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

**CASE NO: A359/2023
HEARD: 26 NOVEMBER 2025
DECIDED: 22 JANUARY 2026**

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

..... 22 January 2026

In the matter between:

ANDRE OOSTHUIZEN Appellant

And	
THE MINISTER OF POLICE	Respondent

ORDER

CORAM: JANSE VAN NIEWENHUIZEN, BAM, et KUMALO JJs

1. The appeal is dismissed with costs.

JUDGMENT

BAM J (JANSE VAN NIEWENHUIZEN & KUMALO JJs concurring)

1. This is an appeal against the order made by the court *a quo*, on 6 October 2022, Ndlovane AJ sitting as court of first instance. The appeal is with leave of the Supreme Court of Appeal, dated 24 October 2023. Albeit the order is silent, the parties appear to have taken a consensual order at the start of the trial, separating the question of liability from quantum. The trial before the court *a quo* therefore, dealt with the question of liability, with quantum having been postponed *sine die*. The appellant's grounds are set out in his notice of appeal. Before I consider the grounds, there are preliminary matters to be dealt with. The applicant filed an application seeking that he be released from the obligation to provide security; condonation for his failure to comply with the provisions of Rule 49, and reinstatement of the appeal. In his affidavit, the appellant sets out his impecunious circumstances and notes that his failure to comply with the provisions of Rule 49 was not based on disregard for this court and its rules.

2. The respondent opposes the application. According to the respondent, Rule 49(13) is peremptory and non-compliance therewith is fatal. The respondent contends that the appellant ought to have applied to the Supreme Court of Appeal for his release from the obligation to provide security simultaneously with his application for leave. Since he did not do so, this court has no jurisdiction to grant any of the relief the applicant seeks in his Notice of Motion. Buoyed by the reasoning of the Full Court in *Progressiewe Privaat Sekuriteit Monitering en Reaksie (Pty) Limited v National Commissioner of South African Police Services and Others*, the respondent urges us to follow same and strike the appeal of the roll. Writing for the Full court, Cox AJ, reasoned:

'When the appellant applied for the hearing date, it was well aware that the issue of security was not settled. Nevertheless, it proceeded to obtain a hearing date. In LG v JG at para 13 Windell J stated as follows:

Therefore, if when applying for leave to appeal in terms of rule 49(1), no application is launched as envisaged by rule 49(13)(a) to release the appellant wholly or partially from the obligation to give security, and leave is granted to the Full Court (as contemplated in rule 49(2), then the remainder of rule 49 is triggered, which sets out the procedure to be followed by the parties in the prosecution of their appeal before the Full Court.

[14] The rules are unambiguous. If security has not been furnished, the appeal record cannot be lodged. Rule 49(13) is peremptory and in this regard ...'¹

3. It seems to us that the approach adopted by the Full Court in *Progressiewe Sekuriteit*, has long been jettisoned by our superior courts. In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive*

¹ *Progressiewe Privaat Sekuriteit Monitering en Reaksie (Pty) Limited v National Commissioner of South African Police Services and Others* (A47/23) [2024] ZAGPPHC 608 (18 June 2024), paragraphs 13-14.

Officer of the South African Social Security Agency and Others O, the Constitutional Court reasoned the issue of compliance with peremptory provisions thus:

‘Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision.’²

4. The decision of the Supreme Court of Appeal in *Signature Real Estate (Pty) Ltd v Charles Edwards Properties and Others* reminds us of the injunction placed on courts when interpreting any legislation:

‘[17] The provisions of [s] 34A are clearly peremptory. But even peremptory provisions must yield to two interpretive imperatives. First, the injunction of s 39(2) of the Constitution, which enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. In this instance, the right implicated is one enshrined in s 22 of the Constitution, namely the right to freely engage in a trade, occupation or profession. Therefore, an application of the section that promotes, rather than impedes, the exercise of that right, is to be preferred. Second, due regard must be had to the purpose of the statute, more specifically, whether adopting a strict or literal interpretation of its provisions is consistent with what the Act seeks to achieve.’³

5. In *Maake and Others v Chemfit Finechemical (Proprietary) Limited*, it was said that:

² *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (CCT 48/13) [2013] ZACC 42, (29 November 2013) paragraph 30; See also *Signature Real Estate (Pty) Ltd v Charles Edwards Properties and Others*, (415/2019) [2020] ZASCA 63; 2020 (6) SA 397 (SCA) (10 June 2020), paragraph 17.

