



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A85/2023

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

14 February 2025

Date

K. La M Manamela

In the matter between:

**LANEL BRED A N.O.
HERMANUS PETRUS STEYN N.O.
RICHARDT SCHEFFER N.O.**

1st Appellant
2nd Appellant
3rd Appellant

AND

ETTIENE JACQUES NAUDE

Respondent

In Re:

ETIENNE JACQUES NAUDE

Applicant

AND

**LANEL BRED A N.O.
HERMANUS PETRUS STEYN N.O.
RICHARDT SCHEFFER N.O.**

1st Respondent
2nd Respondent
3rd Respondent

In Re:

**LANEL BRED A N.O.
HERMANUS PETRUS STEYN N.O.
RICHARDT SCHEFFER N.O.**

1st Plaintiff
2nd Plaintiff
3rd Plaintiff

AND

TRIFECTA INVESTMENT HOLDINGS (PTY) LTD
ALEFEUS CHRISTO SCHOLTZ N.O.
ELMARIE SCHOLTZ N.O.
JOHANNES VOS N.O.
ALEFEUS CHRISTO SCHOLTZ
ETIENNE JACQUES NAUDE
VOS, STEYN, VAN ZYL INCORPORATED
ANNEKE PRETORIUS
THE REGISTRAR OF DEEDS

1st Defendant
2nd Defendant
3rd Defendant
4th Defendant
5th Defendant
6th Defendant
7th Defendant
8th Defendant
9th Defendant

DATE OF JUDGMENT: This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of the judgment is deemed to be 14 February 2025.

JUDGMENT

Khashane Manamela, AJ (Hassim, J and Mahosi, J concurring)

Introduction

[1] The writing of this judgment was recently assigned to me by this Full Court due to the initial designated scribe, Hassim J, becoming unable to do so due to circumstances beyond her control. The Court expresses its regret for the delay.

[2] The first to third appellants ('the appellants') are the trustees, for the time being, of the Shosholoza Trust. They are dissatisfied with the dismissal of their action against the respondent by Kooverjie J ('the Court *a quo*'). The action was instituted in August 2011 by the appellants seeking, in the main, payment of an amount of around R3 million from the respondent. The respondent, a practising attorney of this Court, had been retained by the appellants to render services in the aforesaid or some other capacity in terms of an agreement between the parties. The respondent, in turn, had in September 2020 brought an application for the action proceedings to be dismissed due to the appellants' alleged failure to prosecute their claim (i.e.

the action proceedings) timeously. As stated above, the Court *a quo* found in favour of the respondent and in terms of its judgment handed down on 8 November 2022 dismissed the action by the appellants. The Court *a quo*, subsequently, granted the appellants leave to appeal that outcome to this Full Court.

[3] The appeal came before this Full Court on 14 August 2024. Mr NG Louw appeared for the appellants and Mr HF Oosthuizen SC appeared for the respondent. But, the hearing of the appeal was impeded by another application brought by the respondent, a month before the hearing, for the striking of the appeal from the roll on the basis of alleged non-compliance with the Uniform Rules of the Court. The striking application was also timed by the respondent to be heard on the same date as the appeal. Obviously, due to the nature of the relief sought, it had to precede the hearing of the appeal in sequence. In the end, there was insufficient time to hear the appeal and judgment in the striking application was reserved.

[4] As apparent from what appears above, the parties in this matter have been involved in a handful of legal skirmishes, already. The striking application is the latest of the legal battles between the parties. A brief background, therefore, is warranted to cast the issues relevant to the striking application in a proper context.

Brief background

[5] What appears below is common cause between the parties or not dispositively disputed, otherwise the areas of dispute are pointed out. As this judgment concerns what is actually an interlocutory application, the material in the background is also derived from the papers in the bundles for appeal.

