REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 374/2013

In the matter between:

GERD ALEXANDER SCHÜTZ **APPLICANT/RESPONDENT**

AND

CLAUDIA PIRKER **FIRST RESPONDENT / FIRST APPLICANT**

HEFNER FARMING CC **SECONDRESPONDENT / SECOND APPLICANT**

Neutral citation: *Schutz v Pirker* (A 374 /2013) [2014] NAHCMD 341 (12 November 2014)

Coram: UEITELE, J

Heard: 30 October 2014

Delivered: 12 November 2014

Flynote: *Practice* - Applications and motions - Notice in terms of Rule 55 and Notice of Motion in terms of Rule 65(1) of the Rules of Court - Meaning of.

Practice – Interlocutory proceedings - Security for costs - *Incola* claiming security for costs against peregrinus - *Incola* does not have a right which entitles him as a matter of

course to furnishing of security for costs by *peregrinus* - Court has judicial discretion - Court should have regard to particular circumstances of the case, and to considerations of fairness and equity to both parties.

Summary: The applicant commenced proceedings on 21 October 2013, by way of notice of motion. In his notice the applicant is asking this court to order Ms Pirker (who is the first respondent) to refrain from interfering with Mr Simon Gaeb (who is allegedly the applicant's agent) and to allow Simon Gaeb to enter onto farm Hefner No. 45 to attend to the applicant's interest on the farm. The applicant is furthermore asking this court to order Ms Pirker to sign the amended founding statement in respect of Hefner Farming CC, so as to reflect a certain Clemens Hellman as the holder of 25% of the members' interest in and to Hefner Farming CC.

On 30 October 2013 Ms Pirker gave notice that she will oppose the applicant's application. On 17 January 2014 Ms Pirker gave the applicant notice, under Rule 47(1), that she requires the applicant to furnish her with security for costs in the amount of N$150 000. She gave as her reasons for requiring the applicant to furnish security for costs the fact that, the applicant is a *peregrinus* of this court. On 28 January 2014 the applicant gave notice to Ms Pirker that he disputes Pirker's entitlement to security for costs. He disputes her entitlement to costs on the basis that, to the knowledge of Pirker, he (the applicant) has substantial assets in the Republic of Namibia, which assets are in excess of the security requested by Pirker. On 11 February 2014 Pirker gave notice that on 21 February 2014 she will apply to the Court to order the applicant to furnish security for costs in the proceedings commenced on 21 October 2013.

On 24 September 2014 the matter was postponed to 30 October 2014 for hearing the application for security of costs. It was further ordered that, Ms Pirker must file her heads of argument by no later than 20 October 2014 and the applicant must file his heads of argument by no later than 23 October 2014. Ms Pirker only filed her heads of argument on 23 October 2014. On 27 October 2014 Ms Pirker brought an application (by way of simple notice) for the condonation of the late filing of the heads of argument.

At the hearing of the application for security of costs on 30 October 2014 Mr Mouton who appeared for the applicant indicated that, the applicant opposes the application for condonation, this is despite the fact that, no notice to oppose the application for condonation was filed. Mr Mouton opposes the condonation application on two grounds. The first ground of opposition is based on the argument that the application for condonation is invalid for want of compliance with Rule 65(1) & (4). The second ground of opposition is that the late filing of the heads of argument prejudices the applicant in that he had to prepare his heads of argument without insight to the arguments on behalf of Pirker.

Held, that Ms Pirker's failure to timeously file the heads of argument was not intentional, and that she sufficiently explained the failure. The application for security for costs was, despite the late filing of the heads of argument, heard on the date on which it was set down for hearing. No demonstrable adverse effects were placed before this Court. That this is a clear case which calls for this Court to exercise its discretion in favour of Ms Pirker, and condone her legal practitioner's failure to timeously compliance with the court order of 24 September 2014.

Held further that the question whether or not the court must order a party from whom security for costs is demanded lies within the discretion of the court. That the court must carry out a balancing exercise. On the one hand it must weigh the injustice to the applicant if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the respondent if no security is ordered and at the trial the applicant's claim fails and the respondent finds himself unable to recover from the applicant the costs which have been incurred by her in her defence of the claim.

