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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

CASE NUMBER: A40/2023

In the matter between:

C[...] **L[...]**

Appellant

and

N[...] **V[...]** **V[...]**

Respondent

CORAM: VAN ZYL J *et* BALOYI-MERE AJ *et* HEFER AJ

JUDGMENT BY: BALOYI-MERE AJ

HEARD ON: 13 OCTOBER 2023

DELIVERED ON: 26 OCTOBER 2023

[1] The Respondent in this matter brought an urgent application which was first heard on the 16th April 2021. Part B of the urgent application was heard on the 28th April 2022 where the parties were given an opportunity to file supplementary heads of argument on the 01st June 2022 and 03rd June 2022 respectively. The matter was then postponed to the 07th June 2022.

[2] The court then gave the order after arguments and consideration of the papers filed in the matter:

- “1. It is declared that the parties are co-holders of parental responsibilities and rights in respect to the minor child H[...] V[...] V[...], a girl born on the [...] F[...] 2019 and currently is three years old (hereinafter referred to as “H[...])”;*
- 2. The Applicant shall have care and primary residency of H[...] as contemplated in section 18(2)(a) read with sections 1, 18(3), and 21 of the Children’s Act 38 of 2005 (hereinafter referred to as “the Children’s Act”);*
- 3. The Respondent shall have contact rights in respect of H[...] every alternative weekends from Friday 14h00 till Sunday 18h00.*
- 4. The Applicant is ordered to contribute half of the traveling expenses of the Respondent.*

5. *The parties shall equally share in the long school holidays and the short school holidays are to alternate between the parties.*
6. *The parties are to exercise three hours contact on the birthday of the minor child and that of the parties should such a day not coincide with the normal contact weekend or holiday.*
7. *Contact on Father's Day/ Mother's Day for three hours, if such a day does not coincide with the normal contact weekend or school holiday.*
8. *Regular telephonic/video call contact on a daily basis between the hours 16h00 till 19h00.*
9. *The parties are ordered to approach a family mediator if any disputes arise that involves the minor child, before approaching court.*
10. *The parties are ordered to attend parenting skills training, co-parenting, and communication skills training.*
11. *Each party to pay their own costs."*

[3] This order was granted by her Ladyship Honourable Justice Chesiwe on the 21st October 2022.

[4] The parties to this appeal have brought applications and counter applications against one another and in this judgment I will refer to Ms. C[...] L[...] as the "Appellant" and Mr. N[...] V[...] V[...] as the

“Respondent”. This appeal is brought to this court with leave of the *court a quo*.

- [5] The history and the background of this matter are clearly captured in the *court a quo*’s judgment¹ and it is not necessary to repeat the background in this judgment.
- [6] The Appellant was granted leave to appeal both the judgment and the order of Madam Justice Chesiwe on the 16th February 2023. The Appellant served her notice of appeal on the 16th March 2023. On the 14th June 2023 the Appellant delivered the appeal record. The application for the date of the hearing of the appeal was served by the Appellant on the 23rd June 2023 on the Respondent.
- [7] After the filing of the record by the Appellant, the Respondent raised the following non-compliance issues against the conduct by the Appellant in prosecuting the appeal, that the Appellant did not, before the filing of the appeal record enter into good and sufficient security for Applicant’s cost of appeal as provided for in Rule 49(13)(a).

¹ Record volume 5 pages 979 – 982.