³ (415/2019) [2020] ZASCA 63; 2020 (6) SA 397 (SCA) (10 June 2020).

[15] As a general rule an Appellant in the High Court, unlike in the magistrate Court, is not required to furnish security for costs of an appeal. The furnishing of security for costs of an appeal is provided for as an exceptional requirement provided for in Rules 49(12), 49(13) and 49(14). The latter Rules are a sequel to the repealed Rule 49(11) which dealt with the suspension of the operation and execution of an order pending the decision of an application for leave to appeal or appeal.

[17] It is clear from the reading of Rules 49(12), 49(13) and 49(14) that all these Rules are subject to the repealed Rule 49(11) which is now replaced by section 18 of the Superior Courts Act 10 of 2013. This simply means that an Appellant is required to furnish security for an appeal only when there is an execution of a Court judgment or order pending an appeal.

[18] Even if there was an obligation on the Appellants to furnish security for costs of appeal (we still maintain that there is no such obligation) this Court cannot uphold the Respondent's point in limine at this stage. If security for costs is not lodged, the lodging of the copies of the record on appeal with the Registrar constitutes an irregular step within the meaning of Rule 30. In the appeal before us the Respondent has failed to make or lodge an application in terms of Rule 30 calling upon the Appellants to remove the cause of complaint. The application to struck the appeal from the roll is accordingly refused.⁴

6. In any event, the Constitutional Court in *Eke v Parsons* affirms that courts should not be detained by the rules:

[39] Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules.....

⁴ (5772/2016, HCAA04/2018) [2018] ZALMPPHC 71 (22 November 2018)

[40] Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to “secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice”. I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings...⁵

7. We confirm that the right implicated in this matter is that provided in Section 34⁶ of the Bill of Rights. Accordingly, an approach to the Rules that seeks to promote rather impede the right is to be preferred. We have reflected on the appellant’s reasons for failing to comply with the relevant provisions of Rule 49 and we are satisfied that the interests of justice will be better served by condoning the appellant’s failures. Condonation is thus granted and the appeal is reinstated. We further align ourselves with the views expressed by the Full Court in *Chemfit*, that the appellant, in any event, was under no obligation to provide security.

8. Even if it were the case, it was open to the respondent to pursue such security by way of a Rule 30 procedure, which the respondent did not do. We thus decline the invitation to strike the appeal off the roll. This then paves the way for this court to deal with the primary business of the day, and that is, the merits of the appeal. We begin by setting out, to the extent necessary, some background details.

⁵ (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015)

⁶ 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.

Background

9. On 11 July 2014⁷, the appellant was arrested without a warrant and charged with defeating the ends of justice. He was detained in police cells from Friday and released on a Monday, 14 July. His claim for delictual damages failed before the court *a quo*. That court found, after considering the evidence before it, that the arrest was justified.

10. Captain Simangaliso Solomon Baloyi, whose evidence was accepted by the court, testified that at the time, in 2014, he was part of a unit charged with enforcing compliance with the Second Hands Goods Act⁸. During or about 2014, he had questioned a man he had seen delivering a massive truck load of copper cable offcuts (offcuts), at a place called Toit Scrap Metals, in Pretoria North, about the origin of the cable offcuts. The man, whom was also the driver, responded that his enterprise, Ellisras Scrap Metal, (Ellisras) had a contract with Exxaro, the supplier of the offcuts. He asked the man for written proof, but he was furnished with a document suggesting that Ellisras was instead contracted to Medupi Power Station. That immediately made Baloyi suspicious. In pursuit of uncovering the true circumstances, Captain Baloyi and his two colleagues, Colonel Sibanda, and Colonel Liebenberg, on 10 July 2014, landed at Exxaro Grootegeluk mine, in Lephalale, where they interviewed various people.

⁷ All dates are in 2014 unless expressly indicated.

⁸ Act 6 of 2009.

