



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

(1) REPORTABLE: <u>YES</u> / NO
(2) OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3) REVISED
DATE 28 August 2025
SIGNATURE

CASE NO: A280/2023

COURT A QUO CASE NO: 72988/2017

In the matter between:-

KOOPMAN I

Appellant

v

THE MINISTER OF POLICE

Respondent

Heard on: 7 May 2025

Delivered: 28 August 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 28 August 2025.

Summary: 1. Costs *de bonis propriis* – when appropriate – non-compliance with the Uniform Rules of Court – conduct of legal practitioner substantially and materially deviates from the standard expected of a legal practitioner – costs order *de bonis propriis* justified.

ORDER

It is ordered:-

1. Both the instructing attorney and the correspondent attorney are jointly and severally ordered to pay the wasted costs of the hearing of 7 May 2025 *de bonis propriis* on scale B for the costs of two counsel.

JUDGMENT

Strijdom J (D Mlambo DCJ (Formely JP) and Kooverjie J concurring)

THE APPEAL

- [1] This appeal did not proceed on the merits. The respondent contended that the appellant had failed to comply with the processes set out in Rule 49 of the Uniform Rules of Court.
- [2] The appellant sought condonation for the failure to prosecute the appeal within the time period set out in Rule 49(6) and 49(7) as well as for reinstatement of the appeal. In addition the appellant filed an application to be released from security for costs in terms of Rule 49(13) of the Uniform Rules of Court.
- [3] It was common cause that the appeal had lapsed and in order for the litigation to proceed, an order reinstating the appeal would have to be granted.
- [4] Prior to the appeal process being embarked upon, the court *a quo* dismissed the action instituted by the appellant. The appellant claimed damages alleging that her arrest was unlawful. The appellant filed her application for leave to appeal. This was dismissed by the court *a quo*. Upon filing her petition, the Supreme Court of Appeal granted same.
- [5] At the commencement of the appeal proceedings this court engaged with the parties on the preliminary objections which had been raised by the respondent regarding the competency of the appeal.
- [6] The respondent persisted with preliminary objections on the basis that there were failures to:
 - 6.1 file a power of attorney authorizing the attorney to appeal in terms of Rule 7(2);
 - 6.2 file a notice of appeal within twenty days after date upon which the leave was granted in terms of Rule 49(2);

- 6.3 timeously file the appeal record (within sixty days after the delivery of a notice of appeal) in terms of Rule 49(6)(a).
- 6.4 timeously institute the reinstatement application as soon as the appeal lapsed in terms of Rule 49(6)(b);
- 6.5 consult with the respondent on the content of the appeal record in terms of Rule 49(9); and
- 6.6 provide security of costs for the respondent's costs of appeal in terms of Rule 49(13).

- [7] These very objections were raised weeks before the hearing that is on 31 March 2025, where the respondent invited the appellant to withdraw the appeal and remedy the irregularities identified. The appellant was particularly advised that *"In the event that we are constrained to file heads of argument on both the interlocutory application and the appeal, we will seek punitive and personal costs order against the legal representatives of the appellant."*
- [8] However, on 3 April 2025, in response, the appellant's attorney maintained that the appeal could proceed. The view, in essence, was that certain of the objections had no merit, and the parties had sufficient time to resolve the rest of the issues. Consequently, the matter was not removed from the appeal roll.
- [9] When the court engaged with the appellant's counsel on the said irregularities raised by the respondent, they then requested that the matter be removed from the roll and tendered the wasted costs. Consequently, this court removed the matter from the roll, but the issue of costs was reserved. The court afforded both parties an opportunity to provide reasons as to why a punitive cost order against the appellant or the appellant's attorney should not be made. At all relevant times, Mr Pearton was the correspondent attorney and Mr Isang Nakale was the instructing attorney.

[10] To this end, Mr Pearton filed his affidavit on the issue of costs on 27 May 2025 and the respondent filed its submission on 10 June 2025. A reply to the respondent's representations was further filed in respect of punitive costs on 17 June 2025.

[11] The issues that this court specifically raised with the appellant were:

11.1 Whether a power of attorney was filed as envisaged in Rule 7(2);
and

11.2 Whether the appellant obliged to tender sufficient security for costs in terms of Rule 49(13).

[12] It is common cause that the appeal had lapsed in February 2023, and the appellant only sought consent from the respondent for the late filing of the record on 3 May 2023 (which was three months after the appeal had lapsed).

