HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A304/2021
(1) REPORTABLE: YES.
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE: 30 MAY 2023
SIGNATURE:

In the matter between:

JEANRU KONSTRUKSIE (PTY) LTD Applicant

and

JACO STEFAN BOTES Respondent

Summary: *Rule 49(13) obliges an appellant to furnish security for the costs of the respondent in an appeal. If the requirement to furnish security is not waived by the respondent, the appellant may obtain a release from the obligation to furnish such security from the court which had granted leave to appeal. The appellant had failed to do so and contended that the Rule was invalid.* ***Found:*** *that the Rule was procedural in nature and sourced in the High Court's common law and Constitutional powers to regulate its own processes. It was accordingly not promulgated ultra vires the Rules Board's powers and the appellant's failure to provide the requisite security rendered the prosecution of his appeal, in particular the obtaining of a date for the hearing of the appeal, irregular.*

ORDERS

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1. The application by the respondent in this application (the appellant in the appeal in case no: A304/21) for a date for hearing of the appeal, is set aside as being irregular.

2. The respondent is ordered to pay the costs of the application.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] The facts pertaining to this application are reasonably simple. It concerns an appellant's failure to furnish "good and sufficient" security for the respondent's costs in a pending appeal in terms of Rule 49(13). After a number of skirmishes, the appellant's ultimate defence was the claim that the relevant Rule was invalid.

Relevant facts

[2] As the matter concerns a pending appeal, it shall be more convenient to refer to the parties as in the appeal itself.

[3] The respondent in the appeal is Jeanru Konstruksie (Pty) Ltd, a construction company. On 21 January 2020 the respondent instituted action against the appellant, J. S. Botes, for payment of R 872 095,65 for services rendered in terms of a written building contract.

[4] The appellant had opposed the action but on 8 June 2020 this court, per Pretorius AJ, granted summary judgment against the appellant.

[5] After leave to appeal was refused by the court of first instance, the Supreme Court of Appeal granted the requisite leave to a full court of this Division on 31 March 2021.

[6] A notice of appeal had been delivered on 28 April 2021 and the appellant proceeded to prosecute the appeal by delivering the record and thereafter applying for a date of hearing of the appeal.

[7] The appellant had not furnished the requisite security for the respondent's costs of the appeal and neither had he obtained a release from his obligation to do so from the court which had granted him leave to appeal.

[8] Thereupon the respondent launched an application in terms of Rule 30, claiming that the prosecution of the appeal, in particular the obtaining of a date for the hearing of the appeal (and consequentially the set down thereof) constituted irregular proceedings in the absence of the necessary security having been furnished.

[9] After various issues regarding dates of set down, erroneous assumptions about the appeal date allocated and the like had all been dealt with, the matter finally came before this court as an opposed motion on 21 April 2023. Insofar as condonation had been necessary for the various deliveries of documents and processes, these were not opposed and condonation was consequently granted. The appeal has been set down for hearing on 31 May 2023.

[10] At the hearing of the application, the consequence thereof, if successful, was debated with counsel. The consequence of a finding of an irregular step having been taken by the appellant would result therein that the appeal would have to be removed from the roll or run the risk of being struck off. This is what has happened in numerous other cases where an appellant had been found to have been in default of having furnished the required security[1]. There was no satisfactory answer produced as to why an alternate avenue, such as applying to the Supreme Court of Appeal for release of the obligation to furnish security or simply the furnishing of security itself (in an amount determined by the Registrar in the event of a dispute)

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[1] See the cases referred to in par 19 hereunder and listed in footnote 9 as well as *Boland Konstruksiemaatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* 1974 (4) SA 291 (C).

had or could not have been explored. It is against this backdrop that I proceed to deal with the contentions raised by the appellant.

The legal position

[11] Rule 49 (13) previously read as follows:

> "*Unless the respondent waives his right to security, the appellant shall, before lodging copies of the record on appeal with the Registrar, enter into good and sufficient security for the respondent's costs of appeal. In the event of failure by the parties to agree on the mount of security, the Registrar shall fix the amount and his decision shall be final*".

[12] After a substantive analysis of the Rule and the issue of whether poverty of a litigant may create a bar to him proceeding with litigation, the formulation of the Rule was found to be unconstitutional to the extent that it did not vest in the Court a discretion to exempt wholly or in part an appellant from compliance with his obligation to furnish security[2].