11. Amongst the people interviewed were employees of Exxaro and those of an entity identified as Wade Walker, apparently in charge of the electrical works at the mine. The appellant was employed by Wade Walker at the time and involved in risk management. Part of his work involved escorting the truck with offcuts to Ellisras. Baloyi and his colleagues wanted to know about the process through which the offcuts leave the mine and what the last load delivered to Ellisras was, with specific reference to the quantity. The appellant's answer was that the last load was fifty-four crates. He agreed and indeed made a statement under oath to this effect.
12. Another staff member of Wade Walker, Etienne Koekemoer, responsible for cutting the offcuts was questioned in the presence of the appellant about the last load that left the mine to Ellisras. His answer was that the last load was ninety-two crates, weighing 800kg, which the appellant had asked him to make. He too agreed to make a statement under oath. No document could be located supporting the load of ninety-two crates. From this point onwards, the details as to how the appellant was arrested are in dispute. Captain Baloyi testified that after the interviews, they were left even more unsettled about the information they had obtained at the mine and resolved to make a follow-up inspection at Ellisras, which they did. Upon inspecting the register, he found two receipts dated 12 June 2014, confirming that two loads had been received. I shall return to the full details of the two receipts.
13. Baloyi testified that he confronted the appellant. Although it is not clear whether the interaction was physical or telephonic, he said that the appellant

apologized during the confrontation and said that he was merely aiming to provide food for his family. Shortly after Baloyi and his colleagues had returned to the police station in Lephalele, the appellant allegedly called Colonel Liebenberg's mobile phone and indicated he had some documents supporting the load of ninety-two crates. On his arrival, Baloyi inspected the document and found that it was silent on the ninety-two crates. He concluded that the appellant was aiming to prevent them from uncovering the truth, and that he was concealing the details around the ninety-two crates. There and then, he informed him that he was arresting him for defeating the ends of justice.

14. The appellant had a completely different story regarding his arrest. After the interviews, he left the mine and was close to Lephalele when Baloyi called and informed him about documents he needed to sign. He drove back to the mine. On his arrival there, Baloyi sat him in a room and informed him he needed to rethink his story if he wanted to go home. The appellant allegedly refused to reconsider. It was then that he was arrested, for refusing to reconsider his version.

15. Before us, the appellant contested all the findings made by the court *a quo*. I now consider the grounds of appeal.

Ground 1: The court erred in finding that Etienne Koekemoer testified during the trial

Ground 2: The court erred in finding that the plaintiff did not deny the averments contained in the affidavit deposed to by Etienne Koekemoer at the time of meeting with the arresting officer, on 10 July 2014

16. On behalf of the appellant, it was submitted that the court erred in referring to Etienne Koekemoer's affidavit as oral testimony. Although Koekemoer's affidavit formed part of the trial bundle, it did not constitute evidence as the plaintiff never admitted the correctness of the contents thereof. It is correct that Koekemoer did not testify during the trial. Thus, the reference to 'his evidence or his testimony' is clearly an error on the part of the court. However, Captain Baloyi testified during the trial, and it is through his testimony that the court heard about Koekemoer's statement. As such Koekemoer's statement was brought into evidence via Captain Baloyi's testimony. The record demonstrates that there was no objection raised by the appellant, hence the court accepted the evidence. This ground of appeal cannot be upheld. It has no merit.

17. As to the second ground, according to Captain Baloy's evidence, Koekemoer made the statement about the ninety-two crates, in the appellant's presence with absolutely no contestation from the appellant. I thus uphold this ground of appeal.

Ground 3: The court erred in finding that the balance of probabilities suggests that there were not only fifty-four crates of offcuts but an additional ninety-two crates thus, the appellant committed the offence of defeating the ends of justice in the presence of the arresting officer.

18. In, addressing the third ground I break it into two parts. The first part suggests that the court erred in finding that there were not only fifty-four crates but an additional ninety-two crates. The second part suggests that the court erred in finding that the appellant committed the offence of defeating the ends of justice. I begin by addressing the second part of this ground. It is correct that the trial was not about the guilt or otherwise of appellant but whether the arrest was justified. The court accordingly erred in this regard. This aspect of the third ground then succeeds.

19. Regarding the first part, it was submitted that the court erred in reaching the finding that not only fifty-four crates, but an additional ninety-two crates had left the mine, despite:

- (i) the *viva voce* evidence, supported by undisputed documentation that only fifty-four crates of copper were received on 12 June 2014; and
- (ii) the denial of the existence of ninety-two crates by Erasmus, the owner of Ellisras; and
- (iii) the denial by Roesch, the safety officer at Wade Walker at Exxaro Grootgeluk mine; and the plaintiff.

