

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT)

Case Number: 1023/2021

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED.

15 September 2021

In the matter between:

FREEDOM STATIONARY (PTY) LTD

Applicant

and

**PALM STATIONARY MANUFACTURERS (PTY)
LTD and MVELI DATA MATRIX SOLUTIONS
(PTY) LTD (JOINT VENTURE)**

First Respondent

**ACTING HEAD OF DEPARTMENT:
MPUMALANGA DEPARTMENT OF EDUCATION**

Second Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
MPUMALANGA DEPARTMENT OF EDUCATION**

Third Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Fourth Respondent

This judgment will be handed down virtually over the Zoom platform at 09:00 on 15 September 2021. The parties will be furnished with a copy of the judgment by email and the judgment will be published on the SAFLII website.

JUDGMENT

Roelofse AJ:

Introduction

[1] The applicant (“*Freedom*”) challenges the provisions of Rule 49(13)(a) of the Uniform Rules (“*the Rule*”). The Rule provides for the furnishing of security for costs by an appellant unless the respondent waives his/her right to security or the court exempts the appellant from furnishing security.

[2] Freedom says that the Rule is *ultra vires* and unconstitutional. Freedom seeks to confine the obligation and right in respect of security for costs to the substantive law and therefore, the Rule, which is part of the procedural law, so Freedom contends, cannot make security for costs a requirement for an appeal and it is consequently *ultra vires*. The second leg to Freedom’s challenge to the Rule is founded upon section 34 of the Constitution of the Republic of South Africa, 1996 (“*the Constitution*”) which guarantees everyone access to the court.

Procedural (or adjective law) and substantive law – the evasive divide

[3] Jeremy Bentham (1747 – 1842) was an English philosopher, jurist, and social reformer.¹ Bentham has left a legacy (or shall I call it a curse), which still haunts jurists to this day when he pronounced that:

“By procedure, is meant the course taken for the execution of the laws Laws prescribing, the course of procedure have on a former occasion been characterized by the term Adjective Laws. This is in contradiction to those other

laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, Substantive Laws”

The distinction between the substantive law and procedural law (also referred to as adjective law) saw the light.

[4] More than a century after the death of Bentham, CENTLIVRES, C.J² said as follows when confronted with the question whether the Separate Representation of Voters Act 46 of 1951 was *ultra vires* section 152 of the South Africa Act:

“In Dixon v Harrison, 124 E.R. 958 at p. 964, it was stated that the greatest absurdity imaginable in law is:

‘that a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of right, in law, and having no right, are in effect the same.’

There is, in my opinion, no warrant for the use sought to be made by Mr. Beyers of the distinction between substantive law and adjective or procedural law. That distinction or basis of classification is indeed not a very clear one. Salmond in his Jurisprudence (3rd ed. at pp. 443 and 445) says:

‘It is no easy task to state with precision the exact nature of the distinction between substantive law and the law of procedure . . . So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other.’

A writer in the Harvard Law Review (Vol. 45 at p. 643) says much the same as Salmond:

'no one has ever been able to formulate any test which will distinguish between procedural and substantive law in any particular case. Substantive law remains the 'law' which we enforce, procedure the practical rules by which we enforce it.'

[5] I gave this short introduction because this court is still, almost 50 years after CENTLIVRES C.J was confronted with the effect of Bentham's pronouncement, still ceased with the evasive divide between the substantive law and the law of procedure because the applicant contends that the provisions of Rule 49(13) of the Uniform Rules (*"the Rule"*) is *ultra vires* section 6(1)(m) of the Rules Board for Courts of Law Act, 1985 (*"the Act"*) for the Rule seeks to make substantive law in terms whereof security is required in appeals emanating from the Superior Court.³

[6] What the applicant in essence contends is that security is governed by the substantive law. It is therefore necessary to determine if the Rule seeks to make substantive law or if the Rule is procedural. The answer to this question must determine the ultimate outcome of this matter. I say, perhaps the answer lies not so much in determining whether a particular right or obligation is substantive or procedural but rather the source of the right or obligation and the realm within which that right or obligation operates.

Litigation background

[7] On 15 May 2019, the Department of Education (*"the department"*)⁴ awarded a tender to Freedom for the manufacture, packaging and delivery of scholastic stationary to all public educational institutions in the Mpumalanga province for a period of three academic years.

[8] The first respondent (*“Palm”*), dissatisfied with the award of the tender to Freedom, launched an application in this court for orders directed at reviewing and setting aside the award of the tender to Freedom and for consequential relief.

[9] On 15 November 2019, his Lordship Mr justice Legodi JP ordered that Freedom disclose its bid documents to Palm. Dissatisfied with this order, Freedom applied for leave to appeal which was refused. Dissatisfied with the refusal of leave to appeal, Freedom petitioned the Supreme Court of appeal for leave to appeal. On 21 May 2020, the Supreme Court of appeal granted leave to appeal to Freedom to the Full Court of this Division.