[6] The appellants' claim against the respondent revolves around an entity called Trifecta Investment Holdings (Pty) Ltd ('Trifecta'), cited as the ninth respondent in the action proceedings, as reflected above. Trifecta, at all material times, had two directors, namely, Mr

Sarel Johannes Breda (‘Breda’) and Mr Alfeus Christo Scholtz (‘Scholtz’). Breda held his 55% shares in Trifecta through the Shosholoza Trust, a family trust. Breda died in a plane accident on 3 March 2009. He is survived by his wife, Ms Lanel Breda (‘Mrs Breda’). Mrs Breda is one of the trustees of the Shosholoza Trust and participates herein in that capacity as the first appellant. The other trustees are Mr Hermanus Steyn and Mr Richardt Scheffer, cited as second and third appellants, respectively.

[7] It is said that during June 2009, the respondent was mandated by the Shosholoza Trust to give advice, among others, regarding a proposed sale of Shosholoza Trust’s shareholding in Trifecta. There appears to be some dissatisfaction about the services or advice provided by the respondent including an amount of R3,2 million which the appellants say the respondent withheld from his trust account as a fee. The appellants consider the respondent’s conduct an unlawful and intentional misappropriation of trust funds, which ought to be repaid by the respondent to the Shosholoza Trust. These allegations are disputed by the respondent.

[8] The appellants issued summons against the respondent on 16 August 2011. It appears that the action proceedings stalled after delivery of an exception by the respondent (together with his co-defendants in the action) complaining that the particulars of claim are vague and embarrassing. The exception was, at some stage set down by the appellants, for hearing on 7 September 2020. It is not clear what became of this. Of particular relevance, for current purposes, is that, on 1 September 2020, the respondent launched the application to dismiss the action proceedings on the basis that the appellants had failed to prosecute their claim timeously (‘the Dismissal Application’). On 8 November 2022, the Court *a quo* handed down its judgment in the Dismissal Application, effectively, dismissing the action proceedings with costs.

[9] The same Court granted the appellants leave to appeal to this Full Court on 9 February 2023. A month later, on 9 March 2023 the appellants served their Notice of Appeal. The appeal bundles were served on 23 May 2023. The notice or application for a date of hearing of the appeal and the bond of security were also served on the same date. The appellants, also, appear to have filed their heads of argument and the practice note on 31 May 2023. The appeal was initially set down for hearing on 28 August 2024 with the notice to this effect served on the respondent on 23 June 2023. The date was brought forward to 14 August 2024 in terms of a directive by the Judge President of the Division dated 22 May 2024. The respondent's application to strike the appeal from the roll was served on 15 July 2024, less than a month from the date of hearing of the appeal on 14 August 2024.

Notice of Appeal

[10] Following the granting of the leave to appeal, the appellants delivered their notice of appeal in March 2023.

[11] The notice of appeal stated that the appeal was directed at 'the whole of the judgment delivered by the Honourable Kooverjie J ("*the Court a quo*") on 8 November 2022'. The notice of appeal also stated that the intended appeal was based on a number of specified grounds on the basis of which it was averred that the Court *a quo* erred in dismissing the appellants' action with costs. The nature and extent of the contents of the notice of appeal form part of the multifrontal attack by the respondent that the appeal be struck from the roll. The latter application is discussed next.

Respondent's striking application and the appellants' counterapplication

General

[12] On or around 15 July 2024, the respondent launched an application to strike the appeal from the roll on a number of grounds ('the Striking Application'). The purpose of the Striking

Application was said to be the failure on the part of the appellants to comply with the Rules of this Court.

[13] The appellants dispute that there is anything untoward with the appeal or its trappings, including the notice of appeal. In their answer to the Striking Application, the appellants included what is characterised as a counter-application. Essentially, the so-called counter-application is aimed at addressing some of the complaints in the Striking Application and, also, they seek condonation regarding any non-compliance that may have been highlighted by the former application. I must immediately mention here that there is a dispute as to the aspects over which condonation is sought, as will appear below. The two applications, as they are essentially focussed on the same issues, are dealt with next under self-explanatory paragraphs.

Grounds for the Striking Application

[14] The grounds for the Striking Application can be stated as follows, that: (a) the notice of appeal does not state the particular respect in which the variation of the judgment or order of the Court *a quo* is sought, as required by Rule 49(4)(b)¹ of the Uniform Rules of this Court and, thus, the notice of appeal is a nullity which cannot be cured by an amendment; (b) no power of attorney was filed with the registrar authorising the appellants' attorneys of record to launch the appeal, as required by Rule 7(2);² (c) failure to comply with Rule 49(13)³ in respect of the furnishing of security for costs of appeal.

