

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 7861/2023

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED.
	
	
	
DATE 8 September 2025	SIGNATURE.....

In the matter between:

UNIVERSITY OF SOUTH AFRICA

1ST APPLICANT

INDEPENDENT ELECTORAL COMMISSION

2ND APPLICANT

INDEPENDENT ELECTORAL TRIBUNAL

3RD APPLICANT

-and-

ECONOMIC FREEDOM FIGURE

1ST RESPONDENT

ECONOMIC FREEDOM FIGHTERS SC

2ND RESPONDENT

AFRICAN NATIONAL CONGRESS YOUTH LEAGUE

3RD RESPONDENT

UNISA LAW STUDENTS ASSOCIATION

4TH RESPONDENT**Delivered : 8 September 2025**

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **8 September 2025 at 10:00 am.**

Date heard : 4 June 2025**Coram : Bresler AJ**

JUDGMENT

BRESLER AJ:

Introduction:

- [1] The Applicants apply for an order in terms whereof the First Respondents are directed to provide security for the costs of specifically two proceedings, as contemplated in Rule 47 of the **Uniform Rules of Court**. Both proceedings were struck from the roll with costs and are therefore still pending before court. The Applicants furthermore apply for these proceedings to be stayed pending the First Respondent's compliance with any order granted by this Court.

[2] The Applicants require security in the amount of R1,000,000.00 (one million rand) from the First Respondent. The application is premised on the following:

- 2.1 The First Respondent caused an urgent application to be issued under Case number 6417/2023 in terms whereof *inter alia* the setting aside and review of a decision by the First Applicant was sought and ancillary relief.
- 2.2 On or about the 1st of August 2023 the matter was struck from the roll with costs due to lack of urgency.
- 2.3 On or about the 29th of August 2023, the First Respondent caused another application to be issued under the above case number wherein *inter alia* an order was sought declaring the Electoral Code of Conduct of the First Applicant inconsistent with the **Electoral Act**, Act 73 of 1998 and ancillary relief.
- 2.4 On the 6th of September 2023, the application was likewise struck from the roll with costs due to lack of urgency.
- 2.5 In the *interim*, the First Respondent also approached the Constitutional Court under case number CCT216/2023 in terms whereof the alleged invalidity of the first decision (verdict) was once again addressed. On the 11th of August 2023, the Constitutional Court dismissed the application on

the basis that it was not in the interest of justice to hear the matter. No order as to costs were made.

2.6 On the 22nd of September 2023, the First Applicant, through its attorneys, sent a letter to the First Respondent's attorneys stating that they are concerned that the First Respondent will not be in a position to pay any award for costs granted against it. This is premised on the basis that the sole purpose of the First Respondent is presumably to contest elections. It was also recorded that the First Respondent's attorneys are acting '*pro bono / pro amico*'.

2.7 The Applicants therefore submit that the applications launched by the First Respondent is vexatious and / or amounts to abuse of process. The First Respondent informed the Applicant that it takes responsibility for any cost order granted against it.

2.8 A draft taxation account was presented to the First Respondent. They raised technical objections hereto without confirming that they take responsibility for same.

2.9 Having regard to the conduct of the First Respondent, prolonged litigation is anticipated. Costs orders may be granted in favour of the First Applicant and the First Applicant will consequently be prejudiced if the First

Respondent is unable to pay same. Injustice is furthermore pre-empted if no security is ordered.

2.10 The relief sought in the two applications referred to herein above, is the same as both is aimed at setting aside the second decision / verdict on the basis that it is unlawful, unreasonable and procedurally unfair.

[3] The First Respondent denied that it should be directed to provide security. The First Respondent submits:

3.1 The notice in terms of Rule 47 was delivered solely to frustrate the First Respondent from accessing courts.

3.2 The alleged taxation was fatally flawed, and the First Respondent was not obliged to respond thereto or to offer payment.

3.3 The First Respondent's attorneys are not acting *pro bono*. Many discussions took place in confidence that are irrelevant to the current proceedings.

3.4 The Applicants do not show a *bona fide* defence to the proceedings. They are therefore unlikely to succeed with their opposition in due course.

- 3.5 The Applicants are clearly trying to shut the doors of justice as they are claiming an exorbitant amount far exceeding the actual potential legal costs that will accrue.
- 3.6 University Student Bodies should not be barred from challenging Universities' decisions. Universities should be alive to the fact that students and / or student bodies will take them to court if they make unjust decisions.
- 3.7 The First Respondent has a reasonable prospect of success. The first decision was unilaterally reviewed and set aside by the First Applicant in favour of adopting the second decision. The First Applicant has no right to self-review.
- 3.8 The two applications before court do not aim to achieve the same result and *lis pendens* therefore do not apply.