Held further, that the scale must tilt in favour of Ms Pirker for the following reasons. The applicant is a *peregrinus* of this court and he does not dispute the fact that if Ms Pirker is successful in the main application and an order of costs is granted in her favour it will be difficult if not impossible for her to recover from him the costs which she has incurred in her defence of the claim against her. The applicant simply states that he has 'considerable assets' in Namibia. Firstly the assets that he claims to have are the

subject of the dispute in the main application, secondly he does not inform this court what the value of those 'assets' are.

ORDER

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1. The applicant is hereby ordered to furnish security for the costs of Ms Pirker in the main application in an amount of N$150 000.

2. The proceedings pending before the Court are stayed until security has been given by the applicant.

3. The matter is postponed to 28 January 2015 at 08h30 for a status hearing.

4. The applicant must pay Ms Pirker's costs of this application, the costs to include the cost of one instructing and one instructed counsel.

JUDGMENT

UEITELE, J

BACKGROUND

[1] The applicant commenced proceedings on 21 October 2013, by way of notice of motion. In his notice the applicant is asking this court to order Ms Pirker (who is the first respondent, but I will, in this judgment, for ease of reference refer to her as Ms Pirker) to refrain from interfering with Mr Simon Gaeb (who is allegedly the applicant's agent) and to allow Simon Gaeb to enter onto farm Hefner No. 45 to attend to the applicant's interest on the farm. The applicant is furthermore asking this court to order Ms Pirker to sign the amended founding statement in respect of Hefner Farming CC, so as to reflect

a certain Clemens Hellman as the holder of 25% of the members' interest in and to Hefner Farming CC.

[2] On 30 October 2013 Ms Pirker gave notice that she will oppose the applicant's application. On 17 January 2014 Ms Pirker gave the applicant notice, under Rule 47(1), that she requires the applicant to furnish her with security for costs in the amount of N$150 000. She gave as her reasons for requiring the applicant to furnish security for costs the fact that, the applicant is a *peregrinus* of this court. On 28 January 2014 the applicant gave notice to Ms Pirker that he disputes Ms Pirker's entitlement to security for costs. He disputes her entitlement to costs on the basis that, to the knowledge of Ms Pirker, he (the applicant) has substantial assets in the Republic of Namibia, which assets are in excess of the security requested by Ms Pirker. On 11 February 2014 Ms Pirker gave notice that on 21 February 2014 she will apply to the Court to order the applicant to furnish security for costs in the proceedings commenced on 21 October 2013.

[3] The application for costs did, however, not proceed on 21 February 2014. The matter was docket allocated to me and on 23 July 2014 I called for a case planning conference for 6 August 2014. On that day, I postponed the matter to 24 September 2014. On 24 September 2014, I postponed the matter to 30 October 2014 for hearing the application for security of costs. I further ordered that, Ms Pirker must file her heads of argument by no later than 20 October 2014 and the applicant must file his heads of argument by no later than 23 October 2014. Ms Pirker only filed her heads of argument on 23 October 2014. On 27 October 2014 Ms Pirker brought an application (by way of simple notice) for the condonation of the late filing of the heads of argument.

[4] At the hearing of the application for security of costs on 30 October 2014 Mr Mouton who appeared for the applicant indicated that, the applicant opposes the application for condonation, this is despite the fact that, no notice to oppose the applicant for condonation was filed. I will accordingly first deal with the application for condonation, because a determination of the application will determine the direction of the application for costs.

B CONDONATION OF THE LATE FILLING OF THE HEADS OF ARGUMENTS

[5] The affidavit in support of the application for the condonation of the late filling of the heads of arguments was deposed to by Ms H Schneider, instructed counsel for Ms Pirker, Ms Schneider explains her failure to timeously file her heads of arguments as follows: She says that prior to preparing the heads of argument she perused the Rules of Court which pertain to the filing of heads of argument in interlocutory applications in application proceedings and established that Rule 71(5)(b) requires heads of argument to be filed by all parties not more than three days before the hearing of the interlocutory application. She was therefore convinced that she had to prepare and settle the heads of argument ready to be filed by no later than Friday, 24 October 2014, leaving three clear court days prior to the date of hearing. She submitted that she failed to look at the court order (of 24 September 2014) which ordered Ms Pirker to file her heads of argument on 20 October 2014. She further stated that it was only when she received the applicant's heads of argument on the afternoon of 24 October 2014 that she was alerted by the opening remarks that she had failed to comply with court order.