Requirements of Uniform Rule 49(4)(b) and effect of non-compliance therewith

[15] Rule 49(4) specifies the requirements for a notice of appeal as follows:

‘Every notice of appeal and cross-appeal shall state —
(a) what part of the judgment or order is appealed against; and

¹ Par [15] below, for a reading of Rule 49(4).

² Rule 7(2).

³ Rule 49(13).

(b) the particular respect in which the variation of the judgment or order is sought.'

[underlining added]

[16] The respondent complains that the notice of appeal failed to state 'the particular respect in which the variation of the judgment or order of [the Court *a quo*] is sought.'⁴ The appellants, on the other hand, say that there is nothing wrong as their appeal is directed at the whole judgment of the Court *a quo*. They seek the overturning of the judgment of the Court *a quo* and, thus, see no room for any other interpretation of their notice of appeal.⁵ The respondent's retort is that the approach urged upon by the appellants accord with Rule 49(4) prior to its amendment in 2013⁶ and not in its current form. But, the appellants' case in this regard is also to the effect that the respondent and his legal representatives, who have been with him throughout these legal proceedings, have always known that the appellants are dissatisfied with the whole judgment of the Court *a quo*. This was made patently clear to the respondent's attorneys and counsel. Also, this is manifested by the respondent's ability to file his heads of argument in opposition to the appeal, the contention concludes. Although, nothing would turn on the latter part of the argument on behalf of the appellants, it is unavoidable to state that its logic do not seem to accord with the tenets of our law. Litigation cannot be based on some extra-curial or informal activities by the parties or on their behalf not borne by the papers before the Court.

⁴ Par [15] above, for a reading of Rule 49(4)(b).

⁵ The appellants deny that the notice of appeal suffers from non-compliance with Rule 49 and, among others, reject the contention by the respondent that the lack of particularisation of the material in the judgment or the order of the Court sought to be varied by pointing to paragraph 1 of the notice of appeal which reads as follows: 'The Court *a quo* erred in dismissing the Appellants' action with costs...'

⁶ Rule 49(4) prior to its amendment read as follows: 'The notice of appeal shall state whether the whole or part only of the judgement or order is appealed against and if only part of such judgement 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.' See GN R472 of 12 July 2013.

[17] Counsel for the respondent steadfastly relied on the decision in *Tzouras v SA Wimpy (Pty) Ltd*⁷ to argue that the appellants' notice of appeal is defective due to failure to comply with the requirements of Rule 49(4). The notice of appeal, counsel argued, failed to specify the findings of fact or rulings of law appealed against and the grounds upon which the appeal was founded.

[18] The decision in *Tzouras*, per Margo J, concerned a notice of appeal (involving an order for the ejectment of the applicant therein from certain premises) and its alleged failure to comply with Rule 49(4)⁸ in an appeal to the Full Bench. The notice of appeal in *Tzouras* simply stated that the appeal was 'noted against the whole of the judgment handed down' by the court *a quo*.⁹ The Court held

'The particular requirements of Uniform Rule of Court 49 (4) and of the corresponding Rule in the magistrates' court have generally been regarded as peremptory so that failure to comply with them (or at least to comply with them substantially) invalidates the notice of appeal *ab initio*. Such a notice of appeal is void and therefore cannot be cured by amendment... In *Alex Murray (Pty) Ltd v Perry* 1961 (2) SA 154 (N) the same Rule was applied but the Court permitted the would-be appellant to file a fresh notice of appeal which complied with the relevant Rule, and at the same time granted condonation of the late filing of a valid notice of appeal. A similar approach has been adopted in respect of other requirements of Rule of Court 49 and of the corresponding Rule in the magistrate's court, but it is not necessary to refer to these cases.'¹⁰

[19] Ultimately, despite its latter *dicta* alluding to the possibility of a fresh compliant notice of appeal availing condonation, the Court in *Tzouras* held that Rule 49(4) was peremptory and, thus, failure to comply with its provisions invalidates the notice of appeal *ab initio* and renders it a nullity.¹¹

⁷ *Tzouras v SA Wimpy (Pty) Ltd* 1978 (3) SA 204 (W) 205D-E

⁸ Rule 49(b) read differently from the current rule, as follows: 'Every notice of appeal to the full court shall state whether the whole or part only of the order is appealed against and if part only is appealed against it shall state which part; and it shall specify the findings of fact or rulings of law appealed against and the grounds upon which the appeal is founded.' See *Tzouras v SA Wimpy* 1978 (3) SA 204 (W) 205B.