The appeal and its shortcomings

[10] Rule 49 of the Uniform Rules set out the procedure for appeals emanating from the Superior Courts.

[11] It is common cause that Freedom complied with the following provisions of Rule 49 in that it: delivered its notice of appeal timeously in accordance with Rule 49(2); made application for a date for the hearing of the appeal in accordance with Rule 49(6)(a); and lodged and served copies of the record with the register and the first to third respondents in terms of Rule 49(7)(a).

[12] What Freedom failed to do was to lodge security as required by the Rule. The Rule reads:

“(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.”

[13] Palm (and not Freedom being the appellant) prosecuted the appeal by obtaining, of its own accord, three dates in November 2020 from the Appeal Registrar of this court and set the matter down in November 2020 and proposed to Freedom’s attorneys that Form D be completed.⁵ Ultimately the appeal was enrolled for hearing on 26 February 2021.

The appeal panel’s response to the shortcomings of the appeal

[14] On 23 February 2021, the Appeal Panel sent an email to the parties drawing their attention to certain instances of non-compliance regarding the appeal, the foremost for purposes of this judgment being that Freedom has filed security for costs as required by the Rule. The appeal panel concluded that in its view the appeal is not properly enrolled and as such not before the court. The appeal panel furthermore strongly recommended that the appeal be removed from the roll of 26 February 2021 so that the parties can attend to the shortcomings and re-enroll the matter for hearing on another date in the future.

The parties’ response to the appeal panel’s views

[15] Freedom's response to the appeal panel's view was as follows:

“3.4.1 The requirement for the Appellant to enter into good and sufficient security for the Respondent’s costs of appeal was held to be unconstitutional. In this regard, we refer to the case of Shepherd v O’Neill and Others, and the commentary thereon by Erasmus, Superior Courts Practice at D1-680. See also the commentary by Harms, Civil Procedure in the Superior Courts at B49.29.

3.4.2 In any event, the first respondent (Palm stationary), has waived security

for costs, which with the knowledge that the Appellant has the resources to meet any adverse costs order.

3.4.3 Furthermore, the First Respondent (Palm Stationary) did not call for security for costs in terms of rule 47(1), nor did the First Respondent issue a Rule 30 notice alleging that the set down constituted an “irregular step”.

Further debate with the appeal panel

[16] On 24 February 2021, the Appeal Panel told the parties as follows:

“The panel notes that the KZN High Court has found the provision concerning filing of security inconsistent with the Constitution. For the panel that is how far it goes. The panel cannot necessarily accept the views of the KZN High Court without any confirmation by the Constitutional Court. If you have authority for the confirmation, the panel would be glad to have it. For now, it suffices to state that the panel does not regard itself as bound by the authorities provided by you.”

"Security in terms of Rule 49(13) cannot be confused with the general security in terms of Rule 47(1). Rule 49(13)(a) deals specifically with security when appealing a matter and for convenience it is reproduced below:

‘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.’

The view of the panel is still that the matter is not properly before Court and that it should be removed. The main problem, as the panel understands it, is the failure to file security. The appellant having been the party who failed to observe

the Rule must bear the costs.”

[17] In response Palm’s attorneys proceeded to inform the appeal panel and Freedom that it had waived compliance with Rule 49(13) in relation to security for costs of the appeal and sought confirmation that the appeal would proceed.

[18] In response Freedom’s attorneys wrote to the appeal panel. They contended that there was no obligation on the part of Freedom, in terms of SCA Rule 9(1), to file security for costs. Freedom reiterated that the requirement for security for costs had, in any event, been waived by the first respondent and that Freedom is not liable for the costs because it had acted in accordance with the directions of the Appeal Registrar.

[19] On 25 February 2021, the appeal panel responded to the parties’ contentions. It stated:

"The panel holds the view that the failure by both parties is in fact fatal as it cannot be rectified if the Rule is read in its proper perspective. The Rule envisages that both the filing of security or the waiver thereof would occur prior to the appellant lodging copies of the record on appeal with the Registrar. It is common cause that the respondent in this matter did not waive its right to security before the appellant could file the copies of the record. As a result the non-compliance, in the opinion of the panel, persists."

[20] In addition to the foregoing, the appeal panel stated that reliance on SCA Rule 9(1) is not helpful in this case. In this regard, the appeal panel stated:

"The SCA granted leave as the SCA and not as a High Court. As such, the Rule cannot be utilised to justify the parties’ omission to file or waive security, as the case may be. The granting of leave by the SCA did not excuse the parties from observance of Rule 49(13)(a). The contravention

therefore stands and the order of the SCA is for present purposes irrelevant."