- [8] Further that the Appellant's application to the Registrar of this court for a trial date was in terms of Rule 49(6)(a) out of time and that the Appellant failed to furnish her full residential address and the names and addresses of every other party to the Appeal.
- [9] The Respondent further alleged that the Appellant failed to file a power of attorney as provided for in rule 7(2) and further failed to file a substantive condonation application for all the above-mentioned non-compliances.
- [10] As a result, the Respondent filed a Rule 30 application², the Appellant opposed the Rule 30 application and filed an answering affidavit which was accompanied by a "counter conditional condonation application".
- [11] The aforesaid interlocutory application was enrolled to be heard simultaneously with the appeal. As a result, I now deal with the Rule 30 application.
- [12] The Appellant's general response to the non-compliance or the Rule 30 application was that there was no legal obligation on the Appellant to comply with those rules as provided for in Rule 4 and

² Pages 1 – 12 of the interlocutory application bundle.

its subsections. For completeness's sake I will quote hereunder Rule 49 and its provisions:

“49 Civil Appeals for the High Court

(1)(a) When leave to appeal is required, it may on a statement of the grounds therefor be requested at the time of the judgment or order.

(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days.

(c) When in giving an order the court declares that the reasons for the order will be furnished to any of the parties on application, such application shall be delivered within ten days after the date of the order.

(d) The application mentioned in paragraph (b) above shall be set down on a date arranged by the registrar who shall give written notice thereof to the parties.

(e) Such application shall be heard by the judge who presided at the trial or, if he is not available, by another judge of the division of which the said judge, when he so presided, was a member.

(2) If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within twenty days after the date upon which leave was granted or within such longer period as may upon good cause shown be permitted.

(3) The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or

order is appealed against, it shall state which part and shall further specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded.

(4) A notice of cross-appeal shall be delivered within ten days after delivery of the notice of appeal or within such longer period as may upon good cause shown be permitted and the provisions of these Rules with regard to appeals shall mutatis mutandis apply to cross-appeals.

(5) In the case of an appeal against the judgment or order of the court of the Witwatersrand Local Division, the Judge President of the Transvaal Provincial Division shall determine whether the appeal should be heard by the full court of the said local division. As soon as possible after receipt of the notice of appeal or cross-appeal, if any, the registrar of the local division shall ascertain from the Judge President his direction in the particular case. If the Judge President has directed that the appeal be heard by the full court of the Witwatersrand Local Division, the said registrar shall immediately inform the parties of the direction. If not so directed by the Judge President, the said registrar shall inform the registrar of the provincial division as well as the parties accordingly.

(6) (a) Within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within ten days after the expiry of the said period of sixty days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.

(b) The court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.

(7) (a) At the same time as the application for a date for the hearing of an appeal in terms of subrule (6)(a) of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if-

(i) The application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

(ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.

(b) The two copies of the record to be served on the respondent shall be served at the same time as the filing of the aforementioned three copies with the registrar.

(c) After delivery of the copies of the record, the registrar of the court that is to hear the appeal or cross-appeal shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be, and shall set the appeal down for hearing on the said date and shall give the parties at least twenty days' notice in writing of the date so assigned.

(d) If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of

subrule (7) (a) the other party may approach the court for an order that the application has lapsed.

(8) (a) Copies referred to in subrule (7) shall be clearly typed on A.4 standard paper in double spacing, paginated and bound and in addition every tenth line on every page shall be numbered.

(b) The left side of each page shall be provided with a margin of at least 35 mm that shall be left clear, except in the case of exhibits that are duplicated by photoprinting, where it is impossible to obtain a margin with the said dimensions. Where the margin of the said exhibits is so small that parts of the documents will be obscured by binding, such documents shall be mounted on sheets of A4 paper and folded back to ensure that the prescribed margin is provided.

(9) By consent of the parties, exhibits and annexures having no bearing on the point at issue in the appeal and immaterial portions of lengthy documents may be omitted. Such consent, setting out what documents or parts thereof have been omitted, shall be signed by the parties and shall be included in the record on appeal. The court hearing the appeal may order that the whole of the record be placed before it.

(10) When the decision of an appeal turns exclusively on a point of law, the parties may agree to submit such appeal to the court in the form of a special case, in which event copies shall be submitted of only such portions of the record as may be necessary for a proper decision of the appeal: Provided that the court hearing the appeal may require that the whole of the record of the case be placed before it.

(11) Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.