⁹ *Tzouras v SA Wimpy* 1978 (3) SA 204 (W) 205C.

¹⁰ *Tzouras v SA Wimpy* 1978 (3) SA 204 (W) 205E-G.

¹¹ *Tzouras v SA Wimpy* 1978 (3) SA 204 (W) 205H-206D.

[20] Mr Oosthuizen SC for the respondent submits that the principles articulated in *Tzouras* remain good law and enjoyed higher affirmation in terms of the decision of the Supreme Court of Appeal in *Leeuw v First National Bank Ltd*.¹² But the SCA went further in the latter decision to also observe that:

‘In 1987 the Uniform Rules of the High Court were amended to provide, for the first time, for the delivery, prior to the hearing, of ‘a concise and succinct statement of the main points . . . which [a party] intends to argue on appeal’ - so-called heads of argument. It can be said that since then the object of the notice of appeal to inform the respondent and the court was also achieved by the heads of argument . . .’¹³

[21] It is notable that the SCA in *Leeuw* cited the change in the formulation of the Rule as a basis for its subsequent holding regarding the delivery of heads of argument.¹⁴ The latter holding was recently applied in the Full Bench (*coram*: Manoim J and Gilbert AJ) decision of this Division in Johannesburg in *Miya v Matleko-Seifert*¹⁵ in the following observations:

‘Accordingly the object of the notice of appeal, to inform the respondent of the case the respondent must meet on appeal and the appeal court of the points to be raised on appeal, is now also achieved by the heads of argument. In the present instance, the appellant does expressly raise the challenge to the magistrates’ court’s jurisdiction in her heads of argument on appeal.’ [footnote omitted]

[22] The essence of the holding above was shared earlier by the Full Court (constituted by Bozalek, Cloete and Savage, JJ) of the Western Cape Division (Cape Town) in *Wiese and another v ABSA Bank Ltd*,¹⁶ including as follows:

‘[6] The bank contended that the notice of appeal is fatally defective in that it failed to specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded. On the other hand the appellants submitted that, given the change in the wording of the subrule pertaining to notices of appeal, this is no longer a requirement.

¹² *Leeuw v First National Bank Ltd* 2010 (3) SA 410 (SCA) [2].

¹³ *Leeuw v First National Bank* 2010 (3) SA 410 (SCA) [2].

¹⁴ Para [20] above.

¹⁵ *Miya v Matleko-Seifert* 2023 (1) SA 208 (GJ) [51].

¹⁶ *Wiese and another v ABSA Bank Ltd* (14580/2013) [2017] ZAWCHC 12; [2017] 2 All SA 322 (WCC) (24 February 2017) [3]-[18].

[7] In *Leeuw v First National Bank Limited* 2010 (3) SA 410 (SCA) at paragraph 2 it was stated that [also reported at [2010] 2 All SA 329 (SCA) – Ed] ...

...

[15] In the present matter the appellants not only complied with Practice Note 46(5) but also filed comprehensive heads of argument dealing with the issues in the appeal. Counsel for the bank accepted that the latter was neither prejudiced in preparing for the appeal, nor taken by surprise as to what case it was called upon to meet. In addition, it was clear to us from both the Practice Note and heads of argument filed by the appellants what the issues were.

...