[21] With regards to who should be held responsible for the costs, the appeal panel stated as follows:

"3. One issue on which the parties may want to address the panel is who should bear the costs. This is notwithstanding that the panel had previously expressed a view thereon. The parties can accept that the views put forward by the panel were never cast in stone and therefore it remains open to persuasion.

4. In consequence of the panel's attitude, it is not necessary for the parties to present oral argument physically or virtually tomorrow but can simply forward their written submissions on the issue. The parties can expect to hear from the court shortly after receipt of their written submissions.

5. I look forward to receiving your written submissions as directed."

[22] Freedom furnished the appeal panel with its written submissions on the issue of costs. It referred the appeal panel to Kama and Others v Kama and Another (1357/2005) [2007] ZAECHC 115 (6 September 2007), where the court condoned the failure to put up security in terms of rule 49(13).

[23] Palm's attorneys responded by alleging that Palm did not tacitly waive security for costs at the time of the filing of the record. Freedom's attorneys maintained that Palm had at all relevant times waived security for costs. It informed Palm's attorneys as follows:

"It is common cause that your client had, at all material times, waived security for the costs of the appeal. On the 1st September 2020, when the appeal record was filed, your client raised no objection, and with full knowledge of its rights, tacitly waived its right to call for security, and knowingly took further substantive and procedural steps in the prosecution of the appeal, by inter alia procuring

dates for the hearing of the appeal, agreeing thereon, and filing heads of argument. On the 25th February 2021, your client reiterated its unconditional waiver by expressly stating " ... the first respondent waives the requirement for security in terms of rule 49(13)."

[24] The appeal panel proceeded to strike the appeal from the roll.

This application

[25] Freedom seeks the following relief in this application:

"1. an order declaring that the provisions of rule 49(13) of the Uniform Rules of Court are ultra vires and inconsistent with section 6(1)(m) of the Rules Board for Courts of Law Act, 1985, are inconsistent with section 34 of the Constitution, and are accordingly invalid and unenforceable.

2. Alternatively, to paragraph 1 above, an order declaring that the first respondent has waived compliance with security for its costs of appeal in the High Court, Mpumalanga Division, Mbombela ("High Court"), alternatively, an order releasing the applicant from providing security for the first respondent's costs of appeal in the High Court, and directing that non-compliance with rule 49(13) is hereby condoned.

3. In the further alternative to paragraph 2 above, an order directing the applicant to lodge security for the first respondent's costs of appeal in the High Court, within 30 days, in an amount to be determined by the Registrar of this Court, and directing that non-compliance with rule 49(13) is hereby condoned.

4. An order directing that the costs of this application be paid by the first respondent, and, should any of the further respondents oppose the relief sought

in this application, such further respondents and the first respondent shall be liable jointly and severally for the costs of this application.

5. *Further, other, and/or alternative relief.*

[26] Palm and the fourth respondent (*“the Minister”*) delivered notices of intention to oppose the application. The second and third respondents abide the court’s decision. The matter was case managed in terms of this Court’s Directive. The Minister was directed by the case management order to deliver his answering affidavit on 11 June 2021 and his heads of argument on 3 August 2021. The Minister failed to do so. Upon allocation of the matter to me and on 24 August 2021, I sent a letter to the State Attorney setting out as follows:

- “1. The above application is allocated to this court for hearing on 2 September 2021.*
- 2. The Minister of Justice and Constitutional Development delivered his notice of intention to oppose the application on 30 April 2021 and was directed by this court to deliver his answering affidavit by no later than 11 June 2021 and his heads of argument by no later than 3 August 2021.*
- 3. The papers before me does not include the Minister’s answering affidavit nor has the Minister delivered his heads of argument.*
- 4. The Minister is required to file a notice by no later than 16:00 on 27 August 2021, indicating whether the Minister still intends to participate in the matter and if so, in what manner the Minister’s intends to participate.”*

On 2 September 2021, the Minister delivered a notice withdrawing its opposition in the application and the Minister furnished this court with his written submissions.

[27] After hearing the parties on 2 September 2021, I proposed to the parties that they discuss amongst themselves an appropriate order for in my view, the sooner the

appeal proceed the better for both parties. The parties furnished me with a draft order which I made and order of court. The order reads:

“Having heard counsel for the Applicant, First Respondent and Fourth Respondent and having read the papers, the Court makes the following order:

1. The Applicant is released from providing security for the First Respondent’s costs of appeal to the Full Court in respect of case number A34/2020 (the appeal against the order and judgment of Legodi JP of 15 November 2019), and the First Respondent’s [Sic]⁶ non-compliance with Rule 49(13) is hereby condoned.

