

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: Geokey Consult CC and Imprint Investments (Pty) Ltd	Plaintiff Defendant	Case No: HC-MD-CIV-ACT-CON-2021/03322 Division of Court: Main Division Heard on: 27 September 2022
Heard before: Honourable Mr Justice Usiku		Delivered on: 14 October 2022

Neutral citation: *Geokey Consult CC v Imprint Investments (Pty) Ltd* (HC-MD-CIV-ACT-CON-2021/03322) [2022] NAHCMD 554 (14 October 2022)

Order:

1. The plaintiff's application for security for costs is dismissed.
2. The plaintiff is ordered to pay the defendant's costs occasioned by the application for security for costs.
3. The defendant is directed to pay the plaintiff's wasted costs occasioned by the postponement of item 5 of the court order dated 26 January 2022 up to and including 20 April 2022.
4. The matter is postponed to 2 November 2022 at 15h15 for status hearing.
5. The parties shall file a joint status report on or before 26 October 2022.

Reasons for order:

USIKU J:

Introduction

[1] In this matter the plaintiff seeks an order in the following terms:

- '1. The respondent is directed to furnish security to the applicant in the amount of N\$5 000 000 (five million Namibia dollars);
2. The security shall be furnished by the way of the bank guarantee in the amount of N\$5 000 000 (five million Namibia dollars) and be delivered within 15 days of date of this order;
3. Alternatively, the form of and manner in which the security is to be furnished shall be fixed by the Registrar of this Court and shall be furnished within 15 days of it being determined by the Registrar;
4. The action under case number HC-MD-CIV-ACT-CON-2021/03322 is stayed until the respondent has furnished the security in the form, amount and manner directed by this order;
5. Costs of suit.'

[2] During the hearing of the application, the plaintiff insisted that it was not asking the court to determine the quantum of security for costs, but requests that the quantum be determined by the registrar. The plaintiff therefore abandoned prayers 1 and 2 above.

[3] The defendant contests liability to give security.

Background

[4] In September 2021, the plaintiff instituted action against the defendant claiming payment in the amount of N\$129 407.43 allegedly due and payable in terms of a contract between the parties.

[5] The defendant entered appearance to defend and filed a plea and a counterclaim. In its counterclaim, the defendant claims against the plaintiff payment in the amount of:

(a) N\$994 393.60 being damages suffered by defendant allegedly as a result of plaintiff's breach of contract, and,

(b) N\$15 872 800 being loss of income allegedly suffered by the defendant as a result of plaintiff's breach of contract.

[6] Thereafter, the plaintiff launched the present application for security for costs.

Application for security for costs

[7] The plaintiff seeks security for costs from the defendant on the basis that:

(a) the defendant has brought the counterclaim referred to above. The defendant is a defendant in another matter of High Power Holdings Investment Pty Ltd v Imprint Investment (Pty) Ltd with case number HC-MD-CIV-ACT-OTH-2021/03944, in which the plaintiffs therein seek an order to set aside and declare meetings held by the defendant between December 2020 and October 2021 as unlawful and null and void, plus costs. The plaintiff states that in the High Power matter there are three plaintiffs and sixteen defendants including the defendant herein, and,

(b) the legal fees in opposing the defendant's counterclaim will involve fees of two legal practitioners and an advocate. The defendant's counterclaim is based on the meetings held and decisions taken by the defendant which High Power now seeks to have set aside as null and void.

[8] On the basis of the above information, the plaintiff prays for an order as set out above.

[9] In opposition, the defendant contends that:

(a) the plaintiff has not placed evidence before court establishing the basis for its conclusion that the defendant will not be able to pay its costs, and that,

(b) the plaintiff has not justified the amount of N\$5 000 000 that it claims as security for costs.

[10] In addition, the defendant denies that there are grounds to believe that it will be unable to pay its costs in the event of it being ordered to do so in the action. The defendant prays that the plaintiff's application be dismissed with costs.

Application to strike out

[11] After receipt of the defendant's answering affidavit, the plaintiff gave notice of its intention to apply for the striking out of certain paragraphs in the answering affidavit. However, the intention to bring such application was abandoned during the hearing of the application for security for costs.

Analysis

[12] Section 11 of the Companies Act 24 of 2004 ('the Act') provides that:

'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 successful, require sufficient security to be given for those costs and may stay all proceedings until the security is given.'

