

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON SECURITY OF COSTS

PRACTICE DIRECTION 61

Case Title: KEJ Road Safety Services CC and Roads Authority of Namibia Road Fund Administration	Plaintiff First Defendant Second Defendant	Case No: HC-MD-CIV-ACT-CON-2022/00028 Division of Court: High Court, Main Division
Coram: Honourable Justice Coleman		Heard: 4 August. 2023 Delivered: 17 August 2023
Neutral citation:	<i>KEJ Road Safety Services CC v Roads Authority of Namibia</i> (HC-MD-CIV-ACT-CON-2022/00028) [2023] NAHCMD 506 (17 August 2023)	
Order:	1. The plaintiff is ordered to furnish security for the second defendant's costs in the form of a bond of security for costs, or in such form as required by the Registrar of this Court, in the sum of N\$150 000, within ten days from the date of this order.	

2. The matter is stayed pending the furnishing of the security.
3. The plaintiff is ordered to pay the second defendant's costs and rule 32(11) of the rules of court does not apply.
4. The matter is postponed to **21 September 2023** at **15:00** for a status hearing.
5. The parties must deliver a joint status report on or before **14 September 2023**.

Reasons:

COLEMAN J:

Introduction

[1] This is an application by the second defendant that the plaintiff puts up security for costs in the main action. I will refer to the parties as cited in the main action.

Pertinent facts

[2] On or about 11 January 2022 the plaintiff caused summons to be issued against the defendants. The plaintiff claims what amounts to two mandamuses and, in the alternative, a claim for 'no less than' N\$4 000 000 as damages for the alleged breach of contract. The alleged breaches appear to be a breach of non-disclosure undertakings and copyright infringements.

[3] The laintiff is a close corporation incorporated and registered in terms of the Close Corporations Act, 1988 ('the Act') in Namibia. On 22 July 2022 the second defendant gave notice under rule 59 that it claims N\$350 000 security for costs to be put up by the plaintiff. The grounds articulated in the notice are that the second defendant has a reasonable belief that the plaintiff does not trade and does not have any realisable property or assets which may serve to

satisfy any costs awarded in favour of the second defendant in this matter.

[4] The facts that the second defendant rely on for this belief are essentially, that the plaintiff had not paid its annual BIPA duties for over ten years, its accounting officer is not in good standing with his professional organisation, no record of any assets could be found, its registered address is a residential address with no apparent ties to the plaintiff, the principal place of business cited in the particulars of claim - Quantum house - apparently does not exist and no financial statements were provided despite requests.

[5] In its answering affidavit the plaintiff disputes many of these allegations but still failed to put up financial statements. It alleges that it owns sufficient realisable property to satisfy a potential costs order, being computers and other information technology hardware. Attempts by the second defendant's legal practitioners to verify this did not come to fruition.

[6] In addition, on 23 June 2022 the plaintiff through its legal practitioners confirmed that it would provide N\$150 000 as security for costs. However, on 18 October 2022, the legal practitioners changed their stance ostensibly following consultation with counsel. This then resulted in a fully-fledged application where a founding affidavit comprising of 126 pages was filed followed by an answering affidavit and replying affidavit.

Conclusion

[7] I considered all the facts and submissions on behalf of the parties and will address only those that I consider relevant for the purposes of my conclusions herein.

[8] Section 8 of the Act provides as follows:

'When a corporation in any legal proceedings is a plaintiff or applicant or brings a counterclaim or counter-application, the Court concerned may at any time during the proceedings if it appears that there is reason to believe that the corporation or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent,

or the defendant or respondent in reconvention, if he is successful in his defence, require security to be given for those costs, and may stay all proceedings till the security is given.’ (Emphasis added)

[9] In my view the words ‘...if it appears that there is reason to believe...’ indicate that the court’s decision in this context is informed with what is apparent rather than conclusive. The court’s discretion is triggered by a reason that appears to exist to believe that the plaintiff will be unable to pay the second defendant’s costs.

[10] Close corporations are relatively loosely regulated corporate entities. One would expect that the bare minimum of compliance is adhered to. It appears that the plaintiff in this matter is tardy with its BIPA payments and does not have an accounting officer who is in good standing with his professional body. It also appears that the plaintiff does not have readily available financial statements. Apart from the unverified computers and other hardware that the plaintiff alleges it owns, it does not own any other property.

[11] On the facts before me it appears that there is reason to believe that the plaintiff will be unable to pay the second defendant’s costs if it is successful in its defence. In addition, the second defendant has indicated that it intends to except to the plaintiff’s particulars of claim. In response the plaintiff sought to amend its particulars of claims, which normally can be taken as an acknowledgement of – at least – a problem with the particulars of claim. The notice of intention to amend is objected to. The amendment had not been resolved yet. In short, the plaintiff’s claim is clearly contentious at this point in time.

[12] This matter had been turned into an unnecessary elaborate procedure. The plaintiff initially acknowledged liability for security for costs and then withdrew it. Instead of simply providing financial statements – assuming it exist – the plaintiff put up resistance to the second defendant’s requests for information, which necessitated this application. Therefore, I agree with the second defendant’s counsel that the limitation on costs in rule 32(11) should not apply here.

[13] Accordingly, I make the following order:

1. The plaintiff is ordered to furnish security for the second defendant's costs in the form of a bond of security for costs, or in such form as required by the Registrar of this Court, in the sum of N\$150 000, within ten days from the date of this order.
2. The matter is stayed pending the furnishing of the security.
3. The plaintiff is ordered to pay the second defendant's costs and rule 32(11) of the rules of court does not apply.
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Judge's Signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Second defendant
TC Phatela Instructed by Kadhila Amoomo Legal Practitioners, Windhoek	S Vlieghe Of Koep & Partners, Windhoek