(12) If the order referred to in subrule (11) is carried into execution by order of the court the party requesting such execution shall, unless the court otherwise orders, before such execution enter into such security as the parties may agree or the registrar may decide for the restitution of any sum obtained upon such execution. The registrar's decision shall be final.

(13) (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, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such percentage thereof as the court has determined, as the case may be.

(14) The provisions of subrules (12) and (13) shall not be applicable to the Government of the Republic of South Africa or any provincial administration.

(15) Not later than fifteen days before the appeal is heard the appellant shall deliver a concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point, and not later than ten days before the appeal is heard the respondent shall deliver a similar statement. Three additional copies shall in each case be filed with the registrar.

(16)

(17)

(18) ”

[13] I now turn to deal with the Appellant's response to the various issues raised by the Respondent in the Rule 30 application and dealt with in the condonation application.

Late Filing of the Application of the Hearing Date³

[14] The application for the trial date was only served on the Respondent on the 23rd June 2023⁴. In argument, counsel for the Appellant submitted that the notice was a mere five days late and the fact that the Registrar accepted her application meant that there was substantial compliance with the rule. Thus the Appellant did not file any condonation application for the late filing of the application for the hearing date.

The Power of Attorney

[15] The Appellant did not file a power of attorney in line with rule 7(2). The submission made by the Appellant is that rule 7(2) is superfluous and its purpose is simply to avoid an instance where a litigant later denies having instructed an attorney to act on his/her behalf.

³ Page 91 of interlocutory application bundle.

⁴ Page 145 of interlocutory application bundle.

- [16] It was further submitted that the rule is inconsistent with the Superior Courts Act 10 of 2013 and militates against the Constitution of the Republic of South Africa, 1996.
- [17] The Appellant also indicated that there was already a power of attorney authorizing the attorney to represent the Appellant in the record⁵. This turned out to be the authority authorizing the Appellant's attorney to initiate an urgent application and had nothing to do with the leave proceedings.
- [18] The Appellant further referred the court to the power of attorney filed in July 2023⁶ which turned out to be the authority for the legal representation to represent the Appellant in the application for leave to appeal. The correct and relevant power of attorney was only attached to the Appellant's supplementary heads of argument and dated the 05th October 2023. In argument, counsel for the Appellant correctly abandoned the argument that rule 7(2) is superfluous and militates against the Constitution of the Republic of South Africa.

⁵ Record volume 4, pages 607 and 608.

⁶ Pages 86 and 87 of the interlocutory application bundle.

The Non-filing of the Appellant's Residential Addresses and the Residential Addresses of the Other Parties that Are Involved in the Appeal

[19] The Appellant submitted in reply to the non-compliance raised by the Respondent, that the addresses of the parties' legal representatives as they appear on the pleadings are sufficient to satisfy Rule 49(6). The appellant further relies on CVD05⁷ which still lists the legal representatives' addresses and not the litigants' addresses. This issue highlighted a misinterpretation rather than non-compliance with the rules. I will come back to this point later in this judgment.

Security for Costs

[20] In response to an issue raised by the Respondent that the Appellant failed to put up a security for costs, the Appellant responded that she does not have any legal obligation to furnish security for the cost of appeal in terms of any statute or common law. The Appellant further argued that the provisions of Rule 49(13) of the Uniform Rules of Court are unconstitutional, *ultra vires* (invalid) and that it does not constitute any legal obligation on the Appellant to provide security for costs on appeal.

⁷ Pages 83 - 85 interlocutory application bundle.