Issues that require determination:

- [4] This Court is only called upon to determine if the First Respondent should be directed to pay security for the anticipated costs of the Applicants in the amount of R1,000,000.00 (one million rand) as claimed by the Applicants.

The Applicable Legal Principles:

- [5] During the course of argument in Court, the First Respondent raised the issue that the deponent noted in the Notice of Motion differs from the deponent that deposed to the Founding affidavit, rendering the Founding affidavit inadmissible and unacceptable.
- [6] In this Court's view, the reference to the incorrect deponent has no bearing on the merits of the matter. As stated by the Applicants' counsel, there is no objection against the authority of the deponent himself. On this basis, the Court finds that the Founding affidavit should be considered and the reference of the incorrect deponent in the Notice of Motion is irrelevant to the determination of the matter.
- [7] Rule 47 of the **Uniform Rules of Court** provides for a procedure whereby one litigant can request security from another for its costs. The rule deals with the procedure and not the substantive law. To determine if a litigant should be ordered to provide security, the Court must have regard to the common law and the statutory provisions.
- [8] Under the common law an *incola* of the Republic cannot, as a general rule, be called on to give security for costs.¹ The mere inability of a plaintiff or applicant as the case may be, who is an *incola*, to satisfy a potential costs order against him is insufficient in itself to justify an order that he furnish security for his opponent's costs.

¹ *Liquidator, Salisbury Meat Market Ltd v Perelson* 1924 WLD 104 at 107; *Brollomer Tin Exploration Co Ltd v Kameel Tin Proprietary Co Ltd* 1928 TPD 600 at 601

Something more is required. The court must be satisfied that the main action is vexatious or reckless or amounted to an abuse of the process of the court.²

[9] The Applicants case is premised on the submission that the proceedings launched by the First Respondent is vexatious and / or constitutes an abuse of process. To determine if a finding in this regard can be made, one must look at how the different courts defined the terms 'vexatious' and 'abuse of process'.

[10] In ***Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others***³ the following was said as to the term 'vexatious':

'In its legal sense vexatious means frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant (Shorter Oxford English Dictionary). Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; abuse connotes a mis-use, an improper use, a use mala fide, a use for an ulterior motive.'

[11] In ***African Farms and Townships Ltd v Cape Town Municipality***⁴ the Court observed:

² ***Boost Sports Africa (Pty) Ltd v South Africa Breweries (Pty) Ltd*** 2015 (5) SA 38 (SCA) at 50C–I

³ 1997 (3) SA 1331 (W) at 1339 E – F

⁴ 1963 (2) SA 555 (A) at 565D – E

'An action is vexatious and an abuse of the process of court inter alia if it is obviously unsustainable. This must appear as a certainty, and not merely on a preponderance of probability. Ravden v Beeten 1935 CPD 269 at p 276; Burnham v Fakheer 1938 NPD 63.'

- [12] It is trite that the rule does not envisage that a detailed investigation of the merits of the case should be undertaken. Nor is it contemplated that there should be a close investigation of the facts in issue in the action. As stated in **Zietsman v Electronic Media Network Ltd and Others**⁵:

'I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party's prospects of success would depend on the nature of the dispute in each case.'

- [13] At this stage it is apposite to note that our courts derive their power from the **Constitution**, 1996. In section 173 the **Constitution** declares:

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

⁵ 2008 (4) SA 1 (SCA) at para 21

- [14] As stated by the Constitutional Court in **South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others**⁶:

'This is an important provision which recognises both the power of Courts to protect and regulate their own process as well as their power to develop the common law. . . . The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that Courts in exercising this power must take into account the interests of justice.'

- [15] And further:

'The task of a . . . Court in determining its own proceedings is an important one. Its primary constitutional responsibility is to ensure that the proceedings before it are fair and it must give content to that obligation. This obligation has always been part of our law and is now constitutionally enshrined as a fundamental right in s 35(3) of the Constitution. The task of ensuring that the proceedings are fair will often require consideration of a range of principled and practical factors, some of which may pull in different directions.'