[18] To sum up therefore, it would appear that, to the extent that the older cases took the approach that the previous Uniform Rule 49(3) was peremptory in nature (at least in the context of appeals from the magistrates' courts), the decision in *Leeuw (supra)* has made it clear that this is no longer the position in the Supreme Court of Appeal. Moreover, to the extent that there was a dichotomy between Supreme Court of Appeal Rule 7 and the old Uniform Rule 49(3), this is no longer the case. Further, and at least in this Division, Practice Note 46(5) caters for any apparent deficiency in a notice of appeal which might give cause for complaint. It follows that the point *in limine* must fail.' [underlining added]

[23] This is also the view of the Limpopo Division (Polokwane) in *Limpopo Province Voluntary Group Scheme Board and Others v Mahubane and Others*.¹⁷

[24] Most of these decisions did not feature, at all, or gain any prominence in argument during the hearing of the Striking Application. And, I am not casting aspersions. Counsel for the respondent was emphatic in his reliance on *Tzouras* for his submission that it renders Rule 49(4) peremptory and relegate to nullity any failure to comply with its provisions. But, the SCA in *Leeuw* (as adopted by this Division and others) made it clear that since the object of the notice of appeal is to inform the respondent and the Court, this is also achieved by the heads of argument.¹⁸ In my view this is part of the current law on the issue.

[25] In conformance with *Leeuw*, the current practice directive¹⁹ of this Division and previous ones, including the practice manual²⁰ require(d) the delivery of heads of argument for

¹⁷ *Limpopo Limpopo Province Voluntary Group Scheme Board and Others v Mahubane and Others* (HCAA14/2019) [2021] ZALMPPHC 2 (28 January 2021) [28]-[35].

¹⁸ *Leeuw v First National Bank* 2010 (3) SA 410 (SCA) [2]. See para [22] above.

¹⁹ Consolidated Practice Directive 1/2024 para 33.17.2.

²⁰ Chapter 7 (Civil Appeals) which also draws the attention of the drafter of heads to the remarks of Harms JA in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and another* 1998 (3) SA 938 (SCA) [37].

purposes of the prosecution of an appeal. The appellants filed what appears to be comprehensive heads of argument succinctly setting out the impugned material in the judgment of the Court *a quo* and the grounds therefor. Consequently, the respondent is in no lesser position to know the findings of fact or rulings of law appealed against and the grounds upon which the appeal is founded. The same applies to the Court. It is also not inconsequential that the appellants have prior to the hearing of the appeal, albeit ‘out of abundance of caution’, amended the notice of appeal. But the respondent appears to dispute that the amendment is of no consequence, since it is not covered by condonation sought in the appellants’ counterapplication. I do not really think it is necessary to deal with this aspect for current purposes.

[26] The respondent, despite the appellants’ efforts to address his concerns, finds the notice of appeal to remain an impediment towards the hearing of the appeal. It is also notable that the respondent’s case does not reveal any form of tangible prejudice - actual or anticipated – due to the alleged non-compliant notice of appeal. At least not prejudice incapable of being remedied through the conventional means of a costs order, often accompanied by postponement of the appeal. The respondent seeks only the striking of the appeal from the roll of this Court. This approach elevates the form of the rules and practice of our Courts over the substance thereof and risk impeding the realisation or exercise of constitutional rights of access to our courts²¹ and of enforcement of such and similar rights.²² Such an approach is discouraged by our Courts and it should be. If needs be, the Court should summon the supreme legal powers afforded by section 173 of the Constitution ‘to protect and regulate [its] own process, and to develop the common law, taking into account the interests of justice’.

²¹ Section 34 of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’).

²² Section 38 of the Constitution.

[27] Consequently, I find no merit in the attack on the notice of appeal in the light of what appears above. I turn to the other grounds for the Striking Application.

No Power of Attorney was filed

[28] Uniform Rule 7(2) prescribes the filing of a power of attorney for purposes of the setting down of an appeal as follows:

‘The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorising him to appeal and such power of attorney shall be filed together with the application for a date of hearing.’

[29] It is common cause that when the appellants applied for a date for the hearing of the purported appeal around 31 May 2023, they did so without filing a power of attorney with the Registrar of this Court. The respondent calls for the striking of the appeal from the roll also in respect of this omission.