[13] Consequently the Rule was amended on 29 October 1999 to now read as follows (the inserted amendment is underlined):

> *"(a) Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the Registrar, enter into good and sufficient security for the respondent's costs of appeal.*
>
> *(b) In the event of failure by the parties to agree on the amount of security ….".*

[14] Applying the (amended) Rule to the facts of this case there can be no doubt that the appellant, had he desired to be absolved or released from his obligation to

[2] *Shepherd v O'Neill and Others* 2000 (2) SA 1066 (NPD) (*O'Neill*), the order being at 1073 I – J, delivered on 30 August 1999.

furnish security, had to apply for such release to the court which had granted leave to appeal, in this case the Supreme Court of Appeal[3]. This had not been done.

The appellant's contention

[15] The appellant accepted the legal position to be as set out above, but contended that the Rule was invalid. The argument in respect of invalidity was this: Section 6(1)(m) of the Rules Board for Courts of Law Act 107 of 1995 provides that the Rules Board may make rules regulating "*… the manner of determining the amount of security in any case where it is required that security shall be given, and the form and manner in which security may be given*" (the underlined portion is what the appellant sought to emphasise). The argument was then further that rules made by the Rules Board may not stipulate "where security is required" and that the source for such obligation must be found elsewhere, such as in a statutory provision or the common law. The appellant contended that as neither the Superior Courts Act 10 of 2013 nor the common law vested the High Courts, the Supreme Court of Appeal or the Constitutional Court (collectively referred to as the High Courts for sake of convenience) with a discretionary power to require security for costs when any of these courts granted leave to appeal, there was no such source. The appellant consequently contended that the promulgation of Rule 49(13) was ultra vires (i.e beyond the powers of the Rules Board) and therefore invalid.

Evaluation

[16] Some support for the appellant's contentions can be found in comments expressed by Engelbrecht AJ in *Dr Maureen Allem Inc v Baard*[4] (*Dr Allem*). Although these views were strongly expressed, they did not form the basis of the order granted in that case and should therefore be regarded as obiter. The comments did rely to an extent on similar obiter views expressed in *FirstRand Bank Ltd v Van der Merwe and Another*[5].

[17] The question of the validity of the current formulation of Rule 49(13) had however squarely been considered and decided a month after the judgment of

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[3] *Strouthos v Shear* 2003 (4) SA 137 (T).
[4] 2022 (3) SA 207 (GJ).
[5] [2002] ZAECHC 23 (7 October 20002).

Engelbrecht AJ by Roelofse (then AJ) in *Freedom Stationary (Pty) Ltd v Palm Stationary Manufacturers (Pty) Ltd and Mveli Data Solutions (Pty) Ltd (Joint Venture) and Others*[6] (*Freedom Stationary*). The attack on the validity of the Rule was the same as in the case in *Dr Allem*.

[18] In *Freedom Stationary* the sometimes ill-defined distinction between substantive and procedural law has been examined, starting with a quotation from Jeremy Bentham (1747 – 1842)[7]. The learned judge, after referring to section 13 of the now repealed Companies Act 13 of 1973 and *Systems Applications Consultants (Pty) Ltd t/a Securinfo v Systems Applications Products AG and Others*[8] (*Systems*), concluded that security for costs is an integral part of procedural law and, as such, fell within the powers of the Rules Board.

[19] For many years since the amendment of Rule 49(13) in October 1999 which, as already mentioned, had remedied its previous unconstitutional formulation, the High Courts, including full courts of various Divisions, have held that "*… it is the right of a respondent on appeal to go into an appeal secured, at least to the extent provided for by the Rules, against the inability of the appellant to pay the costs if the appeal is unsuccessful*[9]".