2. Costs are reserved for determination in the judgment of this Court.”

[28] Although the parties are now entitled by virtue of the order to proceed with the appeal, the declaratory relief in prayers 1 and 2 of the notice of motion as well as the issue of costs must still be pronounced upon for the order that was granted is owed to its own reasons despite that the order was granted by agreement. Prayer 3 of the notice of motion needs no further attention because the order given absolves Freedom from furnishing security.

[29] I therefore proceed to set out the parties’ contentions that are relevant for purposes of deciding the relief sought in prayers 1 and 2 of the notice of motion as well as costs.

[30] As stating point, there is no doubt that the parties proceeded with the appeal apparently totally oblivious of the Rule’s requirement regarding security. Only when the appeal panel raised the issue, the parties set fourth their views. Freedom and Palm’s views are aimed at preventing a cost order as a result of the appeal being struck, the one blaming the other for non-observance with the Rule.

[31] Freedom goes strides further by challenging the legality and constitutionality of the Rule. Obviously if Freedom succeeds, Freedom was entitled to disregard the Rule (only to the extent that Palm ostensibly tacitly waived security) and the appeal panel was wrong in striking the appeal. For Freedom, if the relief it seeks is granted (the declaratory orders), a cost order could be avoided, and Palm may well be saddled therewith. In terms of the order that was granted, costs remain to be determined.

[32] Despite that the appeal now to proceed, I consider in the exercise of my discretion, that the challenge to the Rule is not hypothetical, abstract or academic. It is one which affects not only Freedom and Palm (insofar as costs are concerned) but also other litigants who wish to take judgments on appeal. The issue of security for costs on appeal should be considered and resolved. That issue is not moot and remains a live controversy in view of the decision in First Rand Bank Ltd v Van der Merwe⁷ where Froneman J declared the Rule do not fall with the limits set by section 6(1)(m) of the Act. This, in my view allows this court to pronounce upon the challenge. I am fortified in my view by what was said in Afriforum NPC and others v Eskom Holdings Soc Ltd and others:⁸

“[111] But even where there has been permanent acquiescence or cessation, there may still remain a public interest in having the legality of the practice settled. Courts retain a discretion to hear matters where there is no live controversy when it is in the interests of justice to do so. The onus rests on the party seeking to have the matter heard to show that there are sufficiently exceptional circumstances for the exercise of this discretion.

[112] A prerequisite for deciding an issue despite the fact that it is moot is that any order the court may make must have some practical effect on the parties or someone else. Relevant factors include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument that has been advanced by the parties.

[113] Where there is a compelling public interest that the constitutionality of a statutory provision be determined, the doctrine of mootness should be less strictly applied. Continuing uncertainty about the meaning of a statutory provision may prejudice the general administration of justice. Where a manifestly unconstitutional provision continues to be applied with potentially adverse consequences, such considerations should override the mootness of the issue, especially if there are conflicting first-instance decisions. However, the court should always keep in mind: (i) the delicacy of the function of judicial review in matters of public interest; (ii) the comparative finality of its consequences; (iii) the consideration due to the judgment of the other repositories of constitutional power; and (iv) the inherent limitations of the judicial process, arising from its largely negative character and limited resources of enforcement.

[114] In Independent Electoral Commission v Langeberg Municipality the Constitutional Court observed that if a court decides to determine one moot issue arising in a case it is not obliged to determine all other moot issues in the same case. It may elect to determine one moot issue because it is in the interests of justice to do so, but may decide that it would serve no purpose to resolve other moot issues, or to grant the relief sought in relation to them, as future cases might present different factual matrixes.”

The parties', contentions

Freedom:

Declaring the Rule ultra vires and inconsistent with section 6(1)(m) of the Act and inconsistent with section 34 of the Constitution, therefore invalid and unenforceable

[33] In my view, a convenient place to start is to set out the procedural area within which section 6(1)(m) of the Act operates. Section 6(1)(m) is one of the powers of the

Rules Board established in terms of the Act. In terms of the provisions of section 54 of the Superior Courts Act 10 of 2013⁹:

“The rules applicable to the Constitutional Court, Supreme Court of Appeal and the various High Courts immediately before the commencement of this section remain in force to the extent that they are not inconsistent with this Act, until repealed or amended.

[34] The rules applicable to the Supreme Court in force immediately before the commencement of the Superior Courts Act is the Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa under GNR.48 of 1965 in GG 999 of 12-01-1965 (*“the Uniform Rules”*). The Rule is located in the Uniform Rules.

In terms of section 1 of the Superior Courts Act, “rules” and “Rules Board” are defined as follows:

“rules” means the applicable rules of court;

“Rules Board” means the Rules Board for Courts of Law, established by the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985);

[35] The long title of the Act reads:

“To provide for the making of rules for the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, High Courts and lower courts; for that purpose to make provision for the establishment of the Rules Board for Courts of Law; and to provide for matters connected therewith.

