REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

CASE NO: I 427/2013

In the matter between:

KRUCOR INVESTMENT HOLDINGS (PTY) LTD t/a PROFESSIONAL FARMING **APPLICANT**

and

ESTIE KWENANI (Born EBERENZ) **RESPONDENT**

Neutral Citation: *Krucor Investment Holdings (Pty) Ltd t/a Professional Farming v Kwenani* (Case No. I 427/2013) [2021] NAHCMD 262 (27 May 2021).

CORAM: MASUKU J
Heard: **3 May 2021**
Delivered: **27 May 2021**

Flynote: Legislation – Section 11 of the Companies Act No. 28 of 2004 – circumstances where the provision applies – vis-à-vis Rule 59 of the High Court Rules - Application of Rule 32(9) and (10) to applications for security for costs.

Summary: The parties in the matter being embroiled in litigation, the respondents launched an application in terms s 11 of the Companies Act, No. 28 of 2004 of in

which it sought security for costs from the applicants in relation to an application launched by the applicant for stay of execution. The applicant argued that the application in terms of s 11 of the Companies Act was inapplicable to the matter and that in any event, the respondent should have complied with the provisions of rule 59 in seeking security for costs. The Court having to deal with legal disputes herein pertaining to the applicability of section 11 of the Act to this matter and compliance with the Rules of this court, specifically Rule 59, Rule 32(9) and (10), held as follows;

Held: an application in terms of section 11 should not be readily granted by the courts as it impedes the rights guaranteed by Article 12 of the Namibian Constitution to access the courts and should be interpreted restrictively therefor.

Held that: according to *Northbank Diamonds Ltd v FTK Holland BV and Others* 2002 NR 284 (SC), for a court to grant an application in terms of section 11, there should be credible testimony placed before it that the applicant or plaintiff, as the case may be, will not be able to pay (not might or is unlikely), the costs of the action or application if unsuccessful. Once that is established, the court may then proceed to exercise its discretion and order security, if so satisfied.

Held further that: the words ‘applicant or plaintiff’ employed in s 11, does not apply to parties in interlocutory proceedings, especial regard had to the provisions of rule 32(11), placing a cap on the amount recoverable in interlocutory applications.

Held: that where a party applies for security for costs in terms of s 11 of the Act, that party is not precluded from complying with the provisions of rule 59, which are procedural in nature, regardless of the basis of the application for security for costs. As a result, the judgment in *Cellphone Warehouse (Pty) Ltd v Mobile Telecommuncations Ltd* 2002 NR 318 (HC), was wrongly decided.

Held: that rule 32(9) and (10) of this court should by now constitute an involuntary act by the parties, and that they need not to be reminded to comply with these provisions any longer.

Held that: in the instant case, the respondent failed to present credible evidence that the applicant would not be able to pay the costs of the application for stay of execution if it becomes unsuccessful.

As a result of the foregoing, the court dismissed the application with costs as provided in rule 32(11).

ORDER

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1. The Respondent's counter-application for security for costs envisaged in Section 11 of the Companies Act, No. 28 of 2004, be and is hereby dismissed.
2. The Respondent is ordered to pay the costs of this application consequent upon the employment of one instructing and one instructed legal practitioner, subject to the provisions of Rule 32(11).
3. The costs ordered in paragraph 2 above, are subject to the provisions of Rule 32(11) of this Court's Rules.
4. The matter is postponed to **10 June 2021** at **08:30** for further directions on the conduct of the matter.
5. The parties are ordered to file a joint status report on proposals for the further conduct of the matter on or before 7 June 2021.

RULING

MASUKU J:

Introduction

[1] The answer expected to be returned by this court in this ruling acuminates to this: in what circumstances are costs in terms of the provisions of section 11 of the Companies Act, No. 28 of 2004, as amended, due to be paid? A secondary question that arises is whether the respondent, in this matter has made out a proper case for the court to grant him security for costs in terms of s 11 mentioned above, as prayed.

The parties

[2] The applicant is Krucor Investment Holdings (Pty) Ltd t/a Professional Farming, a company, duly incorporated in terms of the company laws of this Republic. Its place of business is situate at Kruger, Van Vuuren & Co., corner of Sam Nujoma and Hosea Kutako Drive, Windhoek. The respondent, Ms. Estie Kwenani, (*Nee* Eberenz), on the other hand, is a major Namibian female who resides at Erf 5396, Shovellar Street, Khomasdal, Windhoek.

Background

[3] The parties are in the throes of heated proceedings, that seem to provide no end in sight at the moment. The applicant, as it appears on the papers, leased certain farms from the respondent against payment of rental. The respondent then instituted action proceedings against the applicant in this court for the rental and eviction of the applicant from the said farms.

[4] In a judgment delivered by Madam Justice Angula AJ, the respondent succeeded in the relief it sought. The applicant, dissatisfied with the said judgment, appealed against the said judgment to the Supreme Court. The appeal, as is the case, stayed the execution of the judgment. It is unnecessary, for present purposes, to deal with the grounds of appeal in the current proceedings.