[13] In his written submissions, Mr Pearton submitted that a valid power of attorney, duly authorising the appellant's attorney to prosecute the appeal, was indeed filed with the Registrar and duly placed in the court file when a date for the appeal hearing was requested. The power of attorney, dated 20 September 2019, was then attached to the attorney's affidavit as Annexure "A".

[14] The respondent argued that there was no evidence that such power of attorney had been filed. More particularly it was concluded that:

14.1 no confirmatory affidavit of the messenger from the appellant's attorney's law firm, or a court stamped power of attorney indicating that such power of attorney was filed in the court file, had been attached;

- 14.2 even though the alleged power of attorney was furnished to the respondent, the appellant's attorney failed to indicate when the request was made to the instructing attorney to furnish same;
- 14.3 it was further pointed out that in terms of the Consolidated Practice Directive 1 of 2023 (which replaced Consolidated Practice Directive 2 of 2022) legal representatives were required to upload all documents, including heads of argument and practice notes to the appeal;
- 14.4 Rule 7(2) stipulates that 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 authorizing him to appeal and such power of attorney shall be filed together with the application for a date of hearing. The only inference that can be drawn is that the date of the hearing in terms of Rule 49(6)(a) was not properly obtained.

[15] In ***Smith v Sci Essel Offshore Services Limited***¹ the court expressed:

"On a plain reading of the rule, it is evident that to prosecute an appeal, it is essential to file the power of attorney when the application is made for a hearing date. Filing an application for a date of hearing without a power of attorney is not the proper 'making' of that application within the meaning of the rules. The imperative of Rule 7(2) becomes clearer when considered in the light of the fact that Rule 7(1) does not prescribe the general filing of a power of attorney when litigation commences." Hence it is trite that a power of attorney cannot be filed after the application of a hearing date.

[16] The appellant's attorney made various representations in his regard. More particularly he submitted that such power of attorney was indeed handed to the Registrar who was required to place same in the physical court file. A date would

¹ (A740/2014) [2024] ZAGPPHC 119 (15 February 2024)

not have been allocated without such power of attorney. In my view, even if this was the case I find no explanation why it was not furnished when requested by the respondent's weeks before.

SECURITY FOR COSTS

[17] The second issue raised with the appellant was the non-compliance in terms of Rule 49(13). The correct understanding of the process in terms of Rule 49(13) is that the appellant was obliged to provide security for the respondent's costs of appeal before lodging copies of the record with the Registrar unless the respondent waived its right to security or the court on application releases the appellant. Rule 49(13)(a) stipulates: *"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."*

[18] In his written response, the appellant's attorney contended that the security for costs issue was a belated attempt by the respondent to prevent the hearing of the appeal. He further submitted that since he was dealing with an indigent litigant, he held a bona fide view that security need not be furnished. He then went on to explain that: *"The failure to bring a timeous application for security for costs was a bona fide error of judgment in the approach to the bringing of this appeal by the whole legal team, and not only myself."*

[19] In fact, on 3 April 2025, the appellant's attorney requested the respondent to waive security. It was expressed:

"We request you to waive security as our client is indigent and your client should not rely on costs. it should not be the object of the state to block a person's access to court which is an entrenched constitutional right should the respondent refuse, please inform us for us to file the necessary application to be released from security."

[20] It appears that the dispute which persists between the parties remain and are the following:

- 20.1 Whether the full court had jurisdiction to consider the application to waive the security for costs; and
- 20.2 Whether the respondent was required to file a Rule 30 application on the premises that the appeal record was filed without the lodgment of the security thus being an irregular step.

[21] On the first issue, in the **TR Eagle SA** matter, the court settled the jurisdiction issue. It held that the court that grants leave to appeal is the court that can release the appellant from putting up security either when granting such leave or when on application once leave to appeal has been granted.²

[22] It was further affirmed that if the Supreme Court of Appeal granted an appellant leave to appeal, it is only that court that can release the appellant from the obligation to provide security for the costs of the appeal and the court hearing the appeal accordingly does not have jurisdiction to do so.³

² TR Eagle Air (Pty) Ltd v RW Thompson unreported GB case no. A206/2018 dated 13 November 2012

³ Strouthos v Shear 2003 (4) SA 13 T at 141

Dr Maureen Allen v Baard 2022 (3) SA 207 GJ at paragraphs 61 to 64 where Strouthos v Shear was cited with approval

[23] On the second issue, namely whether the respondent was required to file a Rule 30 application, in order to request for the appeal to be struck off, was also pronounced upon by the full court in **TR Eagle**. In the said matter, the respondent also raised non-compliance with Rule 49(13)(a) in his heads of argument requesting that the appeal should be struck off the roll. The appellant therein also contended that the respondent should have initiated the Rule 30 procedure as there was non-compliance on the security for costs obligation on the part of the appellant.