[36] Section 6(1) of the Act, empowers the Board established in terms of the Act, to:

“Powers of Board.—(1) The Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts, from time to time on a regular basis review existing rules of court and, subject to the approval of the Minister, make, amend or repeal rules for the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts regulating—

- (a) the practice and procedure in connection with litigation, including the time within which and the manner in which appeal shall be noted;*
- (b) the form, contents and use of process;*
- (c) the practice and procedure in connection with the service of process or other documents, including the issue of interrogatories;*
- (d) the practice and procedure in connection with the execution of process, including writs and warrants;*
- (e) the practice and procedure in connection with the reference of any matter to a referee under section 38 of the Superior Courts Act, 2013, and the remuneration payable to any such referee;*
- (f) the compulsory examination by one or more registered medical practitioners of any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed and whose state of health is relevant for the determination of such damages or compensation, as well as the manner, time, place and responsibility for the cost of the examination, and the making available to the opposing party of any documentary report on the examination;*
- (g) the procedure at or in connection with any enquiry as to the mental state of any person, and the findings or orders which may be made or issued at any such enquiry;*
- (h) the appointment and admission of commissioners to take evidence and examine witnesses;*
- (i) the manner in which documents executed outside the Republic may be authenticated to permit of their being produced or used in any court or produced or lodged in any public office in the Republic;*

- (j) *the appointment and admission of sworn translators;*
- (k) *the duties of sheriffs and other officers of court;*
- (l) *fees and costs, including the fees payable in respect of the service or execution of process (except subpoenas or warrants issued at the request of the State in criminal matters) or in respect of the summoning of persons to answer interrogatories;*
- (m) *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 such security may be given;*
- (n) *the hours during which the offices of registrars and clerks of the court shall be open for official purposes;*
- (o) *the manner of recording or noting evidence and proceedings;*
- (p) *the custody and disposal of records or minutes of evidence and proceedings in the Supreme Court of Appeal and the High Court of South Africa;*
- (q) *the appointment of assessors in proceedings in lower courts;*
- (r) *the tariff of fees chargeable by advocates, attorneys and notaries;*
- (s) *the taxation of bills of costs and the recovery of costs;*
- (t) *generally any matter which may be necessary or useful to be prescribed for the proper despatch and conduct of the functions of the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts in civil as well as in criminal proceedings.*

[37] Section 6 of the Act makes it clear that the powers of the Board are focussed upon making, reviewing, amending and repealing rules for one purpose and that purpose is for the efficient, expeditious and uniform administration of justice. The proper administration of justice is pivotal for the enforcement and ventilation existing individual rights and obligations and for the creation of new rights and obligations either through legislation or the common law. The rules of procedure, through which individual rights and obligations belonging in the realm of the substantive law are indispensable for: “.....*that a man hath a right to a thing for which the law gives him no remedy; which is*

in truth as great an absurdity, as to say, the having of right, in law, and having no right, are in effect the same.' Substantive law is the source of rights and obligations and the procedural law provides the manner in which a remedy is obtained.

[38] Not only the substantive law creates rights and obligations. So does the procedural law too. The Uniform Rules (and also the rules of other courts), which operates within the realm of the procedural or adjective law, are abound with rights and obligations, albeit procedural. Rules of procedure are important and indispensable for the proper administration of justice. This is what was said by O'Regan in Giddey NO v JC Barnard and Partners ¹⁰

"But for courts to function fairly, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of 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 a failure to observe those time limits may result, in the absence of good cause shown, 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 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 caused by the rule is justifiable, then as long as the rules are properly applied, there can be no cause for constitutional complaint. The rules may well contemplate that at times the right of access to court will be limited. A challenge to the legitimacy of that effect, however, would require a challenge to the rule itself. In the absence of such a challenge, a litigant's only complaint can be that the rule was not properly applied by the court. Very often the interpretation and application of the rule will require consideration of the provisions of the Constitution, as section 39(2) of the Constitution instructs. A court that fails to adequately consider the relevant

constitutional provisions will not have properly applied the rules at all.”
(Endnotes omitted)

[39] I proceed with the rule that is the subject of this dispute, namely Rule 49(13)(a).

[40] The Board has amended Rule 49(13) in 1999¹¹ to provide that a court who grants leave to appeal or subsequently on application to it, may release the appellant wholly or partially from that obligation of giving security. This amendment was probably made as a result of the judgment in Shepard v O’Niell¹² which found the Rule before its amendment unconstitutional because: “....As matters stand at present in terms of Rule 49(13) the Court has no power to either exempt an appellant from putting up security or to interfere with the amount fixed by the Registrar. There is much to be said for protecting a respondent in an appeal from an impecunious appellant who drags him from one court to the other. On the other hand to in effect bar access to a Court of appeal because a deserving litigant is unable to put up security appears to me to be unfair and in conflict with the provisions of the Constitution.”