[5] It is common cause that the applicant did not fully comply with the rule 8(2) of the Supreme Court, relating to the delivery of the record of proceedings. This resulted in the Registrar of the Supreme Court writing a letter to the applicant, dated

31 August, 2021, copied to the respondent, indicating that the appeal, would, in the circumstances, be 'deemed as withdrawn. We will proceed to close our file herein'.[1]

[6] This letter must have come as sweet music in the respondent's ears. I say this because the respondent, soon thereafter, called upon the applicant to vacate the premises within a stipulated time frame and pay the amount of the judgment of this court, failing which execution processes would ensue without further delay.

[7] The applicant, faced with the precipitous consequences of the execution of the judgment, moved an application, purportedly on an urgent basis, seeking an order for the stay of this court's order, pending an application for condonation of the non-compliance with the Supreme Court rules. This application served before me. It was struck from the roll for want of compliance with the provisions of this court's rules relating to urgency.

[8] The applicant, in that event, decided to proceed with its application in the normal course, as envisaged by rule 73(5) of this court's rules. The application was vigorously opposed by the respondent, intent on having her pound of flesh so to speak, and being placed in a position where she could enjoy the fruits of the judgment in her favour.

[9] In the interregnum, the respondent filed a counter-application of her own. By notice of motion dated 10 October 2021, she approached the court seeking an order essentially compelling the applicant to furnish sufficient security for her costs in the amount of N$ 1.5 Million, or such amount as the court may deem fit. The security was sought for costs arising from the applicant's application for the stay of proceedings. This, the applicant states was done in terms of the provisions of s 11 of the Companies Act, 2004, as amended, ('The Act').

[10] In her notice of motion, the respondent further sought an order for the payment of the security claimed or as the court may deem appropriate, within a period of 5 days from the date of the order, or such other date as the court may

[1] Letter from the Registrar of the Supreme Court, p 51 of the bundle of pleadings.

determine, failing which an order striking the application for stay of proceedings would issued by the court.

[11] This application is also vigorously opposed by the applicant, who filed extensive affidavits in opposition. It is unnecessary, for present purposes to canvass the factual allegations traded by the parties in this connection. The issues facing the court are primarily legal in nature and should place the court in a position to decide whether the respondent stands on *terra firma* in her counter application.

[12] It does bear mentioning though that the primary basis upon which the respondent contends that she is entitled to security in terms of the said provisions of the Act, is that the applicant is a company incorporated in terms of the Act. Furthermore, so contends the respondent, the application for the stay of proceedings sought by the applicant constitute legal proceedings, as envisaged in s 11 of the Act. That being the case, the applicant should provide security in terms of the said provision.[2]

[13] The respondent further states that she reasonably believes that the applicant has no prospects of success in the application for stay of proceedings. As such, she further contends, she stands to suffer financial prejudice in the event the application for stay of execution is unsuccessful. 'The applicant will not pay my costs arising from the application.'[3]

[14] In justifying the assertion immediately above that the applicant will not the able to pay her costs, the respondent chronicles the history of the litigation between the parties, as briefly adverted above. She asserts that the application for stay of proceedings is nothing but a ploy on the part of the applicant to prolong the appeal process and to enable the applicant to continue in occupation of the farms in question.

[15] It is the respondent's further case that after the letter from the Registrar of the Supreme Court was received, her demand to the applicant to pay the amount of

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[2] Paragraph 15 of the respondent's founding affidavit in her counter-application, p 142 of the record of pleadings.
[3] Paragraph 17 of the respondent's founding affidavit, p 142 of the book of pleadings.

the judgment remains unsatisfied. She asserts, after the history recounted briefly above, that, '. . . in view of the aforesaid background of the litigation between myself and the applicant coupled with the tactics and strategies that the applicant deployed as stated herein above and below, is a deliberate measure and tactic that the applicant and its Directors have deployed in order to frustrate me and to make me incur unnecessary legal costs arising from all these legal proceedings.'[4]

[16] It is the applicant's further case that the Deputy Sheriffs of Rehoboth and Windhoek, respectively, went to execute the court's order against the applicant's property in his presence in November 2020. The deputy sheriffs found that there was no property that could be attached in execution, hence nulla *bona* returns that were filed by them. The deputy sheriffs established that the applicant's animals and goods had been removed from the farms under cover of the night.

[17] The respondent further deposes that in December 2020, she obtained another writ of execution, which was served at the No.3 Kerby Street, the applicant's registered address. No property could be realised therefrom. It is the respondent's case that the tactics employed by the applicant are not geared to obtain redress before the court but to harass and annoy her as the proceedings for stay are nothing but an academic exercise, conjured to cause the respondent to incur unnecessary legal costs in opposing the application for stay of proceedings.

[18] The respondent further asserts that it is clear that the applicant has vacated the farms in question and that there is no property the applicant left on the farms in question. This, the respondent argues, renders the application for stay of proceedings a lame reason for staying the execution.

[19] It is the respondent's further contention that the fact that *nulla bona* returns were filed by the deputy sheriffs, coupled with the applicant's failure to pay the respondent's occupational rent as ordered by this court, indicate that the applicant is unable to pay its debts as envisaged by s 350 of the Act. This, the respondent states, is a reason for the court to order the applicant to pay the security for the respondent's costs.

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[4] Paragraph 28 of the respondent's founding affidavit, p 146 of the book of pleadings.

[20] It is the respondent's further case that she has so far incurred large amounts in legal costs, namely of the action proceedings and the urgent application that was struck from the roll, evidenced by bills of costs due for taxation. It is the respondent's contention that in view of these facts, it is only proper that the applicant be ordered to furnish security for costs. The applicant's refusal to comply with the orders of the court raise a legitimate fear that if she is successful, the applicant may refuse to settle the costs order.