[20] Engelbrecht AJ argued in *Dr Allem* that most of these judgments pre-dated the promulgation of the Superior Courts Act 10 of 2013. The relevance of this argument is that the Supreme Court Act 59 of 1959 had provided in Section 20(5)(b) that if leave to appeal was granted against a judgment or order of a provisional division in any civil proceedings given <u>on appeal</u> to it, the court granting leave could, in its discretion order the appellant to furnish security for the respondent's costs of the appeal. The argument proceeded that now that the Supreme Court Act has been repealed, the statutory source for requiring security for costs has fallen away, but this is incorrect. The repealed section 20(5)(b) only dealt with appeals against orders

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[6] [2021] ZAMPMBHC 42 (15 September 2021).
[7] At par [3].
[8] [2015] ZASCA 93 (1 June 2015).
[9] *Cape Diem Explorations (Pty) Ltd v Kasimira Trading 82 (Pty) Ltd and Others* [2016] ZAGPPHC 1099 (14 December 2016); *Kama and others v Kama and Another* [2007] ZAECHV 115 (6 September 2007) (a full court); *Jyoti Structures Africa (Pty) Ltd v KRB Electrical Engineers* 2011 (3) SA 231 (GSJ) and *TR Eagle Air (Pty) Ltd v Thompson* [2020] ZAGPPHC 801.

made in respect of appeals to a high court as court of appeal (e.g such as an appeal from a magistrates court). Rule 49(13) however also covers, and always have covered, appeals against orders by high courts sitting as courts of first instance. Its source could therefore never have been limited to Section 20(5)(b) instances only. The argument that once Section 20(5)(b) was repealed, the "source" of the Rule 49(13) requirement for furnishing security fell away, incorrectly assumed that Section 20(5)(b) was the actual or only "source" of the requirement.

[21] The finding by Roelofse AJ that the requirement to furnish security is "sourced" in procedural rather than substantive law, is in my view fortified by the following dictum by O'Regan J in *Giddey NO v JC Barnard and Partners*[10] (*Giddey*): "*But for the courts to function fairly, they must have rules to regulate their proceedings. <u>Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence</u> …. Of course, all these rules must be complaint with the Constitution. To the extent that they do constitute a limitation on a right of access to court, that limitation must be justifiable in terms of section 36 of the Constitution, if the limitation ceased by the rule is justifiable, then as long as the rules are properly applied, there can be no cause for constitutional complaint …*". (my emphasis)

[22] In the present instance, there is no Constitutional attack by the appellant on Rule 49(13) based on its limitation of an appellant's right to exercise his right of access to a court to prosecute his or her appeal. Any limitation on such right has already been ameliorated by the amendment of the Rule following on the judgment in *O'Neill*[11].

[23] In *Boost Sport Africa (Pty) Ltd v South African Breweries (Pty) Ltd*[12] (*Boost*) the Supreme Court of Appeal had cause to embark on a similar exercise as that required from this court by the appellant. In that case a defendant sought to compel a suspected impecunious plaintiff to furnish security for its costs. The application was made in terms of Rule 47(1), which the court found dealt with procedural and not

[10] 2007 (5) SA 525 (CC) at par 16.
[11] At footnote 2 above.
[12] 2015 (5) SA 38 (SCA).

substantive law[13]. In terms of the common law, a court could order a peregrinus (be it a company or a natural person) to furnish security, but not order an incola to do so. Section 13 of the repealed Companies Act 61 of 1973 however, created an exception to the common law and was wide enough to include incola plaintiff companies. The court, after having examined some historical development on the subject, considered the position now that this statutory exception had been repealed (as the Companies Act 71 of 2008 contains no similar provision) and pointed out that the High Courts have an inherent power to regulate their own processes and develop the common law [14]. The source for this power is also now expressly provided for in section 173 of the Constitution[15]. The court went on to find that, since the repeal of aforementioned section 13, there was no "*… legitimate basis for differentiating between an incola company and incola natural person*". A court could then order a plaintiff incola company, absent said section 13, to furnish security[16].

[24] This approach accords with the Supreme Court of Appeal's own later dictum in *Systems*[17] where it held "*It is of significance that the Constitutional Court in Giddey NO v JC Barnard and Partners (Giddey) made the illuminating observation that ordering security for costs is a procedural matter incidental to civil proceedings and that when a court makes an order for security, it exercises its power to regulate its own process*".

[25] Applying the above dicta, I therefore find that although the appellant is correct that a source must exist outside the subordinate legislation comprised of the Rule for the requirement that an appellant must furnish security for the costs of the respondent on appeal, such a source indeed exists in the common law authority that the High Courts may regulate their own processes, which authority has since the advent of Democracy been expressly provided for in section 173 of the Constitution.