[6] Mr Mouton opposes the condonation application on two grounds. The first ground of opposition is based on the argument that the application for condonation is invalid for want of compliance with Rule 65(1) & (4). He submitted that, in terms of Rule 65(4) the application had to be in the form of Form 17, but because it did not so comply, with Rule 65(4) it did not indicate when the applicant had to file a notice to oppose and when he had to file his opposing affidavit and is to that extend void. The second ground of opposition is that the late filing of the heads of argument prejudices the applicant in that he had to prepare his heads of argument without insight to the arguments on behalf of Pirker. He further argued that Ms Schneider was personally present in my Chamber and in court when I ordered that Ms Pirker file her heads of argument on or before 20 October 2014.

[7] Before I consider the objection raised by Mr Mouton I will briefly digress and state that this application was argued before me on 30 October 2014 and Mr Mouton also

argued an application for the condonation of the late filing of an application to amend particulars of claim on 03 November 2014[1]. In that application for condonation it was in exactly the same form (the 'short form') as is the case in this application. I raised the question with Mr Mouton, whether in view of his arguments in this matter, should I then not also regard the application in the *Kehrmann* matter as a nullity because it did not comply with Rule 65(1) & (4). Mr Mouton could not give an unequivocal answer to that question.

[8] I now return to the current matter. Rule 65 (1) & (4) reads as follows:

'**Requirements in respect of an application**

65. (1) Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.

(2) ….

(4) Every application, other than one brought *ex parte* in terms of rule 72, must be brought on notice of motion on Form 17 and true copies of the notice and all annexures thereto must be served, either before or after the application is issued by the registrar, on every party to whom notice of the application is to be given.'

[9] When Mr Mouton argued the matter I drew his attention to Rule 55, and asked him whether Rule 65(1) & (4) apply to interlocutory proceedings. His reply was that, Rule 65(1) & (4) equally applies to interlocutory proceedings. Rule 55 provides as follows:

'**Upliftment of bar, extension of time, relaxation or condonation**

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[1] *Martin Kehrmann v Stephane Gradtke case* No I 1613/2004.

> **55.** (1) The court or the managing judge may, on application on notice to every party and on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.
>
> (2) An extension of time may be ordered although the application is made before the expiry of the time prescribed or fixed and the managing judge ordering the extension may make any order he or she considers suitable or appropriate as to the recalling, varying or cancelling of the consequences of default, whether such consequences flow from the terms of any order or from these rules. ‘

[10] I do not agree with Mr Mouton for the following reasons. In the matter of *Yorkshire Insurance Co Ltd v Rueben*[2] the court had the following to say:

> ‘There is to my mind a substantial difference between an application being brought on notice and an application brought on notice of motion. It could never have been intended, when parties are already engaged in litigation and have complied with such formalities as appointing attorneys and giving addresses for the service of documents in the proceedings, that, in further applications incidental to such proceedings, the parties would be required to go through all the same formalities again with all the concomitant and unnecessary expense.
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> I am satisfied that the use of the word 'notice' in sub-rule (11) as opposed to the 'notice of motion' in the other sub-rules to Rule 6 indicates clearly that interlocutory and other applications incidental to pending proceedings were not intended to be brought by way of formal notice of motion in the same way as applications initiating proceedings.’

The argument of Munnik, J in the *Yorkshire Insurance* case apply with equal force to the present matter, and the objection by Mr Mouton that the application for condonation does not comply with rule 65(1) & (4) is ill-conceived and I reject it.

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[2] 1967 (2) SA 263 at 265 (C-H).