[21] Lastly, the respondent draws the applicant's managing director, Mr. Hendrik Krüger into the fray. She points out that he is the one who states that he is authorised to act on the applicant's behalf and relies in that regard on a resolution of the applicant's board of directors. She states that because of the *nulla bona* returns mentioned earlier, she reasonably believes that the applicant's directors are litigating under the pretext of the applicant, as the applicant does not appear to have property of its own, or is unable to pay its debts. The applicant's directors are litigating using the applicant's name in order to avoid personal liability for the respondent's costs, she further deposes.

[22] What is the applicant's take on these serious allegations by the respondent? The applicant's director, Mr. Krüger deposed to the answering affidavit. He pours scorn on the respondent's allegations and imputations contained in the founding affidavit. First, the applicant deals with legal contentions regarding the propriety of the respondent's reliance on various provisions of the Companies Act. I deal briefly with these immediately below.

[23] First, the applicant takes the position that the respondent, in this matter, did not comply with the provisions of rule 59 of this court's rules, which deal with furnishing security for costs. It is the applicant's further contention that the respondent did not bring its application for security for costs as soon as practicable after the applicant's application for stay of proceedings.

[24] The applicant further takes issue with the non-compliance by the respondent with the provisions of rule 32(9) and (10). In this regard, it is the applicant's position

that had the respondent fully complied with the provisions of rule 32(9), this application may well have been avoided. It is the applicant's case that if the respondent had fully answered to the information it required, the deponent to the applicant's affidavit would have given the applicant the assurance that he would be willing and able to pay the respondent's taxed costs if successful.

[25] It is the applicant's further contention that the application in terms of s 11 of the Companies Act is ill fated. This is because, so contends the applicant, the power to stay proceedings vests in this court's entitlement to regulate its own processes and the execution of its orders. It was the applicant's further contention that the remedies availed under s 11 of the Companies Act are not available to the respondent in the interlocutory application for stay of proceedings.

[26] Regarding the provisions of s 350 of the Companies Act, it is the applicant's contention that for the respondent to succeed in her reliance of s 350, she would need to place admissible evidence before the court to show that the applicant will be unable to satisfy an adverse costs order issued against it. This, the court may be able to properly decide, based on allegations of fact placed before court by the respondent. This, the applicant contends, the respondent has failed to do.

[27] The applicant further argues that the reliance on s 350 of the Act is totally misplaced because it applies to liquidation proceedings, which are themselves predicated on s 349(f) of the Act. These sections, so contends the applicant, do not extend such as to apply to s 11 of the Act.

[28] On the merits of the application for security for costs, the applicant denies the imputation that its application for stay of proceedings is geared to cause the respondent to incur unnecessary costs. It is the applicant's case that these allegations are unfounded. It is the applicant's case that the costs for the application for stay of proceedings and that for security for costs are different in nature and character and should, for that reason, be dealt with separately in their own individual right. It is wrong to conflate them as the applicant seeks to do.

[29] It is the applicant's further contention that its pursuit of the application for stay of proceedings is genuine and that it believes that it has reasonable prospects of success on appeal. In this regard, the applicant states that it filed its application for reinstatement with the Supreme Court on 2 October 2020 and the application awaits adjudication by the Supreme Court. It states that it has prospects of success both on the condonation application and the reinstatement as well. In sum and because of what is contained in this paragraph, the applicant denies that its application for stay of proceedings is geared to harass, annoy or to intimidate the respondent.

[30] Regarding the writs of execution referred to earlier, the applicant requests the court to note the timing of the said writs of execution. They were delivered after the applicant had filed its application for reinstatement of its appeal before the Supreme Court. Furthermore, contends the applicant, the writs were issued after the application for the stay of proceedings had been lodged before this court.

[31] The applicant further states that the court should not draw an adverse inference from the writs as the writ marked annexure 'EK 7' was served on the applicant's auditors and is not a reflection of the applicants' lack of movable assets as alleged. It was always clear that the deputy sheriff would not find any assets of the applicant at its auditor's premises.

[32] Equally, the applicant pours scorn on the allegations that it has approached this court with 'unclean hands' as alleged by the respondent. It is the applicant's case that it did not effect payment in terms of the judgment because it genuinely believes that the judgment of this court is wrong in law, hence the appeal it lodged.

[33] Furthermore, the applicant contests that the amount of security requested is reasonable. According to the applicant, the amount of N$ 1.5 million is excessive in all the circumstances of this case. The applicant in conclusion applied for the dismissal of the application for security for costs with costs not capped by the provisions of rule 32(11).

[34] It is not necessary, for present purposes to deal at any length with the replying affidavit filed by the respondent. It would be appropriate to mention that the

respondent stuck to its case like a postage stamp to an envelope. She concedes no inch whatsoever, contending that her application is sound and that the court should not allow the applicant to abuse the court's procedure by moving the application for stay of proceedings.

Determination

[35] At this juncture, it is opportune to deal with the issues that arise. In particular, it may be necessary, in the first instance, to have regard to the propriety of bringing the application for security for costs in terms of s 11 as the respondent has done. If the respondent is found to be barking the wrong tree in that regard, that may well spell doom to the entire application. Whether that should be so will be an issue investigated as the determination of the matters in issue unfold in the ensuing pages of this judgment.