- [21] The Appellant relied heavily or solely on the ***Allem Inc v Baard in re: Baard v Allem Inc (A5005/2021:2016/44725) [2021]ZAGPJHC 677; [2022] 1 All SA 680 (GJ); 2022 (3) SA 207 (GJ) (12 August 2021)*** judgment and quoted almost fifty paragraphs from the said judgment.
- [22] The court in the *Allem v Baard* judgment was called upon to deal with whether the provisions of Rule 49(13) were *ultra vires* the Constitution or not. The court, per Madam Acting Justice Engelbrecht, considered the several judgments from the different High Courts on the provisions and application of Rule 49(13) where for instance Justice Froneman as he then was in the Eastern Cape Division of the High Court in the matter of **First Rand v Van Der Merwe** held in obiter that “*Rule 49(13) may well be ultra vires and thus unconstitutional*”. This issue was never taken forward as the parties to that matter later settled and the issue of the constitutionality or otherwise of Rule 49(13) was never explored further.
- [23] Prior to the 1999 amendment of this rule, Rule 49(13)(a) was considered in a full bench appeal in *Shepherd v O’Neill*⁸ and the court there held that the conflicting rights of the litigants can be

⁸ 2000 (2) SA 1066 (N).

adequately safeguarded where the court is vested with the power to determine, and exercise its discretion whether a particular appellant should be compelled to put up security and in what amount. In that particular judgment, Rule 49(13) to the extent that it did not embody the power that the court should have a discretion to determine whether a particular appellant should put up security and in what amount was held to be in conflict with the Constitution and to that extent invalid. As a consequence of that ruling, the Rule 49(13) was then amended.

- [24] Subsequent to the amendment in 1999 of Rule 49(13), the rule was considered by the courts in **Strouthos v Shear**⁹ per Justice Daniels where the court explained the rule as follows:

“Here it is provided that the court in granting leave to appeal or “subsequently on application to it ...” (as opposed to the court to which the appeal is made, or the court hearing the appeal) is the court designated to order the release of the appellant from his/her obligation to lodge security. Since leave to appeal was granted by the Supreme Court of Appeal, or properly put, the President of the Court, it is only that Court that can conceivably release the respondent from his obligation to provide security, and the court hearing the appeal accordingly does not have jurisdiction to do so. This much follows from a proper reading of the sub-rule. Should the appellant be so inclined he could apply to that court for such relief. In considering such an application, the court has a wide discretion which will be judicially exercised. However, until such time and such an order are obtained, the respondent is obliged to provide

⁹ 2003 (4) SA 137 (T) at paragraph 8.

security, and this must be done before lodging copies of the record on appeal with the Registrar in terms of sub-rule 13(a).

The copies of the record were lodged on 01 February 2022. Since security was then not lodged, the lodging of the copies of the record on appeal constitutes an irregular step within the meaning of Rule 30, and may accordingly be set aside upon application. Should it be set aside the provisions of rule 7(d) which provides that:

“(i)f the party who applied for a date of the hearing of the appeal neglects or fails to file or deliver the said copies of the record within forty days after the acceptance by the Registrar of the application for a date of hearing in terms of sub-rule 7(a) the other party may approach the court for an order that the application has lapsed” apply. Should security be furnished, the record cannot be lodged, and sub-rule 7(c) cannot be given effect to.”

- [25] In December 2017 a full bench of the Gauteng Division, Pretoria issued a judgment in the matter of *Erasmus v Absa Bank Ltd*¹⁰ where the court considered the question of whether condonation for non-compliance with Rule 49(13)(a) was to be granted. The court in this matter was not called upon and did not engage with the meaning and constitutional validity of Rule 49(13). The court found that the Appellant in that matter must apply for condonation for the late filing of security and declined the Applicant’s argument that the court ought to dispense with the requirement for security on the basis of Rule 49(13) and the court held that only the court

¹⁰ (A) 982/13) [2017] ZAGPPHC 890 (08 December 2017)

granting leave to appeal can release the Appellant from the obligation to furnish security.