[11] The question whether or not I will condone the late filing of the heads of argument falls within my discretion, which I must exercise judiciously. Rule 56, assist me in the exercise of my discretion in that it outlines some of the guidelines I must consider in the exercise on my discretion, those guidelines are:

> '**56.** (1) On application for relief from a sanction imposed or an adverse consequence arising from a failure to comply with a rule, practice direction or court order, the court will consider all the circumstances, including -
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> (a) whether the application for relief has been made promptly;
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> (b) whether the failure to comply is intentional;
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> (c) whether there is sufficient explanation for the failure;
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> (d) the extent to which the party in default has complied with other rules, practice directions or court orders;
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> (e) whether the failure to comply is caused by the party or by his or her legal practitioner;
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> (f) whether the trial date or the likely trial date can still be met if relief is granted;
>
> (g) the effect which the failure to comply has or is likely to have on each party; and
>
> (h) the effect which the granting of relief would have on each party and the interests of the administration of justice.'

[12] In this matter, Ms Schneider has stated that she only came to realize that she has not complied with the court order of 24 September 2014 in the late afternoon of Friday, 24 October 2014. When she realized her non-compliance she promptly brought an application for the condonation of her failure to comply with the court order on Monday, 27 October 2014. She further stated that her failure to timeously file the heads was caused by her oversight to take into consideration the court order, she only had regard to the Rules of Court. I am accordingly satisfied that her failure to timeously file the heads of argument was not intentional, and that she sufficiently explained the failure. The application for security of costs was, despite the late filing of the heads of

argument, heard on the date on which it was set down for hearing. No demonstrable adverse effects were placed before me. I am accordingly of the view that this is a clear case which calls for me to exercise my discretion in favour of Ms Pirker, and I accordingly condone her legal practitioner's failure to timeously compliance with the court order of 24 September 2014. I will accordingly proceed to deal with the application for costs.

C SECURITY FOR COSTS

[13] The affidavit in support of the application for security of cost was deposed to by Mr Udaneka Nakhamela the legal practitioner representing Ms Pirker. In the supporting affidavit Mr. Nakhamela advanced the following reasons for demanding security from the applicant.

(a) That a search was conducted at the Deeds Registries Office and the search did not reveal any immovable property registered against the applicant's name.

(b) The assets which applicant claims to have are disputed by Ms Pirker.

(c) That if Ms Pirker is successful in her opposition to the applicant's application she will have no effective way of executing a cost order in her favour against the applicant.

[14] Mr Mueller deposed to the opposing affidavit on behalf the applicant, he raised a point *in limine*, namely that Ms Pirker has not demanded security for costs 'as soon as possible after the commencement of the proceedings'. I have no difficulty in dismissing the point *in limine* because, in my view the notice for the furnishing of security for costs was given as soon as the notice to oppose the main application was given and there was in my opinion no unreasonable delay by Ms Pirker in giving the notice for a request for security for costs. The grounds on which the application for security of cost is opposed amount to the following:

(a) Ms Pirker is not per se entitled to security for costs simply because the applicant is a *peregrinus* and domiciled in a foreign country.

(b) The applicant holds and is the registered owner of the 50% member's interest in and to Hefner Farming CC.

(c) That Ms Pirker has not made out a case why the applicant must furnish security.

[15] The question whether or not the court must order a party from whom security for costs is demanded lies within the discretion of the court. The principles which may guide the court were set out as follows in the matter of *Magida v Minister of Police:*[3]

> '…an *incola* by claiming security for his costs against a non-domiciled foreigner did not assert a right flowing from substantive law. In other words, an *incola* did not have a right which entitled him as a matter of course to the furnishing of security for his costs. It was a question of practice in the Dutch courts that a Judge should hold an inquiry to investigate the merits of the matter fully. The approach of the Judge was not to protect the interests of the incola to the fullest extent. He had a judicial discretion to grant or refuse the furnishing of security by means of a *cautio fideiussoria* by having due regard to the particular circumstances of the case as well as consideration of equity and fairness to both the *incola* and the non-domiciled foreigner. If the non-domiciled foreigner was, however, unable to find a surety (*fideiussor*) he could, if he so wished, tender security by way of pledge (*cautio pigneraticia*) but he was not compelled to do so, … The Dutch jurists in their treatment of the subject of furnishing security *by cautio fideiussoria or cautio juratoria* certainly did not consider the dice to be loaded against a non-domiciled foreigner. On the contrary, their approach was most benevolent to the non-domiciled foreigner by stressing inter alia the following relevant aspects:
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> 1. Where the non-domiciled foreigner is a *vagabundus* without a fixed residence and has no country of his own ('die ginck dwalen, ende gheen seeckere woonplaats en hadde, geen eygen Landt ende Jurisdictie van dien Rechter en besadt') the Judge should be more readily disposed to order him to furnish adequate sureties

[3] 1987 (1) SA 1 (A).