[24] The full court was in fact saddled with the same enquiry. At paragraph 17 it was expressed:

"Then the question will then arise, is it material that the respondent in an appeal engage a Rule 30 procedure where the appellant has failed to give security, can it be said that he or she has acquiesced and waived such right and that the appeal must proceed."

It established at paragraph 18 that:

"Rule 49 (13)(a) 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 the appellant wholly or partially from giving security on application to it. The latter may occur when the respondent has not waived his right, and this will oblige the appellant to place factors to the satisfaction of the court why he or she should be released wholly or partially from giving security when filing the record of appeal."

- [25] The full court further by referring to **Boland Konstruskie Maatskappy (Edms) Bpk V Petlen Properties Edms Bpk**⁴ echoed the sentiments that it is undesirable to allow a matter to proceed in instances that when there is no full and proper explanation before it. It expressed:

“The court emphasized on the need to file a proper application for condonation, supported by affidavit allowing the other side to respond. 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 were served there was knowledge on his part that he had not compiled, 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 remand to tender wasted costs in order to attend to compliance and condonation...”

- [26] Similarly, in this matter, the appellants attorneys were forewarned of the non-compliance. The appellant’s legal team held differing views by relying on **Maake**⁵, a full bench decision of the Limpopo High Court. The respondent was surely entitled to respond to the application to waive security that was belatedly filed just before the hearing. There could have been no doubt in the appellant’s attorneys minds that the security issue would be persisted with and would require proper ventilation before they could proceed on appeal. It was evident that appearance

⁴ 1974 (4) SA 291 C at 293 D-H

⁵ Maake and others v Chemfit Finechemical Pty Ltd (5772/2016; H CAA 04/2018 [2018] ZALMPPHC 71 (22 November 2018 [14-18])

on the date set down for the appeal would result in wasted costs. The conduct was clearly irresponsible and negligent.

- [27] In ***Carpe Diem***⁶, the court again echoed the importance of having the security issue resolved before proceeding on appeal. At paragraph 14 the court noted *"amongst many others procedural shortcomings plaguing the appeal, there was listed a failure to provide security and where the appellant sought condonation for some of its failures and asked the court to inter alia release it from the obligation to furnish security"*.

The court further expressed:

"The failure to find security and to obtain a ruling on the failure to find security before an appeal was due to be heard is of a character different to other non-procedural non-compliances which I have mentioned. It is the right of a respondent on appeal to go into an appeal secured, at least to the extent provided by the rules against the inability of the appellant to pay costs of the appeal is unsuccessful. The failure to provide an explanation as to why security should be disposed with and the failure to have the issue of security resolved by application to court before Kasimira incurred expenses in opposing the appeal are in my view sufficient by themselves to justify the dismissal of the application to dispense with security".

- [28] It should also be noted that any request for a waiver should have been made before the filing of the appeal record. In instance the appeal record was filed on 13 September 2023, but waiver was only sought on 7 April 2025.

LEGAL PRINCIPLES PERTAINING COSTS DE BONIS PROPRIIS

⁶ *Carpe Diem Exploratas (Pty) Ltd v Kasimira Trading 82 (Pty) Ltd and Others* [2016] ZAGPPHC 1099 (A601/14)

[29] The general principle is that a losing party will be ordered to pay costs of the winning party who should not be left out of pocket when it is the other party who either brought or failed to defend a claim against the winning party. The following factors have been outlined by our courts, when considering *de bonis propriis* cost orders, namely:

- 29.1. The general rule is that legal representatives are entitled to their costs when representing their clients irrespective of whether their clients win or lose. There are, however, circumstances when a court orders a legal practitioner to pay the costs of the matter out of his/her own pocket⁷. Granting an order *de bonis propriis* is wholly within the court's judicial discretion.⁸ Such orders are however only reserved for the most serious of matters and where a court expresses its displeasure of the conduct of a legal representative.⁹
- 29.2. Such awards are granted when it becomes apparent that there has been a material departure from the responsibility of office¹⁰. The aim of the order is to indemnify a party against an account for costs from his own representative, namely, to compel the representative to pay the costs himself.¹¹
- 29.3. In ***South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others v Chairperson Gauteng Liquor Board and Others***¹², the Constitutional Court stated:

⁷D G Lembore and others V Minister of Home Affairs and others 2024 [5] SA 251 GS (18/2) 2024 paragraph 23

