mbuque, 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 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,

⁵ Para 8.6 of the Plaintiff's Opposing Affidavit.

⁶ Para 8.7 of the Plaintiff's Opposing Affidavit.

⁷ Para 15 of the Defendant's Replying Affidavit.

⁸ Para 21 of the Defendant's Replying Affidavit.

⁹ *Hepute and Others v Minister of Mines and Energy and Another* 2008 (2) NR 399 (SC) at 409-10.

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 of 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 therefor.'

[9] The main matter arises from a written Owner-Driver Distribution Agreement that was entered into on or about 15 February 2017 between the plaintiff, represented by Joas Uahindua who is a sole member of the plaintiff and the defendant, represented by Viian Govender in Windhoek, The Republic of Namibia. In terms of that agreement the plaintiff would render cartage services for the defendant to and from the defendant's customers as a contractor. The plaintiff stated that it complied with all of its obligations arising out of the agreement as well as the terms stated therein and rendered cartage services as agreed, but on 1 April 2018 the defendant addressed a purported notice of termination of the agreement to the plaintiff. The plaintiff states that the defendant's purported termination of the agreement is in breach of the agreement as it amounts to an unsubstantiated repudiation of the agreement on invalid and salacious grounds, and that the purported notice of termination of the agreement is inherently defective for reasons indicated in the particulars of claim. In her replying affidavit in the present application, Sorita Botha denied that the plaintiff invalidly and without good cause terminated the agreement between the parties.¹⁰

[10] In the present matter, it is apparent from the papers filed that the parties are in agreement that the plaintiff is not in a good financial position to furnish security for costs. The defendant showed on a balance of probability that the plaintiff is poor but failed to show in addition, on a balance of probability, that the plaintiff is a nominal litigant or a front for another party. The plaintiff has shown that it is entitled to maintain the action and that it has real interest in the subject matter of the cause, and therefore it cannot be said that its conduct amounts to abuse of the process of

¹⁰ Para 14 of the Defendant's Replying Affidavit.

the court nor can it be said that the claim is frivolous.

[11] Our courts will be slow to close the doors of the court to a plaintiff who, although poor, needs to pursue a claim which may be meritorious. To do so may well result in an injustice in itself.

[12] In the exercise of the discretion I have, I am inclined not to grant the relief being sought.

[13] The application is dismissed with costs, limited to the amount of N\$20 000.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant/Defendant	Respondent/Plaintiff
H Garbers-Kirsten <i>instructed by</i> Koep & Partners, Windhoek	R Silungwe <i>of</i> Silungwe Legal Practitioners, Windhoek