(fideiussores) unless he possessed fixed property in respect of which he could furnish a hypothec. (Damhouder (op cit cap 99 nr 6).)

2. No one should be required to furnish security beyond his means to an *incola*. Nor should a non-domiciled foreigner be compelled to perform the impossible. Van Alphen (1608 - 1691) Papegay ofte Formulier Boek (1682) Eerste Deel hoofstuk 24 request 9 'mandement van arrest op goederen om de Jurisdictie te fonderen nr 10': 'Niemand is gehouden te stellen cautie vorder as hykan...'

3. The object of the cautio juratoria, based on considerations of equity and justice, was to prevent an impecunious non-domiciled foreigner from being deprived of his right to litigate against an incola.'[4]

[16] In the matter of *Hepute and Others v Minister of Mines and Energy and Another* [5] the Supreme Court said the following:

'[30] What the court is engaged in is a balancing exercise. As was said in *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER 534 (CA) at 540a - b:

'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 plaintiffs 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.'

[17] In the present matter upon perusing the affidavits filed in this intermediate application for security for costs the applicable facts seem to show that:

(a) the applicant is a *peregrinus* of this Court, he resides in Austria;

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[4] Also see the case of *Hepute and Others v Minister of Mines and Energy and Another* 2007 (1) NR 124 (HC).

[5] 2008 (2) NR 399 (SC) Also see the case of *Northbank Diamonds Ltd v FTK Holland BV and Others* 2002 NR 284 (SC).

(b) despite the fact that the Amended Founding Statement in respect of Hefner Farming CC indicates that the applicant holds 50% members' interest in that Close Corporation, Ms Pirker denies that the applicant ever held members' interest in the Close Corporation.

(c) Pirker is an *incola* of this court.

[18] It is against the backdrop of these facts that, I have to carry out a balancing act. I am of the view that the scale must tilt in favour of Ms Pirker for me to order the applicant to furnish Ms Pirker the security for costs she has demanded. I say so for the following reasons. The applicant is a peregrinus of this court (I am mindful of the fact that the mere fact that one of the litigants is a *peregrinus* does not entitle the *incola* party to security for costs) and he does not dispute the fact that if Ms Pirker is successful in the main application and an order of costs is granted in her favour it will be difficult if not impossible for her to recover from him the costs which she has incurred in her defence of the claim against her. The applicant simply states that he has 'considerable assets' in Namibia. Firstly the assets that he claims to have are the subject of the dispute in the main application, secondly he does not inform this court what the value of those 'assets' are.

[17] In addition to my finding that the applicant must provide the security for costs of Ms Pirker, I am of the view that I am in just as good, a position to adjudicate the quantum of the costs in order to avoid any further delay of this matter. Ms Pirker claimed an amount of N$150 000 in her rule 47 notice. I am satisfied that N$150 000 is a reasonable amount for security for costs. As Ms Pirker has substantially succeeded in her application, it seems to me that in the circumstances it is just and equitable that the applicant must pay Ms Pirker's costs occasioned by his opposition to this application. I therefore make the following order:

1. The applicant is hereby ordered to furnish security for the costs of Ms Pirker in the main application in an amount of N$150 000.

2. The proceedings pending before the Court are stayed until security has been given by the applicant.
3. The matter is postponed to 28 January 2015 at 08h30 for a status hearing.

4. The applicant must pay Ms Pirker's costs of this application, the costs to include the cost of one instructing and one instructed counsel.

SFI Ueitele
Judge

APPEARANCES:

APPLICANT/RESPONDENT	C J MOUTON Instructed by Mueller legal Practitioners
DEFENDANT:	H SCHNEIDER Instructed by Nakhamela Attorneys