Section 11 of the Companies Act

[36] It must be mentioned upfront that the protagonists are all *ad idem* regarding the provisions in question. In this regard, they have by and large cited the same cases. It will be in the analysis of the facts of this case that a determination will have to be made whether the respondent is on *terra firma* in bringing the application in terms of s 11 and I dare say, in her dogged reliance on other provisions of the Companies Act, namely ss 449 and 350.

[37] Section 11 of the Act has the following rendering:

> 'Where a company or other body corporate is the plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator of the company, will be unable to pay the costs of the defendant or respondent if the defence of the latter is unsuccessful, require sufficient security to be given for those costs and may stay all proceedings until the security is given.'

[38] The court was referred by the parties to numerous cases that deal with this section. One case, in particular, referred to by the respondent, which, however dealt

with the predecessor of s 11 of the Act, namely s 13 of the repealed Act, is *Northbank Diamonds Ltd v FTK Holland BV and Others*[5].

[39] In dealing with the requirements and application of the said provision, the Supreme Court remarked as follows:[6]

'Both counsel submitted, and correctly in my view, that s 13 requires an investigation in two stages. Firstly, the Court must consider whether the applicant has established by credible testimony that there is reason to believe that the company or body corporate, if unsuccessful, will be unable to pay the costs of the defendant. If the Court satisfied that is of the end of the matter. However, if the Court is satisfied that a case was made out it must then exercise the discretion conferred upon it by the section.'

[40] The Supreme Court proceeded to consider the meaning to be attached to the words 'reason to believe' occurring in the said provision and stated as follows:

'In regard to when the Court has 'reason to believe' that an applicant or plaintiff company will be made to pay the costs order against it, the following was stated in the *Vumba Intertrade* case (*supra*) at 107E-H, 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 . . . In short, there must facts before the court on which the court can conclude that there is reason to believe that a plaintiff close corporation will be unable to satisfy an adverse costs order; and the onus of adducing such facts rests on the applicant."'

[41] It is necessary, to point out that although the Act has been repealed, the provisions of s 11 remain largely the same as they were in s 13 of the repealed Act. For that reason, it must be stated and both parties agree, that the reasoning of the Supreme Court in relation to s13 of the repealed Act, is fully applicable to s 11 of the Act.

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[5] *Northbank Diamonds Ltd v FTK Holland BV and Others* 2002 NR 284 (SC).
[6] *Ibid* p 287.

[42] I am of the view that besides the reasoning quoted above is binding on this court, it is in my view correct and comprehensively sets out the standard that needs to be met before security for costs in terms of the provision in question, may be ordered by the court on application.

[43] I find it necessary to point out a few issues in regard to this particular matter. First, it would appear to me that resort to this section is not something that must be easily sanctioned by the court. I say so for the reason that the provision in question serves to impede the fundamental right to access the courts as enshrined in Art 12 of the Constitution. For that reason, its application should be restrictively interpreted. Furthermore, the granting of the application should be sparingly granted and only in deserving cases.

[44] Second, the provision goes against the common law rule that a court cannot order an *incola* plaintiff company to provide security for costs of the defendant in an action.[7] This is more so the case where there is no allegation that the proceedings instituted by the plaintiff company, constitute an abuse of the court's processes thus requiring the insurance, so to speak, of security for costs.

[45] It would appear to me that the word 'testimony', as employed in the provision, must not be allowed to vanish in significance. According to the Oxford Advanced English Dictionary, the word means 'a formal written or spoken statement saying what you know to be true, usually in court.' It would therefor appear that the word, 'evidence' could be used as a synonym therefor.

[46] It would, for that reason require that the applicant for security for costs in terms of s 11, should place credible or reliable, trustworthy or believable and admissible evidence on oath, which can stand up to scrutiny. That evidence must of necessity show and serve to convince the court that the applicant or plaintiff company will not be able to pay the costs of the suit if unsuccessful. It should be recorded in this regard that the test is not low, namely that the applicant or plaintiff company may not be able to or is unlikely to be able to pay the costs if unsuccessful. (Emphasis added).

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[7] *Boost Sports v SA Breweries* 2015 (5) SA 38, at 43C-E.

[47] There must, from a close consideration of the nomenclature employed, be an element of certainty about the inability to pay the costs. That should be reasonably drawn from the facts stated on oath and should serve to convince the court that the right of that party to access the court without let must necessarily be interfered with by ordering security for costs.

[48] In this connection, it would appear to me that the evidence, or testimony placed before the court must not be unconvincing, impoverished, vacillating, contrived or the offspring of romanticism. It must be testimony that the court can accept without hesitation as inherently convincing and truthful and thus fit to require the court to place an unusual burden of costs on an *incola* company, even before the conclusion of the proceedings has been reached. I proceed to consider the application of this principle below.

Does s 11 apply to proceedings, which do not involve a plaintiff or an applicant?

[49] Before I venture an answer to the poser above, it is necessary to first deal with an issue raised by the applicant's counsel, Mr. Steyn and in terms of which the court was moved to dismiss the application. It was the applicant's contention that the provisions in question do not apply to the applicant in this particular instance. The basis for this argument was laid on the words 'the company or corporate is plaintiff or applicant in any legal proceedings . . .' (Emphasis added).