20. It is plain from the judgment that between the versions of the defendant and that of the plaintiff, the court *a quo* was faced with two diametrically opposed versions. However, the court decided the matter in favour of the defendant and dismissed the plaintiff's version. Although the court gave some reasons and weighed the probabilities in dismissing the plaintiff's version, it

did not make any credibility findings about any of the witnesses. Respectfully, the court could have been more specific by following the approach suggested in *Minister of Safety and Security v Scheepers*, where it was said:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

[20] As a general rule, courts of appeal are reluctant to interfere with factual findings made by trial courts unless they are convinced that those findings were clearly wrong. See in this respect, the well-known case of *R v Dlumayo & another* 1948 (2) SA 677 (A) at 706.⁹

21. In *McDonald v Young*, the court, with reference to *Da Mata v Otto NO*, said:

⁹ *Minister of Safety and Security v Scheepers* (CA 125/2011) [2012] ZAECHGHC 83 (12 October 2012), paragraphs 19-20.

‘[T]he mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantitative and impersonal measure to testimony...

‘Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts – testimony which no sensible man can believe – goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded.’¹⁰

22. Now, to address this aspect of the third ground, one needs to go back to Captain Baloyi’s inspection at Ellisras, post the interview. He testified with reference to two receipts (erroneously referred to as invoices during the proceedings) which he had copied from Ellisras’ register during the inspection. Despite being questioned repeatedly by the appellant’s counsel about where he had obtained the two copies, as Erasmus denies that they come from the register he maintained at Ellisras, Captain Baloyi was unshaken. He maintained that those copies emanate from the register he inspected at Ellisras. Upon being shown the record with OB1509/06/2024, he vehemently denied that the record was the actual register, insisting that he had never seen it before. The details of the two receipts are set out here below (omitting for now what is not relevant):

**VERKRYGING REGISTER: MAGNETIESE METAL (Acquisition Register:
Non-Magnetic Metal) ELLISRAS**

Verkry Van (loosely translated as Received from)	M4969	M4970

¹⁰ (292/10) [2011] ZASCA 31; 2012 (3) SA 1 (SCA) (24 March 2011), paragraph 14.

Voorletters en van (<i>Initials and Surname</i>)	Wade Walker	Andre Oosthuizen
Identity Number	7[...]	70...
Address	Andre	Wade Walker
Volle beskrywing van item (<i>Full description of item</i>)	580Kg R34 800	800Kg GSB R48 000
Tel: 0[...]		

23. In its judgment, the court reasoned the matter as follows:

‘ Despite the plaintiff and his witnesses’ denial of the ninety-two crates, the invoices and weighing tickets suggested that there was not only one transaction as alleged by the plaintiff.

The evidence of the invoices and the weighing tickets indicate that there were different payments of R34 000 in respect of fifty-four crates (580kg) and R58 000 (should be R48 000) in respect of ninety-two crates (800kg). The plaintiff’s allegation of the splitting of the transactions cannot be sustained.

The above observation/conclusion is supported by the fact that the invoices and weighing tickets represent different information, amounts, weights and invoice number.’

24. It is quite clear that the court did not believe the appellant’s version that the details referred to in the two copies, 4969 and 4970, refer to one transaction. This is evidence no sensible person can believe. We cannot fault the court in its findings in this regard. This ground has no merit.

Ground 4. The court erred in finding that the invoices and weight tickets suggested that there was not only one transaction on 12 June 2014; that the invoices and weighing tickets indicate different payments that relate specifically to 54 crates of copper in the amount of 580kg and 92 crates of copper weighing 800kg

25. This ground is addressed in my reasoning of the third ground. For the same reasons set out in the analysis of that ground, this ground cannot be upheld.

Ground 5: The court erred in not finding that on the date in question, 12 June 2014, only 54 crate load of copper left Wade Walker/Exxaro mine as testified to by the plaintiff, Erasmus, and Roesch; and having regard to the documents file of records, ie, Request to remove scrap, Gate release; Photos of 54 crates of copper; Final weighing ticket 700, 701 and 702; Register with M 4969; and M 4970; and Document from Ellisras Scrap Metal OB 1509/06/2024.