Whether Rule 49(13) is Constitutionally Invalid and/or Ultra Vires

[26] In trying to answer the question of whether Rule 49(13) is unconstitutional, this court has to consider section 34 and the access to court. Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. Justice Mokgoro in **Chief Lesapo v North West Agricultural Bank and Another**¹¹ held that the right to access to court is of such importance that there is no basis to suggest that the right to access court must be considered simply as access to a court of first instance. In accordance with section 36 of the Constitution, that right may be limited only in terms of law of general application to the extent that the limitation is reasonable and justiciable in an open and democratic society based on dignity, equality and freedom, taking into account relevant factors such as the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation

¹¹ 1999 (12) BCLR 1420 (CC) at para 22.

between the limitation and its purpose and less restrictive means to achieve the purpose.

[27] Section 34 must also be read with section 171 of the Constitution, which provides that all courts function in terms of national legislation and their rules and procedures must be provided for in terms of that legislation. The national legislation envisaged in section 171 for present purposes must be the Superior Courts Act and the Rules Board Act and there is no question that the Uniform Rules, of which Rule 49(13) form part, are those contemplated in section 171.

[28] The Constitutional Court in **Giddey NO v JC Barnard and Partners**¹² per Justice O'Regan held that:

“For courts to function fairly they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on paying off being prevented from proceeding with a claim or defence. A common example is the rule regulating the notice of bar in terms of which defendants may be called upon to lodge their plea within a certain time failing which they will lose the right to raise their defence. Many of the rules of court require compliance with fixed time limits, and the failure to observe those time limits may result, in the absence of good cause shown¹³, in a plaintiff or defendant being prevented from pursuing their claim or defence. Of course, all these rules must be compliant with the Constitution. To the extent that they do not constitute a limitation on a right of access to court, that limitation

¹² 2007 (5) SA 525 (CC) at para 16.

¹³ My emphasis

must be justifiable in terms of section 36 of the Constitution. If the limitation caused by the rule is justifiable, then as long as the rules are properly applied, there can be no cause for constitutional complaint.”

[29] In the same vein the Constitutional Court held in **Domehl v Minister of Justice and Others**¹⁴ that not every procedural requirement constitutes an infringement of a right to access to court.

[30] A limitation analysis suggests that Rule 49(13) may be considered a justifiable limitation in that the rule exists in accordance with the provisions of national legislation especially section 51 of the Superior Courts Act which provides for the retention of rules in place before the statute was promulgated and section 6(1) of the Rules Board Act which confers upon the rules board the power to make and amend rules. On the principle of subsidiarity, it is the provisions of these statutes that must be applied to assert the access to court right, and not section 34 directly¹⁵. Rule 49 constitutes a law of general application within the meaning of section 36 of the Constitution and the bar is not absolute as an appellant is able to escape the requirement of providing security either by agreement within the parties or approaching the court. Accordingly, this limitation is flexible.

¹⁴ 2000 (2) SA 987 (CC).

¹⁵ S v Mlungu 1995 (3) SA 867 (CC) at para 59.

[31] This court finds that the argument that, Rule 49(13) is inconsistent with the Constitution and that it is *ultra vires*, is not sustainable under the circumstances. Rule 49(13)(a) post-amendment is not inflexible as it provides the court with the power to release an appellant from the obligation to provide security and further affords an appellant an opportunity to approach the court that granted leave to appeal for an order dispensing with the requirement to provide security.

[32] In **Strouthos v Shear** *supra* the court further held as follows:

“As explained earlier it is the respondent’s case that he is entitled to proceed and that he may or may not apply for condonation for his failure to lodge security, and if he does so apply and the application is refused, the applicant will then be entitled to move for the appeal to be struck from the roll. It is argued that notwithstanding the fact that he has not been released from that obligation, the applicant is not entitled to demand security nor is he obliged to lodge security. This approach renders the rule a nullity, and as said earlier, the respondent is clearly wrong. It is for the respondent to apply for and obtain the release from his obligation to provide security.

The applicant applies for an order directing the respondent to furnish security. Strictly speaking, such an order is not required, since the respondent is obliged in terms of the rule to provide security. The rule does not provide for an order in the terms prayed.”