[50] It would appear to me that the intention of the legislature, in promulgating this section was to protect respondents or defendants who had been dragged to court by impecunious plaintiffs or applicants, to answer cases in respect of which the defendants or respondents are not be likely to be indemnified for their costs should they become successful.

[51] The court was referred to a number of cases, one of which is *MV Navigator (No. 2): MV Navigator v Wellness International Network*[8]. In *Navigator,* Louw J reasoned as follows regarding the application of the provision in question:

[8] *MV Navigator (No. 2): MV Navigator v Wellness International Network* 2004 (5) SA 29 at 37D-E.

'. . . Section 13 refers specifically to a company or body corporate, which is a plaintiff or applicant in any legal proceedings. There is no express reference in the section to a company or body corporate, which is an appellant. There is no suggestion in the wording of the section that it should be read broadly so as to include an appellant in appeal proceedings. The authors of *Henochsberg on the Companies Act* vol 1 at 29 state that: "On the ordinary meaning of its language, s 13 has no application to proceedings in an appeal.'"

[52] By parity of reasoning, the applicant's counsel argued and forcefully too, that the provision in question must be confined to action or application proceedings and should not be extended, as the respondent seems determined to do, to interlocutory proceedings. Is this argument correct?

[53] I do not find it necessary to decide the question in a broad context. It is necessary for me to confine the issue to the facts of this particular case. Literally interpreted, it would appear that in the instant case the provision in question would have been open to the applicant to invoke in the action proceedings and this would have been subject to the respondent, the plaintiff in the action proceedings, being a corporate entity. It is beyond disputation that the respondent is a natural person and as such, the provisions of s 11 could not have been invoked against her.

[54] I am of the considered view that Mr. Steyn is correct on the facts and the law that the provisions of the Act can be invoked by a defendant or respondent in circumstances where there is an action or application being prosecuted by a plaintiff or applicant which is a corporate body in serious financial doldrums. It appears to me that it would be incorrect and a misapplication of the provision to seek to invoke the provision as the respondent seeks to do, in what are clearly interlocutory proceedings in this case.

[55] I did not understand Mr. Khama, for the respondent to seriously contend or at all, that the application for security for costs is not an interlocutory proceeding. It must be regarded as such for the reason that the main proceedings that are, subject to other considerations that need not detain us here, are the appeal lodged by the applicant, which was deemed withdrawn and the applicant claims it is has filed an application both for condonation and reinstatement before the Supreme Court.

[56] It was in reaction to the attempts by the respondent to execute after the appeal was deemed with drawn that the applicant lodged an application for stay of execution of the judgment, which I think is beyond disputation that it is an interlocutory application. Upon that interlocutory application was the application for security for costs lodged to interpose the determination of the application for stay of proceedings. It is thus an interlocutory proceeding and in my considered view, is not open to the invocation of s 11 of the Act. It does not fall within the realms of an action or application in which only plaintiffs and applicants feature respectively, as the *dominis litis*.

[57] I am of the considered view, having regard to the discussion above that Mr. Steyn for the applicant is eminently correct that the respondent is in the peculiar circumstances of this case, barking the wrong tree. It is not open to the respondent to seek the invocation of the provisions of s 11 when the respondent is not a plaintiff or an applicant, as discussed above.

[58] The proceedings in which the provision is sought to be invoked, are interlocutory in nature and do not meet requirement of the provision, namely that of a plaintiff or applicant being a party. This point is accordingly well taken by the applicant in my considered opinion and the application for security for costs should for that reason alone fail.

Is there credible testimony that the applicant is be unable to pay the costs?

[59] The evidence relied upon by the respondent in support of the application has been recorded earlier in the judgment. In the main, the respondent relies on some *nulla bona* returns filed by the deputy sheriffs, indicating that there were no movable goods of the applicant found that could be attached to satisfy the amount of the judgment, which the applicant seeks to have set aside on appeal.

[60] I am in unqualified agreement with Mr. Steyn that it would be incorrect for the court to rely on these returns as a basis for concluding that the applicant, if it was correct that this provision applies to it, will be unable to pay the costs, if it be an

unsuccessful party. It must first be mentioned that one of the returns was served at the registered office of the applicant's auditors. Would that return, standing on its own, provide credible evidence that the applicant would not be able to pay the costs of the proceedings? I think not.

[61] It is elementary reasoning that the return in question was served at a place where the applicant has no assets and cannot, in the circumstances, be used to gauge the level of the applicant's financial ability. What could possibly be found as assets in that event, would be the property of the auditors, which are not subject, in any event, to attachment in relation to the debts of or judgments obtained against their client. This return accordingly takes the matter no further.

[62] In relation to the other *nulla bona* return, it appears common cause that the deputy-sheriff went to execute at the respondent's farms. This, importantly, and it is common cause, was at the time when the applicant had vacated the farms in question and had removed its livestock and other property that was used at the farm.

[63] The logical question to pose at this juncture is whether it would then be correct that this return would serve as credible testimony, as accentuated above, that would convince this court that the applicant will be unable to pay the costs of the proceedings? Again, the answer that must be returned, must be in the negative. The said return does not provide credible evidence that the applicant is bereft of any property, movable or otherwise, that would render it able to pay the costs of the application for stay of proceedings in the event it becomes unsuccessful in those proceedings.