[41] For its contention that the Rule is *ultra vires*, Freedom relies on First Rand Bank Ltd v Van der Merwe¹³, where Froneman J said:

“It seems to me, however, that there is a more fundamental problem relating to rule 49(13), one that ultimately favours the respondents, namely that they are not obliged at all to provide security in an appeal of this nature.

Section 20(5)(b) of the Act [the now repealed Supreme Court Act] explicitly vests the court granting leave to appeal from civil appeals in the High Court with the discretionary power to order the furnishing of security, but the Act contains no such a provision in respect of a court granting leave to appeal from the High Court as a court of first instance in civil appeals (Klipriversoog Properties (Edms) Bpk v Gemeenskapsontwikkelingsraad 1987 (2) SA 117 (A) at 121G-122G).

The rules of court are delegated legislation and if a rule does not fall within the scope of its enabling legislation it is ultra vires (Harms, Civil Procedure in the Superior Courts, A 2.2, 2002 ed.). The enabling statutory provisions for the old Appellate Division rules and the Uniform Rules for the High Courts were the now repealed ss. 43(1) and 43(2)(a) of the Act. These provisions allowed for the making of rules ‘for regulating the conduct of the proceedings’ in those courts in broad, permissive terms. Security for costs was seen as a matter of practice and not of substantive law, with the result that an ultra vires challenge to the old AD rule 6(2) and the old High Court rule 49(13) (which dealt with security for costs on appeal) was unlikely to have met with any success.

Matters have changed on two fronts.

The enabling legislation is now to be found in the Rules Board for Courts of Law Act 107 of 1985. Section 6(1)(m) of Act 107 of 1985 provides that the Rules Board may make rules that regulate

“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.” (my emphasis).

The rules may thus not stipulate where security is required – the legal obligation to provide security, or its obverse side, the right to require security from an opposing party, must be found elsewhere.

*The second change is the new constitutional context. An inflexible right to demand security effectively infringes everyone’s right of access to justice under s.34 of the Constitution, as held in *Shepherd v O’Niell*, above, at 1073C-D.*

Section 20 of the Act deals comprehensively with parties' rights in the appeal process from the High Courts. It provides for a discretionary power to order security in one case (appeals from appeals), but not in another (appeals from the High Court of first instance). The common law cannot help either. The inherent power of the superior courts to regulate their own process as far as ordering security is concerned is limited to controlling vexatious litigation – the kind of litigation which is almost by definition excluded where an order granting leave to appeal is made.

The Supreme Court of Appeal rules no longer contain a provision similar to the old AD rule 6(2) which provided for an inflexible right to demand security. The present rule 9 dealing with security refers only to the situation where the court granting leave to appeal has ordered the appellant to provide security. It thus falls within the enabling provision of s.6(1)(m) of Act 107 of 1985.

In my judgment the provisions of rule 49(13) do not fall with the limits set by s. 6(1)(m).

In so far as the provisions of the rule seeks to be the source of a right to security it goes beyond the powers of regulation set out in s.6(1)(m) of Act 107 of 1985. If its claim is more modest, namely that it merely assumes the existence of such a right, it still overreaches itself because there is no other source of such a right.

If this reasoning is correct rule 49(13), even in its amended form, is invalid. The cure, if needed, lies in amending the Act, not the rules. Although the invalidity stems from reasoning thus far couched in terms of the common law ultra vires doctrine, it in effect amounts to a finding that the rule is invalid under the Constitution according to the doctrine of legality (Pharmaceutical Manufacturers Association of SA and another: In re ex parte President of the Republic of South Africa and others 2000(2) SA 675 (CC), para [50], 698D-F)."

[42] I respectfully disagree with Froneman J's dictum. The dictum overlooks the wide power the Board has in terms of Section 6(1)(a) to review, amend, make and repeal rules regulating the practice and procedure in connection with litigation. The Cambridge Dictionary defines "litigation" as "*the process of taking a case to a court of law so that a judgment can be made*". The Collins Dictionary defines litigations as "*Litigation is the process of fighting or defending a case in a civil court of law*". Therefore, appeals can be nothing else than also part of the process of litigation. That is the reason for the existence of Rules 49 and 50. No one can argue that the Board does not have the power under section 6(1)(a) of the Act to lay down the procedure for Superior Court appeals. In my view, section 6(1)(m) of the Act supports and enhances Rule 49. The source of the power to regulate the issue of security on appeal does not lie in section 6(1)(m) of the Act. Section 6(1)(m) of the Act empowers the Board to prescribe 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 such security may be given and is not confined to appeals but to any other rule which provides for security.¹⁴ In Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd¹⁵, the court said:

"The rule [Rule 47], which deals with the procedure to be followed, applies to all cases where security is sought in the high court. It deals with procedure and not with substantive law."