26. It is common cause that Captain Baloyi and his colleagues interviewed Koekemoer in the presence of the appellant. Koekemoer replied that the last load to leave the mine was ninety-two crates. A follow up inspection demonstrated, according to the evidence accepted by the court, two different receipts labelled as 4969 and 4970. The appellant clearly makes the mistake of underscoring the quantity of evidence, which is not the way to approach probabilities. Thus, it matters not how much evidence was led on behalf of the plaintiff's case. What matters is the quality of the evidence. I have already stated that we cannot fault the court's conclusion that there were two loads of

copper offcuts that left the mine. This again, is evidence no sensible person can believe. This ground cannot be upheld.

Ground 6: The court erred in not finding that the alleged separate register recording that 54 and 92 crates of copper was delivered at Ellisras on 12 June 2-14 does not exist, having regard to the evidence of Erasmus that no such register exists and that his only register is that contained in Verkryging Register, and the failure of the investigating officer Captain Baloyi to make a copy of the said documents and produce them at trial.

27. On probability, the notion that the records presented by Captain Baloyi during his evidence are not part of Ellisras acquisition or receipt register, notwithstanding the information recorded therein, is zero. There is no merit to this ground and no basis to upset the court's finding.

Ground 7: The court erred in finding that the affidavit of Etienne Koekemoer suggests that an additional 92 crates of copper were loaded on 12 June 2014 in that the affidavit simply states that a load of copper in the amount of 92 crates, therefore there was only one load on that day

28. There is no merit to this ground. During cross examination, Captain Baloyi's evidence was put to the plaintiff as seen in this exchange:

'Adv Mothibe: They called Koekemoer...

Plaintiff: That is correct.

Adv Mothibe: They asked Koekemoer about the last load that was taken out of the mine.

Plaintiff: That is correct.

Adv Mothibe: **He responded ninety-two crates were taken out of the mine.**

Plaintiff: That is correct, that is what is in his statement.' (own underline)

29. Irrespective of how the sworn statement is couched, it is common cause that the question posed to the witnesses, including the plaintiff and Koekemoer was, 'what was the last load' that left the mine to Ellisras? Koekemoer answered that it was ninety-two crates.

Ground 8: The court erred in not finding that the conclusions reached by Captain Baloyi were based on speculation, assumption and conjecture and therefore unreasonable under the circumstances

30. This ground lacks merit and cannot be upheld for the following reasons. The arresting officer, according to the court's finding, had Koekemoer's affidavit, confirming ninety-two crates, and he had, through his own investigation, extracted the two receipts from Ellisras' acquisition register. This is far from speculation and conjecture. Baloyi had enough to justify the conclusion of a prima facie case against the appellant. We cannot fault the court's finding in this regard. Our conclusion is informed by the reasoning of the court in *Scheepers v Minister of Safety and Security*:

'[18] The test is an objective one and the question to be answered is in our view whether the arresting officer had direct personal knowledge of sufficient facts at the time of the arrest, on the strength of which it can be concluded that the arrestee had prima facie committed an offence in his presence. Stated differently, did the arresting officer have knowledge at the time of arrest, of such facts which would, in the absence of any further facts or evidence, constitute proof of commission of the offence in question. The aim is not to determine

whether the arrested person is guilty of the offence on which he was arrested.’¹¹

Own underline

Ground 9: In light of the fact that the Defendant conceded that the plaintiff was arrested without a warrant, it is trite that under the circumstances the defendant can only avoid liability for damages as a result of wrongful arrest in the event of proving on a balance of probabilities that the provisions of Section 40 (1) (a) of the Criminal Procedure Act, CPA, 51 of 1977 find application

31. It is unclear what this ground seeks to challenge, as opposed to stating the legal position. The court *a quo* found that the arrest was justified and that the provisions of Section 40 (1) (a) of the Criminal Procedure Act were met. The ground cannot be upheld.

Ground 10: The court erred in not finding that the defendant had failed in its onus to prove the lawfulness of the arrest and consequently dismissing the defendant's defence

32. The court correctly found upon weighing the evidence placed before it that the defendant had discharged the onus placed upon them. We see no basis to interfere with this finding.

Conclusion

¹¹ 2015 SACR 284, ECG, paragraph 18

33. Based on the reasoning in this judgment, we see no basis to upset the conclusions reached by the court *a quo*. The appeal accordingly fails.

Order

1. The appeal is dismissed with costs.

BAM J

**JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, GAUT-
ENG DIVISION, PRETORIA**

Date of Hearing:

26 November 2025

Date of Judgment:

22 January 2026

Appearances:

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