[64] What should also not be allowed to sink into oblivion, as we consider this question, is the fact that the applicant's director, Mr. Krüger undertook on oath, that he would be personally liable to pay the applicant's costs in the event the applicant is unsuccessful in the application for stay of proceedings. This statement, made on oath, and I must say, by a person who it is common cause, is an officer of this court, should not be taken lightly. It would, in my view, serve to discount a finding that the

applicant will be unable to pay the costs occasioned by the possible failure of the application for stay of proceedings and about whose success I venture no opinion.

[65] Another important factor that must be considered is that the respondent's counter-application, dated 3 February 2021, is solely directed at the possible failure of the applicant's application for stay of proceedings and not any other proceedings. In this regard, it must be recalled, as mentioned earlier, that the application for stay of proceedings is interlocutory in nature and effect. This fact becomes important in this jurisdiction as I narrate below.

[66] Rule 32(11) of this court deals with costs in interlocutory proceedings. It provides the following:

> 'Despite anything to the contrary in these rules, whether or not instructing and instructed legal practitioners are engaged in a cause or matter, the costs that may be awarded to a successful party in any interlocutory proceeding may not exceed N$ 20 000.'

[67] What becomes plain in this connection, is that the rule-maker, in his wisdom, decreed what the maximum amount of costs in interlocutory proceedings should be. Importantly, the fact that counsel, both instructing and instructed are engaged, does not, on it own change the amount of costs recoverable, namely, N$ 20 000. The importance of this provision is that it gives a guide, all things equal, as to what the amount of costs is likely to be in interlocutory proceedings.

[68] The net result is that the court, especially in view of the tender by the applicant's director to pay the costs occasioned by the application for stay of proceedings, if unsuccessful, is likely to in the amount of N$ 20 000. With all these factors properly taken into account, can this court say without diffidence that the applicant will not be able to pay the costs of the application for stay? It is plain to me that the answer returned must be in the negative. I cannot, on the basis of the evidence adduced by the respondent, on whom the onus lies, come to the view that the applicant will not be able to pay the costs occasioned by the application for stay of proceedings.

[69] Having answered this question in the negative, it is in my considered opinion unnecessary, in the circumstances, to answer the second stage of the enquiry mentioned in *Northbank,* namely, whether the court should exercise its discretion imbued on it by the section in question. The fact that the respondent has failed on the first hurdle, it is plain on *Northbank,* should mark the end of the application.

[70] There are no facts placed before this court, which when properly considered and weighed in the scales, lead the court to a conclusion that there is reason to believe that the applicant will be unable to satisfy an adverse costs order if it be issued against it in its quest to stay execution of the judgment of this court. The application in terms of s 11 must, in my considered view, fail and I so hold.

[71] I should perhaps, and for the sake of completeness, state that there is no evidence, credible or otherwise that points in the direction that the applicant has been or is about to be placed in liquidation. To this extent, Mr. Khama's reliance on the provisions of s 349 and 350 of the Act, is accordingly misplaced and I need not deal therewith at all. That being the case, I remain fortified that the application in terms of s 11 must fail in this case.

Rule 32 (9) and (10).

[72] The applicant pertinently raised the issue of non-compliance with rule 32(9) and (10) of the rules of this court. I find it unnecessary to deal in any detail with this issue. I say so because it is plain that the respondent's counter-application is an interlocutory one. I have said so in so many words in the preceding paragraphs of this judgment. It was stated in *Soltec CC v Swakopmund Super Spar*[9] that an application for security for costs is an interlocutory application and thus subject to strict compliance with the provisions of rule 32.

[73] It accordingly goes without saying that the respondent, as the party seeking to invoke an application for security for costs, was bound to initiate the provisions of rule 32(9) and (10) of the rules and attempt to reach an amicable resolution of the

[9] *Soltec CC v Swakopmund Super Spar* 2018 JDR 1566 (Nm) 18 (k).

issue of security for costs. It is not in dispute that the respondent did not fully comply with the said provisions.

[74] A letter written by the applicant, seeking particulars and the nature of the proposed interlocutory application; the orders likely to be sought and the grounds thereof, was not answered by the respondent.[10] It may have assisted bridge any gap between the parties had the correspondence in question been answered during the period of active engagement by the parties.

[75] It is too late in the day of judicial case management that the court should be dealing with bread and butter issues, so to speak, of impressing upon parties to fully and meaningfully comply with rule 32(9) and (10). By now, rule 32(9) and (10) should constitute an involuntary action by the parties, without much thought, reflection or rumination, let alone debate. That parties need to be reminded of the need for compliance is close to being scandalous. Courts must reserve judgments for real issues in dispute and not dedicate time to elementary issues like compliance with rule 32(9) and (10).

[76] Because I have dealt with the matter on the merits and on a very important interpretational matter, that does not appear to have been the subject of prior determination in this jurisdiction, I do not find in necessary in the peculiar circumstances of this case to strike the matter from the roll, although that is generally speaking, the correct route to follow.[11]

[77] This approach is adopted for reasons of practicality in this matter and must not be construed as an indication, suggestion or pointer that parties may fall foul of the provisions of rule 32 (9) and (10) without consequence. Far from it! Parties who tempt fate in this regard shall meet their comeuppance and have a tale to tell to other litigants not to follow the perilous path they did.

Applicability of rule 59 to s 11 of the Companies Act

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[10] Applicant's letter dated 23 December 2020, p 186-188 of the book of pleadings.