[43] In any event, in Systems Applications Consultants (Pty) Ltd t/a Securinfo v Systems Applications Products AG and Others¹⁶ the following was said over Giddey NO v JC Barnard and Partners¹⁷

"It is of significance that the Constitutional Court in Giddey NO v JC Barnard and Partners (Giddey) made an illuminating observation that ordering security for costs is a procedural matter incidental to civil proceedings and that when a

court makes an order for costs it exercises its power to regulate its own process.” (Endnote omitted).

[44] At para. 23 of Systems Applications Consultants (Pty) Ltd it was held that:

“Inasmuch as s 13 of the 1973 Companies Act granted a substantive right, this does not detract from the fact that granting an order for security for costs has been held to be a procedural matter.”

[45] Security is therefore an integral part of the procedural law. As such, the Board, as part of its powers, may regulate procedural issues pertaining to security in the process of litigation and consequently the Rule is not *ultra vires*. Freedom would not have succeeded in obtaining the declaratory relief it sought in prayer 1 of its notice of motion.

The Rule offends section 34 of the Constitution

[46] Section 34 of the Constitution provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[47] Freedom contends that the Rule is unconstitutional because, in its current peremptory form, it is inconsistent with section 34 of the Constitution.

[48] There is no merit in this contention because, subsequent to the amendment of the Rule in 1999, the court has the power to release an appellant from furnishing security. In any event, the furnishing of security or not remains a function of the court's process over which the court has its own control. In this manner, injustice is subverted where need be in instances where security is required, either through the substantive

law or the procedural law, but the court, in the interest of fairness absolves a party from the obligation to furnish security. See: Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd¹⁸:

“Until Shepstone & Wylie and Others v Geyser NO 1998 (3) SA 1037 (SCA), the approach adopted had been that although the court was not bound to order security to be furnished, it should nevertheless do so unless special circumstances exist. Hefer JA rejected that approach. He stated (at 1045l–1046A):

‘In my judgment, this is not how an application for security should be approached. Because a Court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of the relevant features, without adopting a predisposition either in favour of or against granting security.’”

Waiver by Palm

[49] The next issue I consider is whether Palm has waived its right to security and if it did, at what stage.

[50] The Rule provides that 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.

[51] Firstly, Freedom says that Palm has tacitly waived its security for costs when it, with full knowledge of the provisions of the Rule neither insisted on the provisions of such security nor objected to the appeal being enrolled for hearing. Secondly, Freedom relies upon Palm’s express waiver of its right to security for costs.

[52] It is common cause that the issue of Freedom's obligation to furnish security for costs in terms of the Rule only arose after the appeal panel raised the issue. It also common cause that it was Palm who took steps for the enrolment of the appeal. Security for costs was not waived either expressly or tacitly before the appeal record was filed.

[53] INNES, C.J., stated in Laws v Rutherford,¹⁹ that the onus of proving waiver is strictly on the party alleging it and he must show that the other party with full knowledge of his right decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Palm never raised the issue of security for costs. Palm cannot say that it was unaware of Freedom's obligation to furnish security under the Rule. I find that Palm, while having full knowledge of its right to security never demanded that Freedom furnish security, therefore abandoning its right by conduct. In any event, Palm also expressly waived its right to security.

Palm:

[54] Palm, in its answering affidavit, says as follows:

*"In the present application, Freedom seeks wide ranging relief including a declaration of constitutional invalidity in relation to the Rules. Astonishingly, Freedom seeks that the costs of this application be paid by Palm."*²⁰

and

*"Palm objects to being drawn into further unmeritorious litigation by Freedom with the transparent aim of drawing out these proceedings further such that Freedom's bid remains shielded from disclosure. I point out that the three-year contract which is the subject of the main application expires in 2022."*²¹

and

“Palm does not wish to get further embroiled in Freedoms misplaced applications before this Court. In particular, Palm has no legal interest in Freedoms primarily relief which aims to declare that Rule 49(13) of the Uniform Rules of Court is unconstitutional. Presumably, this will be dealt with by the Minister and the Rules Board as necessary.”

[55] Palm therefore decided not to get involved in the debate over the constitutionality of the Rule and has contributed nothing in that regard.

[56] Palm focused its response on the issue of costs. It objected to “Freedom’s gracious prayer” that Palm pay the costs of the application for Palm has at all times adopted a reasonable approach to the litigation and that there is no basis to hold Palm responsible for the costs of the application.