⁶ 2007 (1) SA 523 (CC)

[16] In **Zietsman v Electronic Media Network Ltd and Others**⁷ the Supreme Court of Appeal remarked with regards to the provision of security, the following:

'[19] In my view it would be quite unreasonable to order the appellant, an incola natural person, to provide security for an action instituted by him, at the behest of a defendant who may not even have a defence worthy of consideration. The first and second respondents submitted that, in the light of the fact that the appellant made no allegation in regard to his prospects of success either, it should be accepted that they do have a defence which is not devoid of any merit. There are two answers to this submission. First, the onus is on the first and second respondents as applicants for security to persuade a court that security should be ordered. Second, not only is a defence not disclosed in the application, it is not alleged that a defence has at any stage been disclosed to the appellant. Therefore, assuming the first and second respondents have a defence to the appellant's action, it does not appear from the papers filed that the appellant is in a position to deal with the merits of the defence.'

[20] The appellant's counsel conceded that there is reason to fear that the appellant may eventually not be able to meet an adverse costs order but then no reason has been advanced to fear that an adverse costs order may eventually be made against the appellant. To require the appellant to furnish

⁷ 2008 (4) SA 1 (SCA)

security in these circumstances would place an unjust impediment on his constitutional right in terms of s 36 of the Constitution.'

[17] **Erasmus**⁸ states the following:

'An action is vexatious if it is obviously unsustainable.'

[18] And further⁹:

'The term 'abuse of process' connotes that the legal machinery is employed for some ulterior purpose.'

[19] In **Phillips v Botha**¹⁰ the Supreme Court of Appeal likewise dealt with the definition of 'abuse of process' and stated:

'The term "abuse of process", connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of a legal claim upon which a Court is asked to adjudicate, they are regarded as an abuse for this purpose.'

⁸ DE van Loggerenberg, **Erasmus: Superior Court Practice**, 3rd Edition, Volume 1 on page Rule 47-6

⁹ DE van Loggerenberg, **Erasmus: Superior Court Practice**, 3rd Edition, Volume 1 on page Rule 47-6

¹⁰ 1999 (2) SA 555 (SCA) at 565E-F.

- [20] None of the aforesaid definitions applies to the Applicants' case. No case is made out as to any ulterior motive being displayed by the First Respondent. It is furthermore not evident that the First Respondent's case is so hopeless that it only serves to frustrate the Applicants. As correctly submitted by the First Respondent, student bodies should be able to litigate if they are of the view that their rights are potentially infringed. Being potentially wrong in the end of the day, does not render proceedings vexatious.
- [21] In this Court's view, the Applicants have failed to show that the proceedings are either vexatious, or that it constitutes an abuse of process and the First Respondent should not be obliged to provide security.
- [22] Although it is of no relevance having found that there is no obligation to provide security, this Court wishes to remark on the amount of security required by the Appellants. In no stretch of imagination can it be anticipated that the reasonable legal costs will accrue to R1,000,000.00 (one million rand). This lends credence to the submissions made by the First Respondent that the Applicants are merely setting the bar so high so as to ensure that the First Respondent cannot continue with the case. To merely state that their access is not restricted because they can provide the security, and then continue, is simply inadequate and unacceptable.
- [23] The right to access to court is a right that must be jealously guarded to ensure judicial oversight at all material times. If access to court can be limited, or even barred, subject to exorbitant amounts being held in security, it would effectively make justice only available to the wealthy leaving the poor without recourse. This

cannot be so. To borrow from the **Zietsman** decision *supra*, it ‘*would place an unjust impediment on his constitutional right in terms of s 36 of the Constitution.*’

- [24] Having said the aforesaid, it is evident that the application in terms of Rule 47 must fail in the interests of justice.

Costs:

- [25] The Court retains a discretion to make a cost order that is just and equitable in the circumstances. The First Respondent is substantially successful in the opposition of the application – this does not automatically entitle it to its costs.

- [26] A final determination of the merits of the main application may lead to new facts being placed before Court that may tip the proverbial scales of justice in either party's favour. In applications like the current one before Court, the Court may thus order the costs to be costs in the cause notwithstanding the Applicants being unsuccessful.

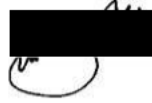
- [27] In this Court's view, and especially in lieu of the nature of the main proceedings forming the *crux* of the claim for security, costs should therefore be in the cause.

Order:

- [28] **In the result the following order is made:**

28.1 The Application in terms of Rule 47 is dismissed;

28.2 Costs are costs in the cause.



M BRESLER AJ

**ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

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