[33] In **Carpe Diem Explorations (Pty) Ltd v Kasimira Trading 82 (Pty) Ltd**¹⁶ where the appellant sought condonation for some of

¹⁶ A601/14 [2016] ZAGPPHC 1099 (14 December 2016) at paragraphs 17 and 18.

its failures and asked the court to release it from the obligation to furnish security, Justice Tuchten commented as follows:

“The failure to file security and to obtain a ruling on the failure to find security before the appeal was due to be heard is of a character different to the other procedural non-compliance which I have mentioned. It is the right of the respondent on an appeal to go into an appeal secured, at least to the extent provided by the rules against the inability of the appellant to pay the costs of the appeal if unsuccessful.

The failure to provide an explanation as to why security should be dispensed with and the failure to have the issue of security resolved by application to court before Kashmiri incurred expense in opposing the appeal are in my view sufficient by themselves to justify the dismissal of the application to dispense with security.”

[34] In **TR Eagle Air (Pty) Ltd RW Thompson**¹⁷ the court was faced with a submission by the appellant that the respondent ought to have engaged the Rule 30 procedure if it considered that the failure to put up security was an irregular step and the full court in that matter held as follows at paragraph 18:

“Rule 49(13) is peremptory. The rule does not place any responsibility on the respondent. The rule obliges the appellant to give security. The rule does not give a court granting leave to appeal the discretion to absolve an appellant from giving security when the record is filed with the Registrar. The rule envisages that the respondent shall be satisfied that sufficient security is given that his costs will be paid in the event of the appeal not succeeding. The rule entitles the respondent to waive his right to such security. The rule envisages an instance where the court granting leave to appeal may release

¹⁷ 2021 JDR 0699 (GP).

the appellant wholly or partly from giving security on application to it. The latter may occur where the respondent has not waived his right and, this will oblige the appellant to place facts to the satisfaction of the court why he/she should be released wholly or partially from giving security where filing the record on appeal.

The court further placed reliance on the judgments in Strouthos and Boland Konstruksie Maatskappy (EDMS) BPK v Petlen Properties (EDMS) BPK¹⁸ and concluded as follows:

“In this matter the second appellant is a practicing attorney who is expected to have known better of the importance to provide security for costs in the appeal and, the possibility of prejudice to the respondent should no security be given. When the heads of argument was served there was knowledge on his part that he had not complied and he was forewarned. This in my view should have triggered prompt attention to either negotiate security and apply for condonation, or alternatively to have the matter removed, to tender wasted costs in order to attempt to compliance and condonation. I am of the view that it is proper to strike the appeal off the roll.”

[35] In the circumstances of this present matter, the appellant is represented by a legal representative who should have known better of the importance to provide security or to apply to be released from providing security costs.

[36] The court in **Allem Inc v Baard** *supra* did not come to the conclusion on the constitutional non-compliance of Rule 49(13) as raised by the Appellant.

[37] The Appellant argued largely that Rule 49(13) is unconstitutional and militates against the provisions of the Constitution. However,

¹⁸ 1974 (4) SA 291 (C).

the court was not called upon to deal with the unconstitutionality of Rule 49(13) as firstly, the Appellant just concluded that Rule 49(13) have been declared unconstitutional although there was never a process to declare that rule unconstitutional and failed to appreciate the Oudekraal principle¹⁹ which held as follows:

“... If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.”

[38] This simply means that a litigant cannot just ignore the law or a rule just because they feel that it is unconstitutional and *ultra vires* while it has never been set aside by a competent court of law. That is not how the law works and the principle of precedent is still alive in the South African law.

[39] The Appellant, in her condonation application, has given reasons why the application for the hearing of the trial date was late. That explanation is accepted by this court.