The Minister

[57] The Minister filed written submissions on 24 August 2021. In short, the Minister argues that there is nothing untoward about the Rule. The Minister argues that the Rule in its current form does not curtail or infringe the litigants constitutional right to access to court in terms of section 34 of the Constitution and that the Rule is not *ultra vires*, having regard to the Act.

[58] For the reasons above, I find that the Rule is not *ultra vires* nor unconstitutional for: the origin of the obligation to furnish security for costs security may be substantive or procedural; the empowering provision for the Rule is located in section 6(1)m of the Act; and, to the extent that the Rule confers upon the court a discretion to absolve an appellant fully or in part from the obligation to furnish security for costs does not offend section 34 of the Constitution.

Costs

[59] Freedom seeks that the first respondent and any other respondents who opposed the relief that is sought in the application pay the costs. Although Freedom was partly successful in the application in view of the order that was granted as set out above, I am of the view that Freedom must pay the costs of this application. After all, if Freedom complied with the provisions of the rule by either furnishing security as requested by or approached the court to absolve it from the furnishing of security, this application would not have been necessary. On its part, Palm proceeded to prosecute the appeal well knowing that Freedom has not complied with the provisions of Rule 49(13). To Palm's credit, Palm made a proposal which it thought would constitute a practical solution so that the litigation could proceed on the merits. Palm, on 12 April 2021, proposed an order as follows:

“..... that the applicant is released from providing security for the first respondents costs of appeal in the High Court and directing that non dash compliance with rule 49(13) is hereby condoned.”

[60] On 15 April 2021, Freedom responded to Palm's proposal. Freedom rejected Palm's proposal on the basis that the offer that was made “WITH PREJUDICE” which, according to Freedom, was unacceptable in the context of the pending litigation. Freedom's attorneys required that the offer be made on a without prejudice basis before Freedom would consider same failing which, the offer would be deemed to be rejected. Palm's offer came to naught.

[61] Having regard that Palm's offer was not unconditional yet that it was a practical solution and the tender was the ultimate order that was eventually granted, I am of the view that it would be fair to order Freedom to pay the costs in the application incurred by Palm from 12 April 2021.

[62] In the premises, in addition to the order made on 2 September 2021, I make the following order:

(a) Prayer 1 of the notice of motion is dismissed;

(b) The applicant shall pay the first respondent's costs in the application reconned from 12 April 2021.

Roelofse AJ
Acting Judge of the High Court

DATE OF HEARING: 2 September 2021

DATE OF JUDGMENT: 15 September 2021

APPEARANCES

FOR THE APPLICANT: Adv Shotlo-Douglas

INSTRUCTED BY: M.S Omar & Associates

FOR THE FIRST RESPONDENT: Adv S Pudifin-Jones

INSTRUCTED BY: Tomlinson Mnguni James

FOR THE FOURTH RESPONDENT: Adv T Ntoane

INSTRUCTED BY: The State Attorney

¹ He is regarded as the founder of modern utilitarianism. Indeed, he was far ahead of his time. He advocated individual and economic freedoms, the separation of church and state, freedom of expression, equal rights for women, the right to divorce, and the decriminalising of homosexual acts. He called for the abolition of slavery, capital punishment and physical punishment, including that of children. He has also become known as an early advocate of animal rights, all part of our present-day social contract.

² In MINISTER OF THE INTERIOR AND ANOTHER v HARRIS AND OTHERS 1952 (4) SA 769 (A) at 781B – E.

³ As will appear from what is set out later in this judgment, the applicant also challenges the constitutionality of the Rule being offensive of section 34 of the Constitution of the Republic of South Africa 1996.

⁴ Herein cited as the second and third respondents.

⁵ Which is a prerequisite to enroll the appeal for hearing in this Division.

⁶ Paragraph of the order was later amended to replace “first respondent’s” with “the applicant’s”.

⁷ (959/2002) [2002] ZAECHC 23 (7 October 2002).

⁸ [2017] 3 All SA 663 (GP).

⁹ Which commenced on 23 August 2013.

¹⁰ 2007 (5) SA 525 (CC) at para.16.

¹¹ In GNR.122 of 1999.

¹² 2000(2) SA 1066 (N) at 1093 per Combrink J. The judgment was delivered on 30 August 1999.

¹³ *Loc cit.*

¹⁴ For instance, Rule 32(3)(a) and Rule 47.

¹⁵ (20156/2014) [2015] ZASCA 93 (1 June 2015).

¹⁶ (1371/2018) [2020] ZASCA 81 (2 July 2020) at para. 20.

¹⁷ *Loc cit.*

¹⁸ (20156/2014) [2015] ZASCA 93 (1 June 2015) at para. 11.

¹⁹ 1924 AD 261 at p. 263.

²⁰ Para. 11 of the answering affidavit.

²¹ Para. 12 of the answering affidavit.