[30] The appellants admitted the omission of the power of attorney. They say the error was rectified, immediately, upon receipt of the Striking Application. They say this was a *bona fide* oversight on the part of the appellants’ attorneys of record. In fact, the paralegal (initially described as a candidate attorney in the answering affidavit) who deposed to the answering affidavit in the Striking Application appears to accept responsibility regarding this omission. He attributes the omission to lack of experience on his part in dealing with appeals. He accepts that his lack of knowledge is no excuse and say that he would learn from the mistake. But I do not think that a paralegal or even a candidate attorney should have been saddled with the sole responsibility of handling the appeal. In fact, a candidate attorney should not be left to wander alone and unsupervised on any Court process, especially when he or she has no prior exposure of the activity or task at hand. The respondent actually disputes the capacity of the candidate attorney to depose to the affidavit. It is in fact, pointed out by the respondent, that the paralegal

or candidate attorney was not involved in the matter. Mr Manley, the attorney, and Mr Kroukamp, the paralegal were the relevant people who were involved in the matter. It is argued on behalf of the respondent, that the condonation sought by the appellants for non-compliance with Rule 7(2) should be refused for this mismatch in the deponent to the affidavit alone.

[31] The appellants, as already hinted, seek condonation in this regard in their so-called counterapplication. It is argued on their behalf that the purpose of Rule 7(2) has been met by the subsequent compliance, albeit after the respondent has already launched the current application for striking. The appellants contend that the grounds advanced for condonation of any non-compliance in this regard are good. There is no prejudice on the part of the respondent, but the striking of the appeal from the roll would prejudice the appellants, due to the error which could only be blamed on the attorneys and not the appellants.

[32] To sum up: the respondent's case - in this regard - is that the appellants should have filed the power of attorney when they applied for a date of hearing of the appeal in terms of Rule 49(6)(a), otherwise there was no proper application for a date of the hearing of the appeal. This, notwithstanding the fact that the Registrar may have set down the appeal despite the appellants' aforesaid failure to comply with Rule 7(2), the argument continues. Therefore, the appeal ought to be struck from the roll for want of a proper set down.²³

[33] As indicated above, the appellants conceded that there was non-compliance with Rule 7(2). They offered an explanation and sought to remedy their non-compliance with *ex post facto* delivery of the power of attorney dated 16 July 2024. Of particular significance, the appellants, in terms of their counter-application, sought condonation. This was before the hearing of the matter and, immediately when they were alerted to the omission by the

²³ *Aymac CC and another v Widgerow* 2009 (6) SA 433 (W), *coram*: Boruchowitz J, Mbha J and Gautschi AJ, at para [6]; *Smith v Sci Essel Offshore Services Limited* (A740/2014) [2024] ZAGPPHC 119 (15 February 2024), *coram*: Van der Schyff, Mahosi and Davis, JJ at paras [17]-[18].

respondent's Striking Application. Our authorities recognise the granting of condonation for failure to comply with Rule 7(2) for deserving cases.²⁴ Bearing in mind the facts surrounding this aspect, some stated above, I am of the view that condonation should be granted. There is no apparent irremediable prejudice to the respondent. I also agree with the appellants' view that the respondent does not seem to have been impeded, in its opposition of the appeal, by the non-compliance and the subsequent remedial steps taken by the appellants in this regard.

'Good and sufficient security' for costs of appeal

[34] Rule 49(13) provides as follows:

'(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.'

[35] The appellants, in a quest to comply with Rule 49(13)(a), delivered (with service on the respondent on 24 May 2023 and filing with this Court on 31 May 2023) a document labelled 'Bond of Security' dated 17 May 2023, which stated the following in the material part:

'BE PLEASED THAT THE APPELLANTS are held liable and firmly bound for the costs in the abovementioned appeal to the full bench of the Honourable Court in the amount of R1 000.00 in the event that the Honourable Court may award costs to the Respondent.'²⁵

[36] The respondent disputes that the appellants complied with the peremptory provisions of Rule 49(13)(a).²⁶ The appellants, it is contended on behalf of the respondent, did not 'enter into good and sufficient security' for the respondent's costs of appeal. This is so, as the

²⁴ *Aymac v Widgerow* 2009 (6) SA 433 (W) [7].

²⁵ CaseLines 041-2.