[11] *Appolos v Mukata* 2015 (3) NR… (HC) and *Bank Windhoek Ltd v Benlin Investments* CC 2017 NR (2) 403 (HC).

[78] The parties in this matter hardly found common ground on any issue, save, as stated, the text of the provisions of s 11 of the Act and how it is applied as recorded in case law. One of the issues on which the parties differed sharply was with regard to the question whether a party who correctly seeks to invoke s 11 is bound to follow the provisions of rule 59. The applicant insisted that rule 59 is only route. Mr. Khama for the respondent argued contrariwise and submitted that s 11 is a self-contained provision that must be applied independently of rule 59.

[79] Mr. Khama argued with all the powers of persuasion at his command that there is no correlation between s 11 and rule 59. He urged the court to hold that a party that seeks costs in terms of s 11 does not have to approach the court via the door of rule 59. He submitted that s 11 is self-contained and needs no aid or intervention from the provisions of the rules.

[80] Mr. Steyn, on the other hand, argued that every application for security for costs serving before this court, regardless of its foundation, whether the common law or statute, should be brought via the only portal, provided by rule 59. He argued that rule 59 is couched in peremptory terms that any application for security for costs must be brought in terms of the said rule. There is no other route created for properly bringing such an application before court, he retorted.

[81] Rule 59 reads as follows:

‘(1) A party entitled to demand security for costs from another must, if he she so desires, as soon as practicable after the commencement of proceedings, deliver a notice setting out the grounds on which the security is claimed and the amount demanded.

(2) If a party contests the amount of security only that party so objecting must, within three days after the notice contemplated in subrule (1) is received, give notice to the requesting party to meet the objecting party oat the office of the registrar on a date pre-arranged with the registrar and that notice must state the date of the meeting ant the date must not be more than three days after the notice of objection to the amount of security is delivered to the party requesting the security.

(3) The registrar must determine the amount of security to be given.

(4) If the party from whom security is demanded contests his or her liability to give security or if he or she fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within 10 days of the demand or the registrar's decision, the other party many apply to the managing judge on notice for an order that such security be given and that the proceedings be stayed until the order is complied with.

(5) The managing judge may, if security is not given within the time referred to in subrule (4), dismiss the proceedings instituted or strike out any pleadings filed by the party in default or make any order that he or she considers suitable or proper.

(6) Security for costs is, unless the managing judge otherwise directs or the parties otherwise agree, given in the form, amount and manner directed by registrar.

(7) The registrar may, on the application by the party in whose favour security is to be given and on notice to interested parties, increase the amount originally furnished if he or she is satisfied that that amount is no longer sufficient and his or her decision is final.

(8) A person to whom legal aid is rendered by or under a law or who is represented by the Government Attorney is not compelled to give security for the costs of the opposing party, unless the managing judge directs otherwise.'

[82] Broken down to its lowest denominations, the rule requires a party seeking security for costs, as soon as practicable, after the commencement of proceedings to do the following:

(a) a party seeking security for costs must give notice and state the grounds upon which such security is required;
(b) the amount of security demanded.

[83] The party from whom security is demanded has the following options:

(a) if it contests the amount of security only, it must within three days of receipt of the notice requiring security, give notice to the party seeking security to meet at the registrar's office for the determination of the amount by the registrar;

(b) if liability to furnish security is contested, or the party refuses to furnish the security in the amount demanded or the amount fixed by the registrar within 10 days of the demand or the registrar's decision, the other party may apply to the managing judge for an order for security;

(c) if security, as been determined by the court is not furnished within the time stated in (b) above, the court is at large to dismiss the proceedings instituted or strike out any pleadings filed by the party in default of providing security.

[84] Mr. Steyn helpfully drew the court's attention to the case of *Cellphone Warehouse (Pty) Ltd v Mobile Telecommunications Ltd.*[12] He urged this court to find that the judgment was wrongly decided and should not be followed. I shall briefly investigate his reasons for moving the court not to follow the reasoning adopted in *Cellphone Warehouse* and decide whether he is correct in this submission.

[85] In the said case, both companies were incorporated in Namibia. Mr. Heathcote, who appeared for the applicant submitted that the s 13 application before court, which is the equivalent of the s 11 application in this matter, was procedurally and completely defective because of non-compliance with rule 47, the predecessor to rule 59.

[86] In addressing this issue, the presiding judge came to the following conclusion at p 321 of the judgment:[13]

'On a proper construction, it seems to me that Rule 47(1) operates where a litigant is entitled to demand security for costs from the other party or where liability is admitted, for instance, where liability to furnish security has already been established or where such other party is a *peregrinus. In casu,* both parties are companies incorporated in Namibia, neither of which is entitled to demand security for costs from the other before liability is established and an order to that effect is made by the Court. No such liability has hitherto been established and liability is contested.'

[87] I interpose and state that rule 47(1) reads substantially the same as the present rule 59(1), save that in rule 47(1) there was the word 'and desiring' between

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[12] *Cellphone Warehouse (Pty) Ltd v Mobile Telecommunications Ltd* 2002 NR 318 (HC).

[13] *Ibid* at p 321 B-D.

entitled and to demand in the opening sentence. Nothing in that provision suggests that an application for security for costs must be brought in terms of the rule only where liability for security costs is admitted or where the other party is a *peregrinus* of this court. That notwithstanding, I do not find it necessary to make a determination on whether the said judgment is clearly wrong, as submitted by Mr. Steyn.