[40] However, the Appellant has failed to show good cause why she failed to file a power of attorney in line with rule 7(2), to provide her physical and the physical addresses of all the parties that are involved in the appeal and to also furnish good and sufficient

¹⁹ [2004] (3) All SA 1 (SCA) (28 May 2004) at para 31.

security in terms of Rule 49(13). The Appellant's failure to comply with the various provisions of Rule 49 cannot be viewed lightly and simply be condoned where good cause has not been shown by the Appellant in her condonation application. The sweeping statement that all these provisions that have not been complied with are unconstitutional is not sufficient reason to grant condonation especially where there has not been an effort to follow the procedure to declare the subsections of this rule unconstitutional.

[41] I must add at this juncture comment on the conduct on the part of the Appellant in the proceedings in this appeal. Starting with the failure to adhere to the court rules in observing the time periods stipulated for the filing of the record, the application for the trial date, the filing of the power of attorney, the furnishing of the addresses of the litigants in this appeal and the putting up of security, all these points to either a total disregard of the rules or a misreading of the rules. I hasten to add that the Appellant's behavior in this proceedings points to a misunderstanding of the rules as the Appellant was adamant that her non-compliance is due to the fact that those rules she did not comply with are unconstitutional and therefore she did not have to comply with. As

a word of caution to practitioners, this court would like to point out that:

“the rules set the parameters within which the course of litigation has to proceed. The rules of engagement, must, therefore, be obeyed by the litigants. However dogmatically rigid adherence to the Uniform Rules of Court is as distasteful as their flagrant disregard of violation. Dogmatically adherence just like flagrant violation defeats the purpose for which the court rules were made.”²⁰

[42] This in essence means that a litigant cannot just flagrantly disregard the rules of court but also does not mean that a litigant is expected to comply with the rules of court to a point that there is no fault. There are measures put in place to assist a litigant who has not complied with all the rules in the form of application for condonation and the likes. But a litigant cannot seek condonation without showing good cause for why the court should condone the non-compliance with the rules. In this particular matter the Appellant does not show any good cause for non-compliance with the court rules, the Appellant still persist with her submission that the rule is unconstitutional and only says

“to the extent that I am wrong in my submission that I have substantially complied with Rule 49(6) of the Uniform Rules of Court in this regard, I humbly request this Honourable Court to condone my failure to strictly comply timeously herewith.”

²⁰ L[...] v Grobler and Another (3074/2016) [2016] ZAFSHC 206 (15 December 2016).

- [43] The Appellant's reliance on case law where there is an indication that the case relied upon was not properly read and considered shows a lack of preparation on the part of the legal practitioner. That is a sad sight to behold in this court, especially at the appeal stage before a full bench. It is expected of legal practitioners to prepare fully and carefully before representing their clients and the lack of preparedness of the legal practitioners should be discouraged.
- [44] In the circumstances, the non-compliance points raised in the Rule 30 application succeed and the "conditional counter application" stands to be dismissed.
- [45] The merits of the appeal cannot be adjudicated at this stage.
- [46] With regard to the issue of costs, the appellant is liable for the costs of the Rule 30 application, the "conditional counter application and the application for condonation as the general rule is that costs follow the order.
- [47] In considering the wasted costs of the appeal, this court is mindful of the fact that this litigation is between two caring parents who, in good faith, are trying to enforce what they both believe is in the

best interest of the minor child. This court considers it appropriate that each party pays his or her own costs.

[48] This court is not closing the doors on the face of the Appellant, the Appellant still has an opportunity to approach a court and make good on the compliance with Rule 49 in due course.

[49] In the circumstances, I make the following order:

[50] **ORDER**

1. The Appellant's appeal is struck from the roll for non-compliance with the rules.
2. The Appellant is ordered to pay the costs of the Rule 30 application, the "conditional counter application" and the condonation application.
3. Each party is to pay his or her own costs in respect of the wasted costs of the appeal.

E.M. BALOYI-MERE, AJ

I concur.

C. VAN ZYL, J

I concur.

J.J.F. HEFER, AJ

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