²⁶ *Collatz and another v Alexander Forbes Financial Services (Pty) Ltd and others* (A5067/2020; 43327/2012) [2022] ZAGPJHC 93 (10 February 2022), *coram*: Senyatsi J, Mahomed AJ and Amm AJ, at paras [16]-[18].

purported security bond is meaningless and provides no security to the respondent. Also, the appellants were not released by the Court *a quo* from the obligation in this regard nor has the respondent waived his right to security for the costs of appeal.²⁷ Further, it is contended on behalf of the respondent, that the appellants failed to reach agreement with the respondent on the amount of security and the manner in which security is furnished, either before or following the delivery of the so-called ‘Bond of Security’. The appellants did not request the registrar to fix the amount of security, as envisaged in Rule 49(13)(b).²⁸ Accordingly, the appeal ought to be struck from the roll also on this ground, the respondent urges the Court.

[37] The appellants reject the criticism levelled by the respondent against the ‘Bond of Security’ filed and that it does not comply with Rule 49(13). Regarding an approach to the registrar to determine the amount of the security, the appellants consider this a prerogative of any litigant who disputes the amount of security furnished. Therefore, the respondent waived his right to dispute the amount of the security given his delayed objection solely intended to derail the appeal, the submission on behalf of the appellants concludes. Mr Louw for the appellants, even doubted that there was any need for condonation with regard to the issue of security for costs.

[38] But, the provisions of Rule 49(13) are clear. The rule has two requirements which may, if needs be, interdependent and sequential.

[38.1] The first requirement is that an ‘appellant shall ... enter into good and sufficient security for the respondent’s costs of appeal’.²⁹ The provision prescribes the timing for the first requirement (i.e. ‘before lodging copies of the record on appeal with the registrar’).³⁰ Also, it allows the respondent in the appeal (through waiver of the right to

²⁷ Rule 49(13)(a).

²⁸ Para [34] above.

²⁹ Rule 49(13)(a), quoted in para [34] above.

³⁰ *Ibid.*

security) or the Court (granting partial or whole release from the obligation) to dispense the appellant from the requirement.³¹ The latter allowances do not feature in the (apparently) heavily contested appeal in this matter. The nature and extent of the security is not mentioned in the rule, save for the appellation ‘good and sufficient’ security. The rule appears to grant an appellant the prerogative of determining the form and amount of security. But, whilst the prerogative is not unconstrained, in terms of the rule it appears only the respondent could enforce the granting of ‘good and sufficient’ security by triggering the second requirement of Rule 49(13).

[38.2] The second requirement of Rule 49(13) is overseen by the registrar. The registrar’s involvement would be triggered or sought when there is ‘failure by the parties to agree on the amount of security’.³² The rule does not prescribe who, between the appellant and the respondent, is to approach the registrar and, thus, it is reasonable to think that either of the parties or both of them may approach the registrar for intervention. But, the registrar is clearly empowered to ‘fix the amount’ which the appellant ‘shall enter into security in the amount’ or percentage of amount determined by the court.³³ The learned author of *Erasmus: Superior Court Practice*³⁴ explains that the latter reference to ‘the court’ is to ‘the court that granted leave to appeal as contemplated in paragraph (a) of this subrule’.³⁵ I do not think that the registrar would be reasonably discharging her or his duties if he or she goes about all these without consideration of the views or representations of the contending parties. Therefore,

³¹ Rule 49(13)(a), quoted in para [34] above.

³² Rule 49(13)(b), quoted in para [34] above.

³³ *Jeanru Konstruksie (Pty) Ltd v Botes* [2023] ZAGPPHC 2169; A304/2021 (30 May 2023) [27].

³⁴ DE van Loggerenberg, *Erasmus: Superior Court Practice* (Revision Service 24, 2024, Jutastat e-publications October 2024).

³⁵ *Erasmus: Superior Court Practice* RS 23, 2024, D1 Rule 49-28.

assertions that a security bond filed is ‘meaningless and provides no security’ should be advanced before the registrar.