[13] The above section requires a two stage enquiry. At the first stage the question is whether an applicant for security for costs has established that there is 'reason to believe' that a company, if unsuccessful, will not be able to pay the applicant's costs in the main action. If the court is not so satisfied, that is the end of the matter and the application is bound to be refused. However, if the court is satisfied that such 'reason to believe' exists, it must, at the second stage, decide, in the exercise of the discretion conferred upon it by the section, whether or not to compel security.¹

[14] In regard to when a court has 'reason to believe,' there must be facts before the court on which the court can conclude that there is reason to believe that the company will not be able to satisfy an adverse costs order. The onus of adducing such facts rests on the applicant.²

[15] In the present matter, the first issue for consideration is whether there is evidence that 'reason to believe' exists that the defendant will be unable to meet an adverse costs order against it.

[16] The evidence adduced by the plaintiff in its founding affidavit is to the effect that the defendant is also a defendant in the *High Power* matter. The plaintiff then proceeds to state that it is entitled to protection in respect of the recovery of reasonable legal costs and disbursements to be occasioned in opposition to the defendant's counterclaim. Thereafter, the plaintiff states that it has reasonable belief that the defendant will be unable to pay its costs if plaintiff's defence against the counterclaim is successful.

[17] I am of the opinion that the plaintiff has not presented facts before the court on which the court can conclude that there is reason to believe that the defendant will be unable to satisfy an adverse costs order. The mere fact that the defendant is also a defendant in another matter is

¹ *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 at 622 I-623A.

² *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 at 1071 E-H.

not sufficient to constitute evidence that the defendant will be unable to satisfy an adverse costs order. Furthermore, the allegation by the plaintiff that the legal fees involved in conducting the relevant claims will entail fees of two legal practitioners and an advocate, does not establish a 'reason to believe' that the defendant will not be able to satisfy an adverse costs order. I am therefore of the view that the plaintiff's application for security for costs stands to be dismissed for the foregoing reasons.

Wasted costs: non-compliance with court order dated 26 January 2022

[18] The court order dated 26 January 2022 gave directions in regard to exchange of pleadings in respect of the present application for security for costs. The defendant was directed, among other things, to file its notice of intention to oppose, if any, and answering affidavit on or before 7 April 2022. The defendant did not do so.

[19] In the parties' joint status report filed on 13 April 2022, the plaintiff reported, among other things, that it was seeking an order directing the defendant to pay its wasted costs occasioned by defendant's non-compliance with the aforementioned court order. The plaintiff insisted that such wasted costs be calculated from January 2022 including the 20 April 2022 court hearing and that such costs be on an attorney and own client scale.

[20] In the court order dated 19 April 2022, the court directed that the issue of wasted costs be determined together with the application for security for costs.

[21] On 16 May 2022, the parties filed a joint rule 32(10)report in which the defendant tendered to pay the plaintiff's wasted costs occasioned by the postponement of item 5 of the court order of 26 January 2022 and that these costs be determined at the hearing of the application for security for costs.

[22] At the hearing of the application for security for costs, the plaintiff prayed that the court grants the application for wasted costs as requested by the plaintiff.

[23] On the information before court, I am satisfied that the plaintiff is entitled to wasted costs occasioned by defendant's non-compliance with the court order dated 26 January 2022. However, I am not persuaded that the conduct of the defendant in not complying with the relevant court order justifies an order for wasted costs on the scale as between attorney and own

client. Furthermore, there is no evidence presented before court that party-and-party costs will not be sufficient to meet the expenses incurred by the plaintiff. I will therefore not grant a punitive costs order but just an ordinary wasted costs order.

[24] Insofar as costs in the present application are concerned, I am of the view that the general rule that costs follow the result, must find application.

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

1. The plaintiff's application for security for costs is dismissed.
2. The plaintiff is ordered to pay the defendant's costs occasioned by the application for security for costs.
3. The defendant is directed to pay the plaintiff's wasted costs occasioned by the postponement of item 5 of the court order dated 26 January 2022 up to and including 20 April 2022.
4. The matter is postponed to 2 November 2022 at 15h15 for status hearing
5. The parties shall file a joint status report on or before 26 October 2022.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
A Ndungula Nakamhela Attorneys, Windhoek	S Rukoro (with him C Williams) Instructed by Williams Legal Practitioners, Windhoek