[88] That the statement quoted above may be regarded as incorrect, and I make no specific finding in that regard, can be seen from the text of the provisions as it provides for two different scenarios. The first is where liability security for costs is not contested but where only the amount of costs is the bone of contention. The second scenario deals with cases where liability for security for costs is contested. In that event, the matter may then be escalated and brought to attention of the managing judge to deal with the issue of liability for security for costs.

[89] I am, in any event, of the considered view that the interpretation of the rule as it is now drafted, fully resonates with the overriding objects of the current rules of court, namely, to 'facilitate the resolution of the real issues in dispute justly, and speedily and cost effectively . . .' It allows the parties to deal with the issue of security for costs in the first instance, without the involvement of the court.

[90] It is where liability for security for costs is contested or where the party liable to furnish security for costs does not furnish the security ordered that the machinery of the court is enlisted. To decide the correctness of the *Cellphone Warehouse* judgment, is in view of the new dispensation ushered in by the new rules, rendered unnecessary.

[91] Rule 59, in my considered view is procedural in nature and is the only mode provided by the rules by which matters of security for costs, regardless of their nature and origin, should be dealt with by this court. The fact that a party seeks security for costs in terms of s 11 of the Act or some other legislative provision, does not preclude that party from accessing the court via the door of rule 59.

[92] This is so because in terms of the rule, the party is required to state the grounds upon which security for costs is required or demanded. It is at that point that s 11 of the Act may or some other legal premise may be mentioned as a basis for the demand for security for costs, thus allowing the possibility of the matter being settled without the involvement of the court at the nascent stages.

[93] It must also be remembered that even in terms of s 11 of the Act, the court exercises a discretion ultimately in making a call on whether security for costs should be furnished. This also holds true in cases where an *incola* demands security for costs. The court exercises a discretion that should be exercised judicially, dependent upon the peculiar facts of the matter.

[94] In the premises, I am of the considered view and by parity of reasoning, that Mr. Khama's argument that his client did not have to bring the application in terms of rule 59 cannot be correct. Legislation and the common law provide for what must or may be done. The rules, on the other hand, provide for how that must be done.

[95] As such, it appears to me that the rules are meant to streamline the procedure all types of proceedings brought before the court, including issues relating to the procedure for bringing applications for security for costs. This is so regardless of the source of the power sought to be invoked, be it statute or the common law.

[96] As recorded before, rule 59 resonates with the overriding objectives of the rules and the ethos of judicial case management. The rules cannot be that easily be discarded in order to follow no recognised or specific route. This is especially so when the route to be followed is one fraught with unnecessary nooks and crannies, coupled with possible delay that may increase avoidable costs and at the same time burden the court with matters that may be otherwise be settled without necessarily invoking its machinery.

Conclusion

[97] I am accordingly of the considered view, regard being had to considerations taken into account, as recorded above, that the application for payment for security for costs, in this case should fail. The respondent has failed to show that this is a case that meets the test of credible testimony that the applicant will not be able to pay security for costs of the stay of execution.

[98] In any event, it was the finding of this court that the applicant in this matter, does not fall within the meaning of ‘applicant’ or ‘plaintiff’ contemplated in s 11 of the Act. In sum, the application for security for costs is bad in law and must for that reason, be dismissed.

Costs

[99] I have, in the course of discussing the case, touched upon the mandatory provisions of rule 32(11). They set a ceiling for costs in interlocutory matters and there is no doubt or argument that this is an interlocutory application. As such, the provisions of rule 32(11) should apply. Nothing has been submitted by either party that would serve to show that the mandatory prescripts of the rule should not be followed in this case.

[100] It is in very rare cases that the court should depart from the strict rails of rule 32(11). This should, in my view, be less so where there is no unanimity between or among the parties regarding the court allowing the parties to exceed the limit for stated and compelling reasons. In this case, I am not satisfied that there justification to depart from rule 32(11). The desire to recoup costs as much as possible from the other side from interlocutory matters does not, on its own, pass master.

[101] The ordinary rule applicable to costs, although by no means immutable, is that costs ordinarily follow the event. There is no reason why the unsuccessful party in this case, the respondent, should not be held liable to pay the applicant’s costs in respect of this particular application.

Order

[102] Having regard to the discussion and conclusions reached by the court as recorded in the preceding paragraphs, the order that commends itself as appropriate in this matter is the following:

1. The Respondent's counter-application for security for costs envisaged in Section 11 of the Companies Act, No. 28 of 2004, be and is hereby dismissed.
2. The Respondent is ordered to pay the costs of this application consequent upon the employment of one instructing and one instructed legal practitioner, subject to the provisions of Rule 32(11).

3. The costs ordered in paragraph 2 above, are subject to the provisions of Rule 32(11) of this Court's Rules.

4. The matter is postponed to **10 June 2021** at **08:30** for further directions on the conduct of the matter.

5. The parties are ordered to file a joint status report on proposals for the further conduct of the matter on or before 7 June 2021.

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T. S. MASUKU

Judge

APPEARANCES:

APPLICANT:	H.H. Steyn
Instructed by:	Krüger, Van Vuuren & Co. (Windhoek)
RESPONDENT:	D. Khama
Instructed by:	Sibeya & Partners