[13] At par 5. See also Van Loggerenberg, *Erasmus Superior Court Practice*, 2nd Ed at D1-633.
[14] At par 13.
[15] Section 173 "*The Constitution Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own processes and to develop the common law, taking into account the interests of justice*".
[16] At par 16.
[17] At footnote 8 above.

[26] In *Boost* the Supreme Court of Appeal had found that, in the case where security for costs is ordered against a plaintiff it should only do so in instances where the litigation is vexatious or reckless or otherwise amounts to an abuse. That is of course the position in the context of when a litigant approaches a court for the first time, thereby exercising his Constitutional rights[18]. The approach is understandably different in instances where a court has already found against a party who wishes to proceed as an appellant. Such an appellant has nothing to lose in taking an adverse finding on appeal and might do so opportunistically or frivolously, even though not necessary vexatiously or recklessly. Recent experience in our courts has shown that this happens with increasing frequency. In addition to the powers to regulate its own processes, High Courts also, again with reference to section 173 of the Constitution, have the power to protect itself (and other litigants, such as respondents in appeals) from abuse of its processes. The High Courts have, as a default position consistently applied the protective measure of requiring security for costs on appeal for more than 50 years. These powers are separate from the hurdle of having to obtain leave to appeal and deals with safeguards on a more practical and again, procedural level.

[27] Having established that the determination of the requirement to furnish security for costs is a procedural matter falling within the ambit of a court's discretion, all that Rule 47(13) does, is to regulate how that procedural matter is to be dealt with. If the amount of security is in dispute and cannot be agreed on, the Registrar will determine it. If an appellant cannot obtain a release from his obligation from the respondent, the court granting leave to appeal can order it, taking all relevant factors into consideration and exercising a judicial discretion. This will include the consideration of whether an appellant should be released from the default protective measure referred to above or not. This has already found to be a Constitutionally compliant regime[19]. This approach is also not a novel one and has, for example,

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[18] As enshrined in Section 34 of the Constitution, guaranteeing everyone a right to have any dispute that can be resolved by the application of law decided in a public hearing before court. See also the considerations applied in such an instance in *MTV Service (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (A).

[19] *O'Nell* above

recently been applied in another Constitutional democracy, Canada[20] and even in Africa[21].

[28] Section 6(1)(a) of the Rules Board Act provides that the Rules Board has the authority "…*to review, amend, make and repeal rules regulating the practice and procedure in connection with litigation…*". In *Freedom Stationery* it has, in my view correctly, been found that "litigation" encompasses appeal processes.

[29] I therefore find that Rule 47(13) was not promulgated outside the powers of the Rules Board. It is a sound example of the procedural requirements to which O'Regan J has referred to in *Giddey* which a party is called upon to take "…*on pain of being prevented from proceeding…*" with litigation and it regulates the application of the High Court's common law and Constitutional powers pertaining to appeals.

[30] It must follow that the appeal has irregularly been prosecuted. This includes the application for and the obtaining of a date for hearing pursuant to the delivery of the record and the subsequent set down of the appeal. The application must therefore succeed and I find no cogent reason why costs should not follow the event.

Orders

[31] In the circumstances the following order is made:

1. The application by the respondent in this application (the appellant in the appeal in case no: A304/21) for a date for hearing of the appeal, is set aside as being irregular.

2. The respondent is ordered to pay the costs of the application.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

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[20] Rule 61.06 of Ontario's *Rules of Civil Procedure* R.R.O. 1990, Reg 194 and *Richardson v Arsenor* 2022 ONCA 137, applying *Yaiguaje v Chevron Corporation* 2017 ONCA 827.

[21] See Westmont Holdings SDN BHD v Central Bank of Kenya [Petition No16 (EO23) of 2021].

Date of Hearing: 21 April 2023

Order granted: 26 May 2023

Reasons furnished: 30 May 2023

APPEARANCES:

For the Applicant:	Adv R. M Venter
Attorney for the Applicant:	Enslin & Fourie Attorneys, Bela-Bela c/o Wiese & Wiese Attorneys, Pretoria
For the Respondent:	Adv B. S Steyn
Attorney for the Respondent:	JC Scheepers Attorneys, Pretoria