⁸ Stainbank v South African Apartheid Museum at Freedom Park and Another [2011] ZACC 20: 2011 (10) BCLR 1058 (CC) at para 52

⁹ Mathimbane and Another v Normandien Farms (Pty) Ltd [2013] ZAIACC 4 at para 27

¹⁰ Blou v Lampert and Chipkin NNO 1973 (1) SAIA

¹¹ Pieter Bezuidenhout – Larochelle Boerdery (Edms) Bpk v Weterius Boerdery (Edms)Bpk 1983 (2) SA 233 (O) at 236

¹² [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC)

“An order of costs de bonis propriis is made against attorneys where a Court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the Court’s displeasure. An attorney is an officer of the Court and owes a court an appropriate level of professionalism and courtesy.”

- 29.4. Legal representatives acting in their representative capacities may be ordered to pay *de bonis propriis* if there is a want of *bona fides* on their part, or if he/she acted negligently or unreasonably. Certainly, no order can be made where it is found that he/she has acted *bona fide*. A mere error of judgment does not warrant an order of costs *de bonis propriis*.
- 29.5. In judging whether a representative party’s conduct is reasonable or not, the matter must be seen not from the point of view of a trained lawyer, but from the point of view of a man of ordinary ability bringing an average intelligence to bear on the question at issue.¹³
- 29.6. In ***Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd***¹⁴ the court expressed:

“It is true that legal representatives sometimes make errors of law, omit comply fully with the rules of the Court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the Court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioner, such that their clients, the actual parties to the

¹³ Re: Estate Potgieter 1909 TS 982 at 1012

¹⁴ [2013] ZAGPPHC 261; [2013] 4 ALLSA 346 (GNP); 2014 (3) SA 265 (GP) and my emphasis

litigation, cannot be expected to bear the costs, or because the Court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstructing the interest of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the Court, and gross incompetent and a lack of care."

- [30] On the facts before me and in applying the said principles, I am of the view that the appellant's attorneys conduct was one where the court should express its displeasure. The appellant's appeal was placed at risk. Her attorneys were well aware of the various objections that the respondent intended to persist with. It was common cause the appeal was plagued with procedural irregularities. Despite being forewarned more than a month before the hearing date, the attorneys and her counsel persisted in proceeding with the appeal. Notably Mr Pearton submitted that he was not the sole decision maker.
- [31] Mr Pearton, in his affidavit, submitted that "*his actions was done on the express instructions of the plaintiff and the instructing attorney*". In essence, his case is that the misunderstanding and misinterpretation of the rules was bona fide, and the rules were not willfully disregarded.
- [32] On the security of costs issue he alleged "*the failure to bring a timeous application for security for costs was a bona fide error of judgment in the approach to bringing of this appeal by the whole legal team and not only myself*".
- [33] As alluded to above, even if the court were to accept that a power of attorney was presented to the Registrar at the time when the physical file was kept at the Registrar's office, it was not explained why same was not made available to the

respondent when the objection was initially raised. The power of attorney was only furnished to both the respondent and this court after the hearing on 07 May 2025.

[34] To further exacerbate the appellant's position, the dispute in respect of the Rule 49(9) process remains unresolved. Again, even if the court were to accept that the appellant's attorneys could not be wholly blamed for the delayed typed transcripts, no acceptable explanation was furnished as to why the procedure set out in Rule 49(9), particularly the joint compilation of the record was not adhered to. The said rule unequivocally required both parties to consult in this regard.

[35] I reiterate that the appellant's attorneys were sternly warned that a punitive costs order would be sought if the hearing of the appeal persisted. It was clearly evident that the appeal on the merits could not proceed until the appellant complied with the processes set out in Rule 49. Instead, a decision was taken to proceed with the appeal, nevertheless. Such unreasonable conduct deviates from the standard expected of a legal practitioner. In this instance, the appellant cannot be expected to bear the wasted cost of the appeal hearing. Punitive costs order against the appellant's attorneys are justified in the circumstances

[36] In the circumstances, the following order is made:

1. Both the instructing attorney and the corresponding attorney are jointly and severally ordered to pay the wasted costs of the hearing of 7 May 2025 *de bonis propriis* on scale B for the costs of two counsel.


J.J. STRIJDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the appellant: **Adv TP Kruger SC**

Adv H Worthington

Instructed by: **Gildenhuis Malatji Inc**

For the Respondent: **Adv S Ogunronbi**

Adv NMA Ndaba

Instructed by: **State Attorney Pretoria**