[39] It is clear from the above, that the respondent should have sought the intervention of the registrar for the latter to ‘fix the amount’ for the security or even the form thereof. It does not behove a respondent to wait until the date of the hearing of the appeal to argue about the nature and extent of the security furnished by an appellant. The jurisdiction in this regard is clearly carved out for the registrar not the Court. The Court would – no doubt – be involved when there is dissatisfaction with the decision of the registrar or the manner it was reached, but that is a different issue. This is not the same as placing any responsibility on a respondent regarding the furnishing of security, but only when a respondent has issues with the nature or extent of the security filed by an appellant. For it would be irrational to expect anyone else other than the respondent to be able to definitively state its concerns in this regard: before the registrar in the first instance.

[40] The authorities appear to allow the Court to be involved including by way of striking an appeal from the roll, where no security has been filed.³⁶ I do not include in the latter category an instance, such as the one propositioned by the respondent of labelling the security filed by the appellants in this matter ‘meaningless’. The ‘Security Bond’ filed by the appellants – warts and all – is still security. In case it falls short of the requirements in the rule it is for the registrar to determine. To treat this otherwise would amount to an overreach of the registrar’s jurisdiction. It is also noteworthy that the respondent appears to have suggested an amount of R356 725.40, but this appears to have been rejected by the appellants. But, the respondent as with the appellants, ought to have approached the registrar for intervention in terms of Rule

³⁶ *TR Eagle Air (Pty) Ltd and another v Thompson* (A206/2018) [2020] ZAGPPHC 801 (13 November 2020), *coram*: Tlhapi, Mudau and Lenyai, at paras [15]-[20]; *Jeanru Konstruksie v Botes* [2023] ZAGPPHC 2169 at paras [7], [30]-[31]. See also *Erasmus: Superior Court Practice* RS 23, 2024, D1 Rule 49-27 and the other authorities cited under footnote 175 therein.

49(13)(b), as stated above. The fact that this was not done, doesn't redound in either of the parties' favour. Therefore, this ground for the striking is also dismissed.

Conclusion and costs

[41] The Striking Application has fallen on all its legs. It really had no discernible or meritorious purpose as the respondent did not really say that he was hampered in mounting his opposition against the appeal due to any of the issues complained of. In the end, even with this outcome, the appeal couldn't proceed.

[42] As indicated above, the hearing of the Striking Application impeded the hearing of the appeal. It took the greater part of the day allocated for hearing the appeal. In any case, due to the significance and impact of the decision on the striking issues, the Court also required a post-hearing opportunity to reflect on the issues and, thus, the possibility of an extemporaneous ruling did not feature. This led to judgment being reserved in the Striking Application and the appeal remaining in *limbo*, so to speak. The appeal would have to be postponed *sine die*, now that it has survived the respondent's attempts to strike it from the roll.

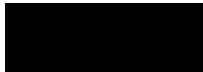
[43] Bearing in mind what appears above, I do not think that the costs should follow the outcome in terms of the convention of this Court. Although, the appellants succeeded in swaying the Court not to strike the appeal from the roll, this outcome wasn't without some blemishes. This is borne by what appears above. Therefore, the appropriate order will be the one where the costs of the application are to be costs in the appeal. The party who is ultimately successful in the appeal deserves the benefit of the costs from the previous sitting, including those that relate to the appeal itself.

[44] To avoid doubt, as the appeal was not struck from the roll, the order to be made below will include a term postponing the appeal *sine die* and, as already stated, with no order as to costs.

Order

[45] In the result, an order is made by the Court in the following terms:

- a) Condonation is granted in favour of the appellants regarding their non-compliance with Uniform Rule 7(2);
- b) The application to strike the appeal in this matter from the roll is dismissed;
- c) The costs of the application in b) hereof shall be costs in the appeal, and
- d) The appeal is postponed *sine die* with no order as to the wasted costs occasioned by the postponement.



Khashane Manamela
Acting Judge of the High Court

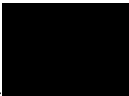
I agree

p.p.



D Mahosi
Judge of the High Court

I agree



SK Hassim
Judge of the High Court

Date of Hearing : **14 August 2024**

Date of Judgment : **14 February 2025³⁷**

Appearances

For the Applicant

Instructed by

:

:

:

Mr N.G. Louw

Manley Inc, Pretoria

For the Respondent

Instructed by

:

:

Mr H F Oosthuizen SC

WNA Attorneys Inc, Pretoria

³⁷ Refer to paragraph [1] above.